IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2348 OF 2013

The Commissioner of
Income Tax-8, Mumbai .. Appellant.
Vs.
Mrs. Hemal Raju Shete .. Respondent.

Mr. Arvind Pinto for the Appellant-Revenue.
Mr. J.D. Mistri,Sr. Advocate i/b Mr.Atul Jasani for the Respondent-assessee.

CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.

DATED : 29TH MARCH, 2016

P.C. :

1. This appeal under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 10th July, 2013 of the Income Tax Appellate Tribunal (the 'Tribunal'). The appeal relates to the Assessment Year 2006-07.

2. Mr. Pinto, learned counsel for the revenue urges the following question of law for our consideration :

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A), wherein the CIT(A) accepting the assessee's mode of offering

capital gains for tax on receipt basis in various assessment years, which is in contravention of Section 45(1) of the Act ?"

3. The respondent-assessee filed her return of income for the assessment year 2006-07 declaring total income of Rs.11,68,470/-. The respondent-assessee had also shown the long term capital gain of Rs.42,38,674/- arising out of the sale of 75,000 shares of M/s. Unisol Infraservices Ltd. (M/s. Unisol) to one M/s.Radha Krishna Hospitality Services (P) Ltd. ("RKHS") in terms of agreement dated 25th January, 2006. The Assessing Officer on perusal of the agreement dated 25th January, 2006 was of the view that under the agreement, the respondent-assessee as well as other co-owners (Shete family) of M/s. Unisol were to receive in aggregate a sum of Rs.20 crores and proceeded to tax entire amount of Rs.20 crores in the subject assessment year in the hands of all co-owners of shares. This resulted in the respondent-assessee being taxed on her share of capital gains at Rs.4.48 crores after availing exemption under Section54EC of the Act. In the result the Assessing Officer by order dated 30th December, 2008 assessed the respondent to an income of Rs.4.60 crores.

4. Being aggrieved, the respondent-assessee preferred an appeal to the Commissioner of Income-Tax (Appeals). By order

dated 24th December, 2009 the Commissioner of Income-Tax (Appeals) deleted the addition of Rs.4.48 crores made by the Assessing Officer on the ground that it is notional. The Commissioner of Income-Tax (Appeals) on examination of the agreement dated 25th January, 2006 noted that in terms of the agreement the respondent-assessee alongwith other co-owners of the shares of M/s.Unisol were to receive Rs.2.70 crores as initial consideration. The respondent-assessee had offered her share out of Rs.2.70 crores received as initial consideration to tax in her return of income for the subject assessment year. The Commissioner of Income-Tax (Appeals) observed that the agreement dated 25th January, 2006 also provided for deferred consideration which was capped at Rs.20 crores, which had to be paid in terms of formula prescribed in the agreement dated 25th January, 2006. The working out of the formula could lead and in fact had led to a situation where no amount on account of deferred consideration for the sale of shares was receivable by the respondent-assessee in the immediate succeeding assessment year i.e. assessment year 2007-08. On the analysis of agreement, the Commissioner of Income-Tax (Appeals) concluded that the amount of Rs.20 crores is the maximum amount that could be received by all co-owners under the agreement from M/s. RKHS. However, on working of the formula there was no guarantee that this amount or for that matter any amount would be received as was evident from the immediate

succeeding assessment year i.e. assessment year 2006-07 when no amount was received as deferred consideration. In fact in terms of formula the amount to be received as deferred consideration was contingent upon the performance of M/s. Unisol in the succeeding assessment year. In the above view, the Commissioner of Income-Tax (Appeals) concluded that no amount of the deferred consideration can be brought to tax in the subject assessment year either on receipt basis or on accrual basis. Accordingly, the addition made by the Assessing Officer was deleted.

5. Being aggrieved, the Revenue filed an appeal before the Tribunal. By the impugned order dated 10th July, 2013 the Tribunal upheld the findings of the Commissioner of Income Tax (Appeals) interalia holding that as there is no certainty of receiving any amount as deferred consideration, the bringing to tax the maximum amount of Rs. 20 crores provided as a cap on the consideration in the agreement dated 25th January, 2006 is not tenable. The Tribunal further held that what amount has to be brought to tax is the amount which has been received and/or accrued to the respondent-assessee and not any notional or hypothetical income as the revenue is seeking to tax the respondent-assessee in the subject assessment year 2006-07.

6. Before considering the rival submissions it would be

appropriate to extract the relevant clauses of agreement dated 20th January, 2006 :

> *"7.6 Initial consideration is the initial sum of Rs.2,70,00,000/- (India Rupees Twenty Seven million) less debt as on completion date plus cash as an completion date to be paid to Shete Group by RKHS in consideration for the shares in accordance with the provisions of clause 3.3.*
> *7.7 Purchase price (for the transferee sale consideration for the transferor) the aggregate of initial consideration and deferred consideration under clause 3.*
> *Clause 2 Agreement to sell and purchase*
> *"Shete Group shall on the completion date sell and transfer as legal and benefical owner, the shares together with all rights attaching thereto to RKHS and RKHS shall purchase the shares free from all claims, charges, liens, encumbrances equities and adverse rights of any description.*
> *Nothing in this agreement shall oblige RKHS to purchase only some of the shares unless Shete Group shall at the same time complete the sale of RKHS of all of the shares"*
> *Clause 3 Consideration*
> *"The purchase price payable by RKHS to Shete Group in respect of the sale of the shares shall be the aggregate sum of the initial consideration as calculated in accordance with clause 3.3 and the deferred consideration as calculated in accordance with clause 3.4. The aggregate of the initial consideration and the deferred consideration shall be capped at Rs.20,00,00,000/- (India Ruppes two hundred million) less debt plus cash.*
> *Subject to Clause 3.3.1 and 3.3.2 below the initial consideration shall be payable on completion and shall be satisfied by the payment to Shete Group on the completion date.*
> *Clause 3.3.1 ....*
> *Clause 3.3.2 ....*
> *Clause 3.4 Deferred consideration shall be payable to Shete Group in accordance with the following provisions :*
> *Clause 3.4.1 For the purpose of clause 3.4*
> *(a) UNISOLs net profit shall mean the net profits before interest and tax of the company as derived*

from the figures shown in the audited accounts of the company (such audited accounts to be prepared in accordance with the generally accepted accounting principles in India excluding any one off profits or one off losses and consistently applied with previous years).

(b) Where any capitalized letter is given any meaning in any of the remaining sub clauses of the clause 3.4 such capitalized letter shall also bear the meaning where it is used in any other of the sub clauses of this clause 3.4.

(c) Cash and debt shall be calculated in accordance with the definition under clause 1.1 at their respective dates as mentioned above.

Clause 3.4.2 The first deferred consideration shall subject to clause 3.4.3 be calculated as follows :

B = (C X 5.5) - Debt + Cash – A

Where

C = UNISOLs net profit for the year ended 31st March, 2006 and for the year ended 31st March, 2007 divided by two.

A = Initial consideration

Cash = Cash as on March 31, 2007

Debt = Debts as at March 31, 2007

On 31st May, 2007 RKHS shall submit the calculation of the first deferred consideration to Shete Group for review. The parties shall agree with 30 days the amount of the first deferred consideration which shall then be made and payable on June 30, 2007."

Clause 3.4.3 The amount payable in respect of B shall be capped at Rs. 20,00,00,00 (Indian rupee two hundred million) minus initial consideration payment of such sum shall be in full settlement of any sum due in respect of B notwithstanding the circumstances where the calculation of B would otherwise result in a figure in excess of Rs. 17,30,00,000/-(i.e India Rupees One hundred and seventy three million)

Clause 3.4.4 In the event only that the amount payable in respect of B did not exceed Rs.20,00,00,000 minus initial consideration the second deferred shall subject to clause 3.4.5 be calculated as follows:

E=(D X 5.5) – Debt + Cash - (A+B)

D = Unisols net profit for the year ended 31st March 2008 and for the year ended 31st March 2009

divided by two
B = the first deferred consideration under clause 3.4.2 (if any)
A = Initial consideration
Cash = Cash as at March 31, 2009
Debt = Debt as at March 31, 2009
On 31th May, 2009, RKHS shall submit the calculation of the second deferred consideration to Shete Group for review. The parties shall agree within 30 days the amount of the second deferred consideration which shall then be made and payable on June 30, 2009
Clause 3.4.5 The amount payable in respect of E under clause 3.4.4 shall be capped at the sum calculated as follows:
Rs.20,00,00,000 - (A+B)
And payment of such sum shall be in full settlement of any sum due under clause 3.4.4 notwithstanding the circumstance where the calculations under clause 3.4.7 would otherwise result in a figure in excess of such sum.
Clause 3.4.6 In the event only that the amount payable in respect of E did not exceed the sum calculated under clause 3.4.5 the third deferred consideration shall subject to clause 3.4.6 be calculated as follows:
G = (F X 5.5) – Debt + Cash - (A+B+E)
F = Unisols net profit for the year ended 31st March 2009 and for the year ended 31st March 2010 divided by two
E = the second deferred consideration under clause 3.4.4 (if any)
B = the first deferred consideration under clause 3.4.2 (if any)
A = initial consideration
Cash = Cash as on March 31, 2010
On 31st May, 2010 RKHS shall submit the calculation of the third deferred consideration to Shete Group for review. The parties shall agree within 30 days the amount of third deferred consideration which shall be made and payable on June 30, 2010"
Clause3.4.7 The amount payable in respect of G under clause 3.4.6 shall be capped at the sum calculated as follows:
Rs.20,00,00,000 - (A+B+E)
And payment of such sum shall be in respect of G shall be in full settlement of any sum due under

clause 3.4.6 in full settlement of the purchase price for the sale of the shares to RKHS notwithstanding the circumstance where the calculation under clause 3.4.7 would otherwise result in a figure in excess of G."

7. Mr.Pinto, learned counsel for the Revenue urged that in terms of section 45(1) of the Act that transfer of capital asset would attract the capital gains tax. It is further submitted that the amount to be taxed under section 45(1) is not dependent upon the receipt of the consideration. In support of the above he invites our attention to Section 45(1)(A) and section 45(5) of the Act which in contrast brings to tax capital gains on amount received. In the above view, it is his submission that the Assessing Officer was justified in bringing to tax entire amount of the respondent-assessee's share in Rs.20 crores referred to in the agreement dated 25th January, 2006 as maximum amount that could be received on the sale of shares in M/s. Unisol by its co-owners from M/s. RKHS.

8. In the present case, from the reading of the above clauses of the agreement the deferred consideration is payable over a period of four years i.e. 2006-07, 2007-08, 2008-09 and 2009-10. Further the formula prescribed in the agreement itself makes it clear that the deferred consideration to be received by the respondent-assessee in the four years would be dependent upon

the profits made by M/s. Unisol in each of the years. Thus in case M/s. Unisol does not make net profit in terms of the formula for the year under consideration for payment of deferred consideration then no amount would be payable to the respondent-assessee as deferred consideration. The consideration of Rs.20 crores is not an assured consideration to be received by the Shete family. It is only the maximum that could be received. Therefore it is not a case where any consideration out of Rs.20 crores or part thereof (after reducing Rs.2.70 crores) has been received or has accrued to the respondent-assessee. As observed by the Apex Court in **Morvi Industries Ltd. vs. CIT (1971) 82 ITR 835**. *"The income can be said to accrue when it becomes due.... The moment the income accrues, the assessee gets vested right to claim that amount, even though not immediately."* In fact the application of formula in the agreement dated 25th January, 2006 itself makes the amount which is receivable as deferred consideration contingent upon the profits of M/s.Unisol and not an ascertained amount. Thus in the subject assessment year no right to claim any particular amount gets vested in the hands of the respondent-assessee. Therefore, entire amount of Rs.20 crores which is sought to be taxed by the Assessing Officer is not the amount which has accrued to the respondent-assessee. The test of accrual is whether there is a right to receive the amount though later and such right is legally enforceable. In fact as observed by the Supreme Court in **E.D. Sassoon & Co. Ltd. Vs.**

CIT (1954) 26 ITR 27 *"It is clear therefore that income may accrue to an assesee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro ....".* In this case all the co-owners of the shares of M/s.Unisol have no right in the subject assessment year to receive Rs.20 crores but that is the maximum which could be received by them. This amount which could be received as deferred consideration is dependent/contingent upon certain uncertain events, therefore, it cannot be said to have accrued to the respondent-assessee. The Tribunal in the impugned order has correctly held that what has to be taxed is the amount received or accrued and not any notional or hypothetical income. As observed by the Apex Court in **Commissioner of Income-Tax vs. M/s. Shoorji Vallabdas and Co. (1962) 46 ITR 144** *"Income-Tax is a levy on income. No doubt, the Income-Tax Act takes into account two points of time at which liability to tax is attracted, viz., the accrual of its income or its receipt; but the substance of the matter is income, if income does not result, there cannot be a tax, even though in book-keeping an entry is made about a hypothetical income, which does not materialize."* In this case Rs.20 crores cap

in the agreement is not income in the subject assessment year. It has been observed by the Apex Court in the case of **K.P. Varghese vs. Income-Tax Officer, Ernakulam & Anr. 181 ITR Page 597** that one has to read capital gain provision along with computation provision and the starting point of the computation is *"the full value of the consideration received or accruing"*. In this case the amount of Rs.20 crores is neither received nor it has accrued to the respondent-assessee during the subject assessment year. We are informed that for the subsequent assessment year (save Assessment Year 2007-08 for which there is no deferred consideration on application of formula), the Assessee has offered to tax the amounts which have been received on the application of formula provided in the agreement dated 25th January, 2006 pertaining to the transfer of shares.

9. The contention of the Revenue that the impugned order is seeking to tax the amount on receipt basis by not having brought it to tax in the subject assessment year, is not correct. This for the reason, that the amounts to be received as deferred consideration under the agreement could not be subjected to tax in the assessment year 2006-07 as the same has not accrued during the year. As pointed out above, accrual would be a right to receive the amount and the respondent-assessee alongwith its co-owners have not under the agreement dated 25th January, 2006 obtained a right to receive

Rs.20 crores or any specified part thereof in the subject assessment year.

10. In the above view there could be no occasion to bring the maximum amount of Rs. 20 crores, which could be received as deferred consideration to tax in the subject assessment year as it had not accrued to the respondent-assessee.

11. We find that both the Commissioner of Income-Tax (Appeals) and the Tribunal have in view of the clear clauses of agreement dated 25th January, 2006 have in the facts of the present case correctly held that the respondent-assessee and the co-owners of the shares did not have a right to receive Rs.20 crores in the subject assessment year.

12. In the above view, in the present facts the question of law as framed does not give rise to any substantial question of law. Accordingly, appeal is dismissed. No order as to costs.

(A.K. MENON,J.) **(M. S. SANKLECHA,J.)**