

**THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'F', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 3049/Del/2016 : Asstt. Year : 2007-08

ACIT, Central Circle-06, New Delhi	Vs	Sh. Harish Bhandari, R/o 51A, Pocket-E, GTB Enclave, Delhi-110093
(APPELLANT)		(RESPONDENT)
PAN No. AFRPB6673A		

Assessee by : Sh. P. C. Yadav, Adv.

Revenue by : Sh. Shashi Bhushan Shukla, CIT DR

Date of Hearing: 07.12.2022

Date of Pronouncement: 03.01.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of Id. CIT(A)-24, New Delhi dated 10.03.2016.

2. Following grounds have been raised by the Revenue:

"1. On the facts and circumstances of the case, the Id. CIT(A) has erred in law in deleting the addition of Rs.2,00,00,000/- u/s 28(iv) of the Act.

2. On the facts and circumstances of the case, the Id. CIT(A) has erred in holding that no real income has accrued to the assessee despite the documentary evidence."

3. All the facts have been taken from the order of the Id. CIT(A).

4. A search & seizure operation u/s 132 of the Income Tax Act, 1961 was conducted at business premises of companies of Rockland Group as well as at the residential premises of Directors of the companies on 06.09.2011.

5. The A.O. noted that from the details available in the case of the M/s RHL, M/s RHL has issued 100,000 equity shares to the appellant in the form of sweat equity shares to the appellant. The equity shares bear a face value of Rs.10. These shares have been valued however at Rs. 200 per share by M/s RHL. The balance amount of Rs. 190 per share is considered as 'share premium'. Accordingly, in the accounts of M/s RHL, the premium amount is shown as "Share Equity Premium". A corresponding amount of asset in the balance sheet is shown as "Intellectual Property Rights" as assets of the company. The A.O. noted that M/s RHL has entered into agreement that the appellant for the issue of these shares. The A.O. noted that agreement clearly states that these shares have been allotted to the appellant without any amount being paid as consideration by the appellant, in lieu of the appellant being an "expert" having vast experience in a particular field, and supplying professional contribution, dedication and value addition to M/s RHL. As per the agreement, for availing entitlement of sweat equity shares, professional shareholders shall remain in the continuous association with the company for at least a minimum period of 10 years from the date of allotment of sweat equity.

6. The shares are subject to a lock-in period of 3 years from the date of allotment of sweat equity. The A.O. further noted that Sh. Prabhat Srivastava, Director of M/s Rockland Hospitals has stated on 07.10.2011 that allottees of sweat equity shares (including the appellant) are either employees of M/s RHL or associated with Rockland Group as friends/relatives. It was stated that such people have worked hard for the growth of M/s RHL, who has allotted these shares to them. The A.O., during the course of proceedings asked the appellant to furnish reasons why the difference between the market value of the shares and the cost in hands of the appellant (Nil) should not be taxed as professional income of the appellant u/s 28(iv) of the Income Tax Act, 1961 in the A.Y. 2007-08.

7. In response, the appellant submitted that it is not income u/s 17(2)(vi) because of the following:-

(i) For the relevant A.Y. 2007-08, sweat equity shares allotted to any person were not treated as perquisite. This has become taxable u/s 17(2)(vi) only w.e.f. A.Y. 2010-11.

(ii) During the A.Y. 2006-07, appellant was not employee of M/s Rockland Hospitals.

(iii) Sweat equity shares became taxable under Fringe Benefit tax only from A.Y. 2008-09.

The appellant also submitted that the appellant is not a professional and has no professional earning, nor has it received any professional fee and therefore the value of Sweat Equity is not chargeable under 28(iv) of the I.T. Act, 1961. The A.O. however held that the appellant clearly falls under the

category of the professional shareholder and not as an employee shareholder, and hence the value of the sweat equity (including the premium amount) is taxable u/s 28(iv). Thus he brought the entire sum of Rs. 2,00,00,000/- (corresponding to 100,000 shares) to tax in the hands of the appellant.

8. Before Id. CIT(A), the assessee made the following submission:

(1) The agreement entered into by the appellant with M/s RHL is conditional agreement inasmuch as which was required that professional shareholders shall remain in the continuous association of the company for at least minimum period of 10 years from the date of allotment of certificate. The words "benefit" or "perquisite" which have been used together in the sub-section have to be read together and draw clear from each other. Normally, the term "perquisite" denotes meeting out of an obligation of one person by another person either indirectly or provision of some facility or amenity by one person to another or from the very beginning the person is irretrievable to him providing such facility or concessions knows that whatever it is being done as it has been granted as a privilege or right of that person. In other words, at the time of execution of business transaction one party should give to the other party an irretrievable benefit or advantage as an obligation or facility or a concession. He relied upon the decision of the Hon'ble ITAT Mumbai in the case of Helios Food Improvers (D) Ltd. v. DCIT (2007) 14 SOT 546 (Mumbai). It was submitted that in the appellant's case, the transaction was not of any

irretrievable benefits; rather, the benefit was conditional because of the two conditions of minimum association of 10 years and a lock-in period of three years. It further submitted that due to the lock-in period of three years, ownership and enjoyment starts only after the lock-in period expires and therefore the market value of the shares in its hands has to be zero in the A.Y. 2007-08.

(2) The value of Rs. 200 per share was only an actuarial valuation of what the share might be valued at after 5 years. The actual book value per share was only Rs.9.98/-.

(3) It has been held in the case of M/s Rupee Finance and Management Pvt. Ltd. Vs. ACIT (2008) 22 SOT 174 (Mum) that a mere purchase of shares for a consideration which less than the market value does not constitute a benefit or perquisite u/s 28(iv).

(4) In September, 2009 and 26.02.2010 under the approval of Hon'ble Delhi High Court, the share premium on sweat equity shares has been reduced to Nil in the books of M/s RHL. Correspondingly "Security Premium Account" has also been appearing as in the books of M/s RHL has also been reduced to Nil. Accordingly it was submitted that there was no real income in the appellant's hands.

(5) The appellant did not render any services to M/s RHL nor is he qualified to do so.

9. It was submitted that the assessment is done on the basis of Sec.28(iv) and not u/s 17(2)(vi), and therefore only the

applicability of Sec.28(iv) to the facts of this case has to be determined. In Commissioner of Income Tax vs. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC) it was held "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently given up, in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

10. In Godhra Electricity Co. Ltd. v. Commissioner of Income Tax, [1997]225 ITR 746 (SC), the apex Court reiterated the view taken in Shoorji Vallabhdas and Morvi Industries. In that case, it was noted that the High Court held that the assessee would be obliged to pay tax when the profit became actually due and that income could not be said to have accrued when it is based on a mere claim not backed by any legal or contractual right to receive the amount at a subsequent date. The High Court of Gujarat however had held on the facts of the case that the assessee had a legal right to recover the consumption charge in dispute at the enhanced rate from the consumers. The apex Court did not accept the view taken by the High Court on

facts. Reference was made in this context to Commissioner of Income Tax v. Birla Gwalior (P.) Ltd., [1973] 89 ITR 266 (SC) wherein it was held, after referring to Morvi Industries, that real accrual of income and not a hypothetical accrual of income ought to be taken into consideration. For a similar conclusion, reference was made to Poona Electric Supply Co. Ltd. vs. Commissioner of Income Tax, [1965] 57 ITR 521 (SC) wherein it was held that income tax is a tax on real income, the apex Court then considered the facts of the case and came to the conclusion (in Godhra Electricity) that no real income had accrued to the assessee in respect of the enhanced charges for a variety of reasons. The apex Court took the view that "one has to look at things from a practical point of view." (R.B. Jodha Mai Kuthiala vs. Commissioner of Income Tax [1971] 82 ITR 570 (SC)). The Hon'ble Supreme Court took the view that the probability or improbability of realization has to be considered in a realistic manner.

11. In the case of State Bank of Travancore vs. Commissioner of Income Tax, [1986] 158 ITR 102 (SC) wherein the majority view was that accrual of income must be real, taking into account the actuality of the situation; whether the accrual had taken place or not must, in appropriate cases, be judged on the principles of real income theory. The majority opinion went on to say: "What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realization in a realistic manner and dovetailing of these factors together'. Of course, once the accrual takes place, on the conduct of the parties subsequent to the year of

closing an income which has accrued cannot be made 'no income'. (The question to be then answered in light of this caveat is, whether any benefit had accrued or arisen to the appellant during the A.Y. 2006-07)

12. Applying the three tests laid down by various decisions of the apex Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of M/s RHL to pass on the benefits of the high valuation of shares; and the probability or improbability of realization of the benefits by the appellant considered from a realistic and practical point of view (the reversal of entries in the books of M/s RHL having taken place subsequently), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the law evolved by the apex Court requires the Assessing Officer to be pragmatic and not pedantic.

13. Section 28(iv) lays down that any benefit accruing to an assessee in the course of exercise of his profession shall be considered as his income. The question that has to be answered, in the light of the law as evolved by the Hon'ble Apex Court, is whether any real benefit has arisen in the hands of the appellant? In this case, the following facts militate against the view that benefit accrued to the appellant or that the benefit was real:

- (1) the share premium was nothing but an entry in the books of M/s RHL; there is nothing to indicate that M/s RHL would have actually compensated the appellant in money

terms. Indeed, the book value was around only Rs.9.98 as against face value of Rs.10.

(2) there is no indication of the actual services provided by the appellant and the quantification thereof.

(3) the entry in the books of M/s RHL was actually reversed in a subsequent year.

Taking a practical view, it is clear that no real benefit accrued or arose in the hands of the appellant, and hence there is no taxability u/s 28(iv).

14. The Id. CIT(A) held that even assuming that a benefit could have said to have accrued, then also it has been held in the case of Helios Food Improvers Pvt. Ltd. vs. DCIT (2007) 14 SOT 546 (Mum) that the word "benefit" has to be interpreted that one party should give to the other an irretrievable benefit or advantage as an obligation or facility or concessions. It was further held that if only the seller had incurred an expense or liability or had provided facility to the purchaser, then the value of cash of such expense or benefit or perquisite shall be treated as income. The same was reiterated in Rupee Finance & Management (P) Ltd. (supra). In the case of the appellant, the offer of "sweat equity" shares is conditional, and not irretrievable. Furthermore, it is seen that the entry of "share premium" liability and corresponding asset "Intellectual Property Rights" reflected in the books of M/s RHL have also been reversed subsequently. It thus follows that the appellant was never in receipt of any irretrievable benefit by way of "share premium" otherwise payable. Even this amount has no

real basis of valuation. Therefore there is no irretrievable benefit that had accrued to the appellant, so as to bring the amount to tax in the hands of the appellant u/s 28(iv). Holding thus, the Id. CIT(A) deleted the addition of Rs.2,00,00,000/- in the hands of the assessee.

15. Having gone through the entire factum which has been mentioned and deliberated in the order of the Id. CIT(A), we find no reason to interfere with the order of the Id. CIT(A).

16. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 03/01/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 03/01/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR