1957

May 15

COMMISSIONER OF INCOME-TAX, BOMBAY

v.

THE PROVIDENT INVESTMENT CO., LTD.

[BHAGWATI, S. K. DAS and J. L. KAPUR JJ.]

Income Tax—Capital gains—Managing agent of company holding shares therein—Agreement of sale of shares and Managing Agency—Sale of shares—Relinquishment of Managing Agency by way of resignation—If amounts to a sale or transfer of Managing Agency—Agreed Statement of Case for reference to High Court—Whether binding on the parties—Indian Income-tax Act, 1922 (XI of 1922), s. 12B.

The respondent company was the managing agent of two other companies holding certain shares therein. D wrote two letters to the respondent on September 14, 1946, offering to purchase some of those shares together with the managing agency and agreeing to pay certain sums as earnest money on the acceptance of the offer and to pay the balance after the transfer of the managing agency was sanctioned by the general body of shareholders. By a letter dated September 30, 1946, the respondent accepted the offer on condition of a sum of Rs. 1 crore being paid out of the consideration as compensation for the loss of the managing agency, and on receipt of the letter, D paid the earnest money. Subsequently, D wrote a letter on October 7, 1946, whereby, in modification of the arrangement previously made, it was agreed that instead of the managing agency being transferred by the respondent, the latter would resign the office of managing agents and certain individuals would be appointed Directors of the two companies. Accordingly, the respondent relinquished the managing agency and thereupon the balance of consideration money was paid to it. The Income-tax Officer considered that s. 12B of the Indian Income-tax Act, 1922, was applicable to the transaction and on the footing that the managing agency, which was valued at Rs. 1 crore, was a capital asset, he computed the capital gains at Rs. 81,81,900. The Income-tax Appellate Tribunal held that the respondent, as the owner of the shares and the managing agency, sold the shares to D and handed back the managing agency to the managed companies, and that this handing back constituted a transfer. On a reference to the High Court by the Tribunal, the agreed statement of the case proceeded on the basis that the dispute between the parties was whether the transaction with regard to the managing agency resulted in capital gains and the High Court held that there was neither a sale nor a transfer of the managing agency within the meaning of s. 12B of the Act. On appeal to the Supreme Court by the Commissioner of Income-tax, it was contended for him (1) that there was a concluded contract

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

of sale as a result of the letters of September 14, 1946, and September 30, 1946, and a sale having taken place, the letter of October 7, 1946, merely changed the mode of performance of the contract and did not affect the true legal character of the transaction which was a sale of the managing agency, and (2) that as there was one indivisible consideration for the whole transaction, including the sale of the shares and of the managing agency, the sale of the shares having taken place and the entire consideration having been paid, there was a sale within the meaning of s. 12B of the Act and the transaction resulted in capital gains.

Held (1) that on a true construction of the letters there was originally only an agreement to sell the shares together with the managing agency and before the sale could take place the letter of October 7, 1946, substituted a new contract, a contract of relinquishment rather than a contract of sale, so far as the managing agency was concerned, and (2) that it was not open to the appellant to go behind the agreed statement of the case and raise a question of law based on different facts and circumstances.

Accordingly, the transaction in question was a relinquishment of the managing agency and was neither a sale nor a transfer within the meaning of s. 12B of the Indian Income-tax Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 179 of 1954.

Appeal from the judgment and order dated March 12, 1953, of the Bombay High Court in Income-tax Reference No. 43 of 1952.

C. K. Daphtary, Solicitor-General of India, G. N. Joshi and *R. H. Dhebar,* for the appellant.

N. A. Palkhivala, D. H. Dwarkadas, J. B. Dadachanji, S. N. Andley and *Rameshwar Nath,* for the respondent.

1957. May 15. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS J.—This is an appeal on a certificate granted by the High Court of Judicature at Bombay under sub-s. (2) of s. 66A of the Indian Income-tax Act (hereinafter referred to as the Act). The appellant is the Commissioner of Income-tax, Bombay, and the respondent is the Provident Investment Co., Ltd., Bombay, hereinafter referred to as the assessee company.

The short question which falls for consideration in this appeal is whether a particular transaction, details

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

S. K. Das J.

whereof we shall presently state, entered into by the assessee company in 1946 resulted in capital gains within the meaning of s. 12B of the Act. The question which was referred to the High Court under s. 66(1) of the Act was this: "Whether the assessee company made a capital gain amounting to Rs. 81,81,900 within the meaning of s. 12B of the Indian Income-tax Act?" The High Court answered the question in the negative. The appellant being dissatisfied with the judgment and order of the High Court asked for and obtained a certificate from the said High Court that the case is a fit one for appeal to the Supreme Court.

The material facts may be very shortly stated. The assessee company is a private limited company, the shares of which were held by the then Maharaja Scindia of Gwalior and his nominees. At the material time, the assessee company was the managing agent of Madhowji Dharamsi Manufacturing Co., Ltd., hereinafter briefly referred to as the Dharamsi Company, and Sir Shapurji Broacha Mills Ltd., briefly referred to as the Shapurji Broacha Company. The assessee company held all the "conversion" shares of the Dharamsi Company and a substantial majority of the "conversion" shares of the Shapurji Broacha Company. The Dalmia Investment Company Limited, which will hereinafter be briefly referred to as the Dalmia Company, wrote two letters to the assessee company on September 14, 1946. In these two letters, the Dalmia Company offered to purchase 28,328 "conversion" shares of the Dharamsi Company at Rs. 500 per share together with the managing agency, and also 75,212 "conversion" shares of the Shapurji Broacha Company, together with the managing agency. We are not concerned with the other details mentioned in the two letters, except this that the Dalmia Company made it clear that it would purchase both the mills or neither, and a time limit till September 23, 1946, 3 p.m. was imposed during which the offer would remain open. This time limit was, however, extended later up to September 30, 1946. The letter further stated:

1957

The Commissioner of Income-tax, Bombay
v.
The Provide t Investment Co., Ltd.

S. K. Das .

"On your accepting the offer, we will pay to you Rs. 20 lakhs in the case of the Dharamsi Company, Rs. 30 lakhs in the case of the Shapurji Broacha Company as and by way of earnest money. You shall have to arrange to get the transfer of the managing agency sanctioned by the general body of the shareholders within a period of 40 days from the date of acceptance. As soon as the transfer is sanctioned, we will pay the balance of the purchase price."

On September 26, 1946, there was a meeting of the Board of Directors of the assessee company. At that meeting, the Board considered the offers made by the Dalmia Company and resolved to accept the offers. The Board further stated in its minutes that out of the total amount received from the sale of the shares, a sum of Rs. 1 crore should be paid to the assessee company as compensation for the loss of the managing agency of the two mills. On September 30, 1946, the assessee company wrote to the Dalmia Company accepting the offers made, subject to a condition which is not material for our purpose. On the same date, the Dalmia Company received the acceptance of the offers made by it and sent two drafts, one for Rs. 20 lakhs and the other for Rs. 30 lakhs. On October 7, 1946, the Dalmia Company wrote a very important letter to the assessee company. This letter said *inter alia* :

"With reference to the interview our Solicitor Mr. Tanubhai had with your Mr. Wadia, we beg to record that it is now being agreed upon as follows in modification of the arrangement previously made between yourselves and ourselves :

(1) In our letters of offer which have been accepted by you, it was arranged that the managing agency will be transferred either to us or to our nominees. Now, instead of doing so by you, you as the present managing agents will give their (sic) resignation, so that at the time of delivery of the shares and payment of moneys, your managing agency will have come to an end. In view of the above, it is not necessary to obtain any sanction of general meeting.

(2) 1. Mr. Sriyans Prasad Jain
2. Mr. Jaidayal Dalmia
3. Mr. Shanti Prasad Jain and
4. Mr. Vishnu Hari Dalmia

will be appointed Directors of both the Mills Companies and thereafter all the present directors will tender their resignation.

(3) Qualification shares in the names of the above proposed Directors will be transferred by you and the balance of the shares will be delivered to us along with the transfer deeds duly signed against payment.

(4) You may communicate by a circular to the shareholders that you have resigned the managing agency. You may further mention in the circular that in accordance with the offer we are prepared to take up the deferred shares held by the shareholders which may be offered to us at the rate of Rs. 25 and Rs. 7-8-0 of Madhowji Dharamsi Manufacturing Co. Ltd. and Sir Shapurji Broacha Mills Ltd. Mills respectively within two months of the date of letter of offer which we would also send."

The assessee company accepted the modified arrangement suggested by the Dalmia Company, and on October 19, 1946, the assessee company wrote to the Dharamsi Company and the Shapurji Broacha Company that it had decided to resign the office of the managing agency and accordingly tendered its resignation on that date. The balance of the consideration money was then paid to the assessee company, and it was not disputed that the value of the managing agency was computed at Rs. 1 crore, nor was there any dispute that the managing agency was a capital asset. Out of the said sum of Rs. 1 crore, the Income-tax Officer computed the capital gains at Rs. 81,81,900 and asked the assessee company to pay tax thereon. The Appellate Assistant Commissioner held that the assessee company had sold the managing agency and therefore the profits or gains arising from that sale were capital gains within the meaning of s. 12B of the Act. The Income-tax Appellate Tribunal, Bombay Bench 'A', held, however, that there was no sale of the managing agency, because the original contract of

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

S. K. Das J.

purchase was varied by the new contract embodied in the letter of October 7, 1946. The Tribunal, however, held as follows:

"The assessee company was the owner of the shares and the managing agencies. It sold the shares to the Dalmia Co. and handed back the managing agencies to the managed companies. This handing back, in our opinion, constitutes a transfer of the managing agencies."

On that footing the Tribunal held that s. 12B of the Act applied. On an application by the assessee company, the Tribunal on being satisfied that a question of law did arise out of its order, referred the question which we have already set out in an earlier paragraph of this judgment, to the High Court of Bombay. The High Court answered the question in the negative on the ground that there was neither a sale nor a transfer of the managing agency within the meaning of s. 12B of the Act.

The point for our consideration is whether the High Court has correctly answered the question. We must first read sub-s. (1) of s. 12B of the Act as it stood at the material time. The sub-section, so far as it is relevant for our purpose, was in these terms:

"The tax shall be payable by an assessee under the head 'Capital gains' in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March 1946; and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place."

It is worthy of note that 'capital gains' were charged for the first time by the Income-tax and Excess Profits Tax (Amendment) Act, 1947, which inserted s. 12B in the Act. It taxed 'capital gains' arising after March 31, 1946, and the levy was virtually abolished by the Indian Finance Act, 1949, which confined the operation of the section to 'capital gains' arising before April 1, 1948. The Finance (No. 3) Act, 1956 (Act 77 of 1956) re-introduced the section in wider terms so as to bring within 'capital gains' 'any profits or gains arising from the sale, exchange, relinquishment or transfer of a

capital asset effected after March 31, 1956, etc. We are not, however, concerned with the question whether the transaction under our consideration, which took place in 1946, resulted in capital gains within the meaning of s. 12B as it stands after the enactment of the Finance (No. 3) Act, 1956 (Act 77 of 1956). The question before us is whether the transaction under consideration resulted in capital gains within the meaning of s. 12B as it originally stood.

Two other points must be stated at the outset in order to clear the ground for a consideration of the relevant arguments advanced before us. The first point is that there is no question here of the assessee company trying to circumvent the provisions of s. 12B of the Act by deliberately modifying the original agreement (by its letter dated October 7, 1946) so as to put the transaction outside the scope of that section. The agreement was modified in October, 1946, before even the insertion of s. 12B in the Act. Therefore, no question of deliberate or fraudulent evasion arises in this case. The second point is that in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and the true legal position arising out of the transaction in question. The Bombay High Court has referred to a large number of English decisions on this point. We consider it unnecessary to examine those decisions in the present case. The point was considered very recently by this Court in *A. V. Fernandez* v. *The State of Kerala* ([1]), where the following observations made are very pertinent:

"If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come

(1) [1957] S.C.R. 837.

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

S. K. Das J.

to the conclusion that the appellant was liable to assessment as contended by the Sales Tax authorities." Those observations were made in a case dealing with sales tax but are equally applicable to the case under our consideration.

Two conditions must be fulfilled before the transaction under our consideration can come within the purview of s. 12B of the Act. The first condition is that the profits or gains must arise from the sale, exchange or transfer of a capital asset; and the second condition is that the sale, exchange or transfer must be effected after March 31, 1946. There is no doubt that the transaction before us was effected after March 31, 1946. There is also no dispute that the managing agency of the two mills which the assessee company held was a capital asset. Therefore, the question bails down to this—did the profits or gains, namely, the sum of Rs. 1 crore which was computed as the value of the managing agency, arise from the *sale* or *transfer* of the managing agency? The Income-tax authorities held that there was a sale of the managing agency; but the Appellate Tribunal held that there was no sale in the strict sense but only a transfer of the managing agency to the managed companies, that is, the Dharamsi Company and the Shapurji Broacha Company. The High Court held that there was neither a sale nor a transfer, because the letter of October 7, 1946, substituted a different contract for the original contract entered into by the parties, and the true legal position with regard to the substituted contract was that the assessee company resigned the managing agency, or, in other words, the managing agency was relinquished by the assessee company.

The learned Solicitor-General, who has appeared for the appellant, has contested the correctness of the view of the Bombay High Court and has submitted a two-fold argument before us. His first argument is that there was a concluded contract of sale as a result of the letters, dated September 14, 1946, and September 30, 1946, exchanged between the parties, and the sale having taken place, the letter of October 7, 1946, which merely changed the mode of performance of the

contract, did not affect the true legal character of the transaction which was a sale of the managing agency. We are unable to accept this argument. The true legal effect of the letters dated September 14, 1946, and September 30, 1946, which contained an offer and an acceptance, was merely this: the Dalmia Company offered to purchase (1) certain shares in the two mills and (2) the managing agency, on payment of a certain consideration, and the assessee company accepted that offer. In law, this was merely an agreement to sell and purchase the shares together with the managing agency on payment of the consideration, etc. The two letters did not by themselves amount to a sale of the shares or the managing agency, in the sense of a transfer of the property in them. Before any such sale could take place, the agreement was modified by the letter of October 7, 1946, and instead of "selling" the managing agency the assessee company agreed to resign or relinquish the managing agency. We are unable to agree with the learned Solicitor-General that the letter of October 7, 1946, merely changed the mode of performance, and did not constitute a new contract. In our opinion, the Bombay High Court correctly held that whereas under the original contract the Dalmia Company wanted the managing agency to be transferred, which meant that it wanted the benefit of that contract to be vested in it and was also prepared to accept the burden of the obligations that went with that contract, under the substituted contract, the Dalmia Company did not want the managing agency to be assigned to it; on the contrary, it wanted the assessee company to relinquish its rights in the managing agency of the two mills by resigning. On a true interpretation, the letter of October 7, 1946, substituted a new contract, a contract of relinquishment rather than a contract of sale, so far as the managing agency was concerned.

The second argument of the learned Solicitor-General is that there was one indivisible consideration for the whole transaction, including the sale of the shares and of the managing agency. So far as the shares were concerned, the sale did take place and the entire

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

S. K. Das J.

consideration was paid; there was therefore a sale within the meaning of s. 12B of the Act, and the consideration being one and indivisible, the transaction did result in capital gains within the meaning of that section. At the first blush, the argument has an apparent merit of plausibility, though it was not urged before the Bombay High Court in the manner in which it has been urged before us. On a closer scrutiny, however, it appears to us that this argument is not really available to the learned Solicitor-General. The parties and the Income-tax authorities, including the Appellate Tribunal, proceeded on the footing that part of the consideration, namely, the sum of Rs. 1 crore, was the consideration for the sale or relinquishment of the managing agency, the Department contending that the transaction was a sale or transfer and the assessee company contending that it was neither a sale nor a transfer but a mere relinquishment. In the agreed statement of the case, it was stated :

"The value of the managing agencies was computed by the assessee company at Rs. 1 crore and there is no dispute on this point. The Income-tax Officer thereupon computed capital gain at Rs. 81,81,900 and again there is no dispute on this point. The question which the Tribunal had to determine was whether the transactions between the Dalmia Company and the assessee company resulted in a capital gain of Rs. 81,81,900."

It is obvious that the entire assessment proceedings proceeded on the basis that the sum of Rs. 1 crore was the consideration for the sale or relinquishment of the managing agencies, and the dispute between the parties was whether the transaction with regard to the managing agencies, in its true legal character, was a sale or transfer or relinquishment. That being the position, it is not now open to the learned Solicitor-General appearing for the Revenue to go behind the agreed statement of the case and to ask us to give an answer to the question of law raised in the case on different assumptions or in a different set of circumstances. The answer must be given on the basis of

1957

The Commissioner of Income-tax, Bombay
v.
The Provident Investment Co., Ltd.

S. K. Das J.

the facts and circumstances as stated in the agreed statement of the case.

We are of opinion that the answer was correctly given by the High Court of Bombay. The transaction in its true legal character was a relinquishment of the managing agency and was neither a sale nor a transfer thereof. Therefore, the High Court correctly answered the question in the negative.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

1957

May 16.

F. N. ROY

v.

COLLECTOR OF CUSTOMS, CALCUTTA.

(S. R. Das C. J., Jafer Imam, S. K. Das, Govinda Menon and A. K. Sarkar JJ.)

Sea Customs—Import without licence—Confiscation of goods—Validity of Order—Discretion of Customs-authorities—Validity of Enactment—Sea Customs Act, 1878 (VIII of 1878), ss. 167(8), 183—Imports and Exports (Control) Act, 1947 (XVIII of 1947), s. 3(1)(2)—Constitution of India, Art. 14.

Section 167, item 8, of the Sea Customs Act, 1878, provides that if any goods the importation of which is for the time being prohibited or restricted by or under Ch. IV of the Act, which Chapter includes s. 19, be imported into India contrary to such prohibition or restriction, such goods shall be liable to confiscation and any person concerned in such importation shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees. By s. 183 of this Act it is provided: "Whenever confiscation is authorised by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fines as the officer thinks fit". The Imports and Exports (Control) Act, 1947, by s. 3(1) empowers the Central Government by an order to make provision for prohibiting, restricting, or otherwise controlling, the import, export, carriage coast-wise or shipment as ships' stores of goods of any specified description. Sub-section (2) of that section provides that all goods to which any order under sub-s. (1) applies, shall be deemed to be goods of which the import or export has been prohibited or restricted under s. 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly,