



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 20th January, 2010

+ **ITA 31/2010**

COMMISSIONER OF INCOME TAX Appellant

-versus-

SHRI CHAND RATAN BAGRI Respondent

Advocates who appeared in this case:

For the Appellant : Ms P.L. Bansal with Ms Anshul Sharma
For the Respondent : Mr Salil Aggarwal with Mr Prakash Kumar

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

BADAR DURREZ AHMED, J (ORAL)

1. The Revenue is aggrieved by the order dated 23rd February, 2009 in ITA No.2347/Del/2007 relating to the assessment year 2002-03. The only issue sought to be raised for consideration of this Court is with regard to the forfeiture of an amount of Rs.59,50,000/- towards 10 lakh preferential



convertible warrants @ 5.95 per warrant. The said warrants were subsequently split-up into convertible warrants of Rs.1/- each with Rs.0.595 as paid up amount in respect of each warrant. The balance amount was to be paid by 8th October, 2001.

2. The assessee had subscribed to these warrants issued by M/s BLB Limited. The assessee after making the initial payment could not make the balance payment and, therefore, M/s BLB Limited forfeited the amount of Rs.59,50,000/- earlier paid by the assessee. The assessee claimed this loss as short-term capital loss under the head “capital gain”. It was submitted on behalf of the assessee that the company had debited the loss to its capital account and not to the profit and loss account and consequently, there was no effect on the profit and loss account of the assessee company. The Assessing Officer, however, observed that the same had cast an effect on the short term capital gains of the assessee showing and the forfeiture of this amount in the manner indicated by the assessee was a tax-evasion tactic, prohibited by law.

3. Since the assessee was the Promoter Director in M/s BLB Limited, the Assessing Officer taxed the same in the hands of the assessee on protective basis and observed that the said amount could be taxed in the case of M/s BLB Limited.



4. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) which was decided in favour of the assessee and against the Revenue. Thereafter the Revenue went up in appeal before the Income Tax Appellate Tribunal which also held in favour of the assessee. The Tribunal held that as a result of the forfeiture of convertible warrants of M/s BLB Limited, earlier allotted to the assessee, the assessee incurred a loss of Rs.59,50,000/- being the amount already paid on the said warrants which was lost in the year under consideration and the same being on capital account, the assessee was entitled to claim the said loss as short term capital loss. The Tribunal also observed that the disallowance of the said loss made by the Assessing Officer by merely observing that it was nothing but a means of tax evasion without giving any basis whatsoever to justify the same and that the addition made by him on this issue and that too on protective basis was not sustainable. Accordingly, the Tribunal upheld the order of the Commissioner of Income Tax (Appeals) while deleting the addition made by the Assessing Officer although on different grounds.

5. The main issue sought to be raised by the learned counsel for the Revenue is that the forfeiture of the convertible warrants did not amount to transfer of assets. The learned counsel referred to Section 45 of the Income Tax Act, 1961 (hereinafter referred to as "the said Act"). The beginning words of which are as follows:-



“Any profits or gains arising from the transfer of a capital asset.....”

6. The learned counsel for the Revenue submitted that the profits or gains and the loss must arise from the transfer of a capital asset. Her emphasis was on the word “transfer”, used in the aforesaid expression. She then referred to Section 2(47) (ii) of the said Act which defines “transfer”, in relation to a capital asset to *inter alia*, include the extinguishment of any rights therein. It was submitted that the forfeiture of the said amount of Rs.59,50,000/- does not amount to extinguishment of any rights in the transfer of capital assets. She submitted that the extinguishment of the right must be in relation to the transfer of a capital asset and for this preposition she placed reliance on the Supreme Court decision in the case of *Vania Silk Mills P. Ltd. vs. Commissioner of Income Tax: 191 ITR 647*. In the said decision the Supreme Court observed that:

“Hence the expression “extinguishment of any rights therein” will have to be confined to the extinguishment of rights on account of transfer and cannot be extended to mean any extinguishment of right independent of or otherwise than on account of transfer.”

7. Secondly, the learned counsel for the Revenue submitted that since the right itself came to be extinguished and the asset did not remain, the forfeiture would not amount to a transfer as contemplated under Section



2(47) of the said Act. In this background, the learned counsel for the Revenue submitted that this appeal be admitted and a substantial question of law be framed on this aspect of the matter.

8. Mr. Salil Aggarwal appearing on behalf of the respondent/assessee raised two points as to why this appeal should not be admitted. The first point raised by him was that the question whether the forfeiture in the present case amounted to transfer or not, was not raised before any of the authorities below and, therefore, the same cannot be taken for the first time before this Court. For this proposition he placed reliance on the decision of this Court in the case of *Commissioner of Income Tax vs. Indocount Finance Limited*:271 ITR 215.

9. The second point urged by Mr. Aggarwal was that the decision in *Vania Silk Mills (supra)* has been over-ruled by the Supreme Court in a Larger Bench decision in the case of *Commissioner of Income Tax vs. Grace Collis*:248 ITR 320 (SC). Our attention was invited to the following passage:

“We have given careful thought to the definition of “transfer” in section 2(47) and to the decision of this court in *Vania Silk Mills Pvt. Ltd.’s* case [1991] 191 ITR 647. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression “extinguishment of any rights therein” to



such extinguishment on account of transfers or to the view that the expression “extinguishment of any rights therein” cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer.”

10. Mr. Aggarwal also placed reliance on the decision of the Karnataka High Court in the case of *Deputy Commissioner of Income Tax vs. BPL Sanyo Finance Limited*:312 ITR 63 (KAR). In the latter decision, the question was similar to the one which the Revenue is seeking to raise before us. There also there was a short term capital loss claimed on account of forfeiture of the share application money. The Court observed that the assessee’s rights to the shares were extinguished and, therefore, this amounted to short term capital loss. The Karnataka High Court also placed reliance on the decision of the Supreme Court in the case of *Grace Collis (supra)*.

11. In the rejoinder, Ms Bansal, who appears on behalf of the Revenue placed reliance on the decision of the Bombay High Court *Commissioner of Income Tax vs. Sterling Investment Corporation Limited (Bom.)*: 123 ITR 441.

12. We have considered the arguments and have gone through the



impugned order and papers on record and we are in agreement with the learned counsel for the respondent/assessee that the present appeal does not deserve admission as no substantial question of law arises for our consideration. This is so on two grounds. First of all, the question of whether forfeiture amounted to transfer, was not at all raised before the authorities below and in view of the decision of this Court in *Indocount Finance Limited (supra)*, we cannot permit the Revenue to take up this issue for the first time before this Court.

13. More importantly, the second issue as to whether the forfeiture of the convertible warrant amounted to a transfer within the meaning of Section 2(47) of the said Act has now been made clear by the Supreme Court in the case of *Grace Collis (supra)* as also by the Karnataka High Court in *BPL Sanyo Finance Limited (supra)*. We agree with the interpretation given by the Karnataka High Court in *BPL Sanyo Finance Limited (supra)* and we see no reason to take a different view. The restrictive meaning given to the word “transfer” by the Supreme Court decision in *Vania Silk Mills P. Ltd. (supra)* has been over-ruled by the Larger Bench of the Supreme Court in the case of *Grace Collis (supra)*.

14. In the present case we find that the forfeiture of the convertible warrant has resulted in extinguishment of the right of the assessee to obtain a share in BLB Limited. It is not a case where the asset itself has been



extinguished or destroyed. A share in a company is nothing but a share in the ownership of the company. While the right of the assessee to share in the ownership of the company (BLB Limited) stands extinguished on account of the forfeiture, the company, with all its assets, continues to exist. The forfeiture only results in one less shareholder. It is not as if the 'asset' in which a share was being claimed was also extinguished. Thus, the second point urged by the learned counsel for the Revenue is also not tenable.

15. In view of the foregoing reasons, no substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JANUARY 20, 2010

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