IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1151 of 2008
With
TAX APPEAL NO. 1188 of 2008
With
TAX APPEAL NO. 800 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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COMMISSIONER OF INCOME TAX,....Appellant(s)

Versus

ANJUM G BALAKHIA....Opponent(s)

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Appearance:

MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1

MR RK PATEL, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 04/07/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

By way of these appeals, the appellant has challenged the order of the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal") whereby the Tribunal has allowed the appeal of the assessee. Hence Tax Appeal Nos. 1151 of 2008 and 1188 of 2008 have been filed by the revenue. Tax Appeal No. 800 of 2013 has been filed by the assessee against the order of the Tribunal has allowed the appeal preferred by the assessee partly.

2. While admitting the appeals, so far as Tax Appeal Nos. 1151 of 2008 and 1188 of 2008 are concerned, this court has framed the following substantial questions of law:

> "(i) Whether on the facts and circumstances of the case and in law, was the Appellate Tribunal right in holding that provisions of section 28(iv) are not applicable in the case of assessee?
>
> (ii) Whether on the facts and circumstances of the case and in law, was the Appellate Tribunal right in not holding that the amount of non-compete fees received by the assessee was taxable as capital gain u/s. 45 r.w.s. 55(2) of the I.T. Act?"

3. So far as Tax Appeal No. 800 of 2013 is concerned, this court while admitting the matter has framed the following

substantial questions of law:

"(1) Whether on facts and in law, the Tribunal is justified in its interpretation of scheme of the Income-tax Act, 1961, for upholding addition of Rs. 10 crore towards non-compete fees?

(2) Whether on facts and in law on merits the Tribunal has substantially erred in holding that non-compete fees is not eligible for deduction u/s. 80-HHC?"

4. For the purpose of deciding the appeals, the facts of Tax Appeal No. 1151 of 2008 are taken into consideration. In this case, the return of income was filed by the assessee which was processed by the Assessing Officer. The assessment was finalized on 26.11.2002 determining total income at Rs. 12,38,80,855/-. The amount of Rs. 10 crore received by the assessee as non-compete tax was taxed under section 45 r.w.s. 55(2) of the Act.

5. Being aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the learned Commissioner of Income-tax (Appeals) who dismissed the appeal vide order dated 23.4.2003 by holding that section 28(iv) of the Act is applicable to the case of the assessee.

6. Against the order of the Commissioner of (Appeals), the assessee preferred the appeal before the Tribunal. The Tribunal by its order dated 4.1.2008 allowed the appeal by holding that section 28(iv) of the Act was not applicable in the case of the assessee. Hence the revenue is before us.

7. Learned counsel for the appellant-revenue Mr. Sudhir Mehta has contended that the Tribunal has committed an error in allowing the appeal of the assessee whereby holding that that section 28(iv) of the Act was not applicable in the case of the assessee. He has further contended that the

issue squarely falls within the scope of section 28(iv) of the Act.

8. Learned counsel for the respondent Mr. Patel has contended that the issue is covered by the decision of the Apex Court in the case of **Guffic Chem (P.) Ltd. v. Commissioner of Income-tax** reported in 332 ITR 602 where in paragraph No. 7 it is held as follows:

> "Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency was in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this court was whether the amount received by the assessee (compensation) on the condition not to carry on a competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgement. The High Court has misinterpreted the judgement of this court in **Gillanders Arbuthnot & Co. Ltd.'s** case [(1964) 53 ITR 283 (SC)]. In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the CIT(A) and the Tribunal. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital

receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable (see: Section 28(va)). The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide section 28(va) and that too with effect from 1.4.2003. Hence, the said section 28(va) is amendatory and not clarificatory. Lastly, in **CIT v. Rai Bahadur Jairam Valji (1959) 35 ITR 148** it was held by this court that if a contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT(A) as well as the Tribunal, came to the conclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of Rs. 50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped into specifically tax such receipts under non-competition agreement with effect from 1.4.2003."

9. The learned counsel for the respondent has further

relied on the decision of the Apex Court in the case of **Commissioner of Income-tax-III, Bangalore v. Sapthagiri Distilleries Ltd. r**eported in (2015) 53 taxmann.com 218 (SC) where it was held that compensation amount received towards loss of source of income and non-competition fee could only be treated as capital receipt and was not liable to tax.

10. We have heard learned counsel for the parties. We have gone through the order of the Tribunal and the judgement cited by the learned counsel for the respondent. In our view, the issue is now squarely covered by the aforesaid decisions of the Apex Court. In that view of the matter, we dismiss the appeals preferred by the revenue. Accordingly, we answer the questions in favour of the assessee and against the revenue.

12. So far as Tax Appeal No. 800 of 2013 preferred by the assessee is concerned, in the light of the decision given in Tax Appeal Nos. 1151 of 2008 and 1188 of 2008, the appeal is allowed. Accordingly, we answer the first question in favour of the assessee. In that view of the matter, the second question does not need to be answered as it has become infructuous.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

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