REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.4380 OF 2018
(Arising out of Special Leave Petition (C) No. 24888 OF 2015)

Addl. Commissioner of Income Tax .... Appellant(s)

Versus

Bharat V. Patel .... Respondent(s)

WITH

CIVIL APPEAL No. 4381 OF 2018
(Arising out of Special Leave Petition (C) No. 25001 OF 2015

J U D G M E N T

R.K.Agrawal, J

1) Leave granted.

2) These appeals have been preferred against the impugned judgment and order dated 23.12.2014 passed by the High Court of Gujarat at Ahmedabad in Tax Appeal Nos. 6 and 14 of 2004 whereby the Division Bench of the High Court dismissed the appeals filed by the Revenue while upholding the decision

of the Income Tax Appellant Tribunal (for brevity 'the Tribunal') dated 27.06.2003.

3) **Brief facts:-**

(a) On 10.09.1998, the Respondent, who is the Chairman and Managing Director of Procter and Gamble (P&G), India, filed his income tax return for the Assessment Year 1998-99 and declaring the total income at Rs 40,13,820/-.

(b) The Assessing Officer, vide order dated 12.02.2001, concluded the assessment proceeding under Section 143(3) of the Income Tax Act, 1961 (in short 'the IT Act') and determined the total income of the Respondent at Rs 7,23,11,013/- against the declared income.

(c) Being aggrieved, the Respondent preferred an appeal before the Commissioner of Income Tax (Appeals) being No. CAB/I-643/2000-2001. After considering the case, learned CIT (Appeals), vide order dated 28.03.2002, dismissed the appeal of the Respondent after comprehensively discussing the taxability of the alleged amount and upholding the Assessment Order passed by the Assessing Officer.

(d) Being dissatisfied, the Respondent carried the matter before the Tribunal. The Tribunal, vide order dated 27.06.2003, in ITA No. 2241/Ahd/2002 partly allowed the appeal filed by the Respondent.

(e) At this juncture, the Respondent as well as the Revenue both preferred cross appeals before the High Court of Gujarat at Ahmedabad.

(f) At the same time, consequent to the decision of the Tribunal dated 27.06.2003, the Assessing Officer started the proceeding side by side to give effect to the order dated 27.06.2003. Vide order dated 15.09.2003, the Assessing Officer held that the difference being sum of Rs 6,80,40,649/- paid to the Respondent by P&G, USA shall be treated as capital gains on transfer/redemption of shares, and hence, the Respondent is liable to pay tax on capital gains. Being aggrieved with the order dated 15.09.2003, the Respondent filed an appeal before the CIT (Appeals) being No. CAB/V-37/04-05 which was upheld by learned CIT (Appeals) in favour

of Assessing Officer while dismissing the appeal of the Respondent.

(g) Being dissatisfied, the Respondent further preferred an appeal before the Tribunal. The Tribunal, vide order dated 24.09.2010, dismissed the appeal. The decision of the Tribunal dated 24.09.2010 was not challenged further.

(h) The Division Bench of the High Court, vide judgment and order dated 23.12.2004, allowed the appeal filed by the Respondent while dismissing the appeal of the Revenue.

(i) Hence, the present appeals have been filed by the Revenue before this Court.

4) We have given our thoughtful consideration to the submissions of leaned senior counsel for the parties and perused the factual matrix of the case.

Point(s) for consideration:-

5) Whether in the present facts and circumstances of the case, any interference by this Court is required with the impugned decision of the High Court?

Rival contentions:-

6) At the outset, learned counsel for the Revenue contended that the High Court erred in law while upholding that the amount received on redemption of Stock Appreciation Rights (SARs) is to be treated as capital gains and not perquisite under section 17(2)(iii) of the IT Act. However, the same is not taxable under the category of capital gains since no consideration had passed from the Respondent.

7) In support of his argument, learned counsel placed reliance on ***Sumit Bhattacharya*** vs. ***ACIT Circle 16(1), Mumbai -*** [2008] 112 ITD 1 (MUM.) (SB) and contended that the Respondent, having received an amount on redemption of Stock Appreciation Rights (SARs) as an employee of the company and there was an employer-employee relationship subsisting at the relevant point of time, therefore, the amount received on redemption of Share Appreciation Rights must be treated as taxable income under the head income from "Salaries". Learned counsel finally contended that the impugned decision of the High Court deserves to be set aside.

8) *Per contra*, learned senior counsel appearing for the Respondent submitted that the amount received by the Respondent from redemption of Stock Appreciation Rights (SARs) can be treated only as capital gains and cannot be treated as perquisite under Section 17(2) (iii) of the IT Act or under Section 28 (iv) of the IT Act. However, it was pointed out that the said capital gains cannot be said to arose to the Respondent since there was no consideration paid as the cost of acquisition by the Respondent. It was also submitted that such amount received on account of redemption of Stock Appreciation Rights could have been taxed if at all under the provisions of Clause (iiia) of Section 17(2) of the IT Act. Finally, it was also submitted that the question of law sought to be raised by the Revenue is no more *res integra* as settled by this Court in the case of ***Commissioner of Income Tax*** vs. ***Infosys Technologies Ltd.,*** [2008] 297 ITR 167 (SC). Hence, these appeals deserve to be dismissed at the threshold.

Discussion:-

9) Before examining the case at hand, it is pertinent to have an understanding of the words “Perquisite” and “Capital Gains”. The word “Perquisite” in common parlance may be defined as any perk or benefit attached to an employee or position besides salary or remuneration. Broadly speaking, these are usually non-cash benefits given by an employer to an employee in addition to entitled salary or remuneration. It may be said that these benefits are generally provided by the employers in order to retain the talented employees in the organization. There are various instances of perquisite such as concessional rent accommodation provided by the employer, any sum paid by an employer in respect of an obligation which was actually payable by the employee etc. Section 17(2) of the IT Act was enacted by the legislature to give the broad view of term perquisite. On the other hand, the word ‘Capital Gains’ means a profit from the sale of property or an investment. It may be short term or long term depending upon the facts and circumstances of each case. This gain or profit is charged to tax in the year in which transfer of the capital assets takes

place. In the instant case, the fundamental question which arises for consideration before this Court is with regard to the taxability of the amount received by the Respondent on redemption of Stock Appreciation Rights (SARs.)

10) It is a matter of record that the Respondent was employed as the Chairman-cum-Managing Director of the (P&G) India Ltd. at the relevant time and the said company is the subsidiary of (P&G) USA through Richardson Vicks Inc. USA and that (P&G) USA owned controlling equity. It is an undisputed fact that the Respondent was working as a salaried employee. The (P&G) USA was the company who had issued the Stock Appreciation Rights (SARs.) to the Respondent without any consideration from 1991 to 1996. The said SARs were redeemed on 15.10.1997 and in lieu of that the Respondent received an amount of Rs 6,80,40,724/- from (P&G) USA. However, when the Respondent filed his return, he claimed this amount as an exemption from the ambit of Income Tax. The issue involved in this appeal is in respect of

Rs 6,80,40,724/- made on account of amount received on redemption of Stock Appreciation Rights.

11) The Tribunal was of the view that the stock options are capital assets and such assets in the instant case acquired for consideration, hence, gain arising therefrom is liable to capital gain tax. However, the stand of the Revenue before the Tribunal was that the amount in question is taxable as perquisite under Section 17(2)(iii) of the IT Act or in alternatively under Section 28(iv) of the IT Act instead of capital gains. The High Court also upheld the view of the Tribunal but the High Court disagreed that such capital gains arose to the Respondent on redemption of Stock Appreciation Rights since there was no cost of acquisition involved from the side of the Respondent. The meaning of the word perquisite for the instant case is given under Section 17(2) of the IT Act. The Revenue alternatively contended that the case of the Respondent should come under the ambit of Section 28(iv) of the IT Act.

12) It is apposite to note here that, particularly, in order to bring the perquisite transferred by the employer to the employees within the ambit of tax, legislature brought an amendment under Section 17 of the IT Act by inserting Clause (iiia) in Section 17(2) of the IT Act through the Finance Act, 1999 (27 of 1999) with effect from 01.04.2000, which was later on omitted by the Finance Act, 2000. The said Clause (iiia) as it was then is reproduced herein below:

> "(iiia) the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at concessional rate, to an individual who is or has been in employment of that person:
>
> Provided that in a case where allotment or transfer of specified securities is made in pursuance of an option exercised by an individual, the value of the specified securities shall be taxable in the previous year in which such option is exercised by such individual.
>
> Explanation- For the purposes of this clause,-
> (a) "cost' means the amount actually paid for acquiring specified securities and where no money has been paid, the cost shall be taken as nil;
> (b) "specified securities" means the securities as defined in clause(h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes employees' stock option and sweet equity shares;
> (c) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of

intellectual property rights or value additions, by whatever name called; and
(d) “value” means the difference between the fair market value and the cost for acquiring specified securities;”

13) The intention behind the said amendment brought by the legislature was to bring the benefits transferred by the employer to the employees as in the instant case, within the ambit of the Income Tax Act, 1961. It was the first time when the legislature specified the meaning of the cost for acquiring specific securities. Only by this amendment, legislature determined what would constitute the specific securities. By this amendment, legislature clearly covered the direct or indirect transfer of specified securities from the employer to the employees during or after the employment. On a perusal of the said clause, it is evident that the case of the Respondent falls under such clause. However, since the transaction in the instant case pertains to prior to 01.04.2000, hence, such transaction cannot be covered under the said clause in the absence of an express provision of retrospective effect. We also do not find any force in the argument of the Revenue that the

case of the Respondent would fall under the ambit of Section 17(2) (iii) of the IT Act instead of Section 17(2) (iiia) of the IT Act. It is a fundamental principle of law that a receipt under the IT Act must be made taxable before it can be treated as income. Courts cannot construe the law in such a way that brings an individual within the ambit of Income Tax Act to pay tax who otherwise is not liable to pay. In the absence of any such specific provision, if an individual is subjected to pay tax, it would amount to the violation of his Constitutional Right.

14) It is pertinent to note that on the point of applicability of clause (iiia) of Section 17(2) of the IT Act, this Court settled the position in ***Infosys Technologies Ltd (supra),*** and has held as under:-

> "17. Be that as it may, proceeding on the basis that there was "benefit" the question is whether every benefit received by the person is taxable as income? In our view, it is not so. Unless the benefit is made taxable, it cannot be regarded as income. During the relevant assessment years, there was no provision in law which made such benefit taxable as income. Further, as stated, the benefit was prospective. Unless a benefit is in the nature of income or specifically included by the legislature as part of income, the same is not taxable. In this case, the shares could not be obtained by the employees till the lock-in period was over. On facts, we hold that in the

absence of legislative mandate a potential benefit could not be considered as "income" of the employee(s) chargeable under the head "salaries"....."

15) The Revenue also contended before the High Court that the amendment brought in by Section 17(2) of the IT Act was clarificatory, hence, retrospective in nature. However, the High Court rejected the stand of the Revenue. The High Court, in its impugned judgment, on the point of the applicability of clause has held as under:-

"15. In the case of Commissioner of Income-Tax, Bangalore vs B.C. Srinivasa Setty [(1981) 128 ITR 294 (SC)] this Court held that the charging section and computation provision under the 1961 Act constituted an integrated code. The mechanism introduced for the first time under the Finance Act, 1999 by which cost was explained in the manner stated above was not there prior to 1.4.2000. The new mechanism stood introduced w.e.f. 1.4.2000 only. With the above definition of the word cost introduced vide clause (iiia), the value of option became ascertainable. There is nothing in the Memorandum to the Finance Act, 1999 to say that this new mechanism would operate retrospectively. Further, a mechanism which explains cost in the manner indicated above cannot be read retrospectively unless the Legislature expressly says so. It was not capable of being implemented retrospectively. Till 1.4.2000, in the absence of the definition of the word cost value of the option was not ascertainable. In our view, clause (iiia) is not clarificatory. Moreover, the meaning of the words specified securities in section (iiia) was defined or explained for the first time vide Finance Act , 1999 w.e.f. 1.4.2000.Morevover, the words allotted or transferred in clause (iiia) made things clear only after 1.4.2000. Lastly, it may be pointed out that even clause (iiia) has been

subsequently deleted w.e.f. 1.4.2001. For the afore stated reasons, we are of the view the clause (iiia) cannot be read as retrospective."

16) Circular No. 710 dated 24.07.1995 which was issued by the CBDT deals with the taxability of shares issued at less than the market price. For ready reference, Circular No. 710 issued by the CBDT is reproduced hereinbelow:-

"**202. Taxability of the perequisite on shares issued to employees at less than market price:**

1. Chief Commissioners and corporate assessees have been seeking clarification regarding taxability of the perquisite on shares issued to the employees at less than market price.

2. The matter has been considered by the Board. The benefit does amount to a perquisite within the meaning of clause (iii) of sub-section (2) of Section 17 of the Income-Tax Act, 1961. The various situations in this regard have to be dealt with as under:

(i) where the shares held by the Government have been transferred to the employee, there will be no perquisite because the employer-employee relationship does not exist between Government and the employee (transferor and the transferee);

(ii) where the company offers shares to the employees at the same price as have been offered to the other shareholders or the general public, there will be no perquisite;

(iii) where the employer has offered the shares to its employees at a price lower than the one at which the shares have been offered to the other shareholders/public, the difference between the two prices will be taxed as perquisite;

(iv) where the shares have been offered only to the employees, the value of perqusite will be the difference between the market price of the shares on the date of

> acceptance of the offer by the employee and the price at which the shares have been offered."

On a perusal of the above, *prima facie,* it appears that such Circular dealt with the cases where the employer issued shares to the employees at less than the market price. In the instant case, the Respondent was allotted Stock Appreciation Rights (SARs.) by the (P&G) USA which is different from the allotment of shares. Hence, in our opinion such Circular has no applicability on the instant case. Moreover, a Circular cannot be used to introduce a new tax provision in a Statute which was otherwise absent.

17) Alternatively, the Revenue also contended that the case of the Respondent shall come within the ambit of the Section 28(iv) of the IT Act. At this juncture, we deem it appropriate, for the sake of convenience, to refer Section 28(iv) of the IT Act which is reproduced herein below:-

> **"28. Profits and gains of business or profession.**-The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession"-

> (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession."

On a first look of the said provision, it is apparent that such benefit or perquisite shall have arisen from the business activities or profession whereas in the instant case there is nothing as such. The applicability of Section 28(iv) is confined only to the case where there is any business or profession related transaction involved. Hence, the instant case cannot be covered under Section 28(iv) of the IT Act for the purpose of tax liability.

18) To sum up, the Respondent got the Stock Appreciation Rights (SARs) and, eventually received an amount on account of its redemption prior to 01.04.2000 on which the amendment of Finance Act, 1999 (27 of 1999) came into force. In the absence of any express statutory provision regarding the applicability of such amendment from retrospective effect, we do not find any force in the argument of the Revenue that such amendment came into force retrospectively. It is well established rule of interpretation that taxing provisions shall

be construed strictly so that no person who is otherwise not liable to pay tax, be made liable to pay tax.

19) In view of above discussion, we are of the considered view that these instant appeals are devoid of merits and deserve to be dismissed. Accordingly, these are hereby dismissed leaving parties to bear their own cost.

.....J.
(R.K. AGRAWAL)

.....J.
(ABHAY MANOHAR SAPRE)

NEW DELHI;
APRIL 24, 2018.