Cdr.P.J.Mathew vs The Income Tax Officer

ID: F2J-C-2675 **Court:** Kerala High Court
Case: ITA.No. 1548 of 2009() **Date:** 2009-10-21

[Cites 6, Cited by 1]

Kerala High Court Cdr.P.J.Mathew vs The Income Tax Officer on 21 October, 2009 Bench: C.N.Ramachandran Nair, V.K.Mohanan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

ITA.No. 1548 of 2009()

1. CDR.P.J.MATHEW ... Petitioner

Vs

1. THE INCOME TAX OFFICER,WARD-2(3) ... Respondent

For Petitioner :SRI.K.M.FIROZ

For Respondent : No Appearance

The Hon'ble MR. Justice C.N.RAMACHANDRAN NAIR The Hon'ble MR. Justice V.K.MOHANAN

Dated :21/10/2009

O R D E R (CR) C.N. RAMACHANDRAN NAIR & V.K.MOHANAN, JJ. -- I.T.A. No.1548 OF 2009 -- Dated, the 21st day of October, 2009

JUDGMENT

Ramachandran Nair, J.

The question raised in the appeal filed by the assessee is whether the Income Tax Appellate Tribunal was justified in holding that the sale of membership card of the appellant by the Cochin Stock Exchange attracts liability for capital gains under section 45 of the Income Tax Act (hereinafter referred for short,'The I.T.Act').

2. We have heard Sri K.B.Mohamedkutty, Senior Counsel appearing for the appellant and the Standing Counsel appearing for the respondent.

3. The appellant-assessee was a member of the Cochin Stock Exchange. However, on account of chronic default, the Cochin Stock Exchange declared him a ITA No.1548/09 -: 2 :- defaulter and terminated his membership and sold his stock exchange membership card in auction which fetched sale consideration of Rs.12,75,000/-. Since the membership card was sold in the previous year relevant for the assessment year 1994-95, the assessing officer brought to tax long term capital gain arising to the appellant on the sale of the Stock Exchange card. Even though the appellant's challenge against the assessment was successful before first appellate authority who allowed the appeal, on second appeal by the Department, the Income Tax Appellate Tribunal allowed the appeal and restored the assessment. It is against this order of the Tribunal, the appellant-assessee has filed this appeal under section 260A of the Act.

4. The short question that arises for consideration is whether the Stock Exchange card of the appellant-assessee sold by the Stock Exchange in the circumstances stated above can be treated as "capital asset" falling under section 2(14) of the Act attracting tax on the profit arising ITA No.1548/09 -: 3 :- out of the sale of the same under section 45 of the IT Act.

"Capital asset", as defined under section 2(14) of the IT Act, means property of any kind held by an assessee, whether or not connected with his business or profession. Though the definition clause provides for exclusions of certain items of property, admittedly, membership card of stock Exchange is not an item excluded under the said clause. However, it is pertinent to note that Section 47 (xiiia) of the IT Act provides for exclusion of capital gains on the sale of membership right held by a member of a recognized stock exchange in India for the purpose stated therein, that is, for acquisition of shares and trading or clearing rights acquired by such member in that recognized stock exchange in accordance with a scheme for demutualisation or corporatisation which is approved by the Securities and Exchange Board of India. A membership card which confers right on the member to trade in stock and shares in the exchange, is certainly a property. So much so, it falls within the definition of ITA No.1548/09 -: 4 :- 'capital asset' under section 2(14) of the I.T. Act.

Further, section 47 (xiiia) makes itself very clear that membership right in stock Exchange is a 'capital asset ' and so much so, the transfer of it except in cases covered by the said clause, would attract liability for tax. However, there is a distinction in this case in as much as the appellant has not sold the membership card, but the same is sold by the Stock Exchange after declaring the appellant a defaulter and after taking over the membership card.

5. The Senior Counsel for the appellant contended that the appellant has not got any benefit on the sale of the membership card and the entire sale proceeds was utilised by the Stock Exchange in their discretion to set off liabilities due to it and to other members and to creditors to whom the appellant had liabilities.

6. We have examined the rules of the Stock Exchange which govern the terms for forfeiture and sale of stock exchange memberships of defaulted members. ITA No.1548/09 -: 5 :- Under clause 47, as and when a member is declared a defaulter, his membership shall lapse and vest in the Exchange. Clause 47A(b) provides for auction sale of the membership after 90 days of declaring a member as defaulter. Clause 47A(e) provides for appropriation of sale proceeds of the membership of the defaulting member. According to this provision, sale proceeds has to be appropriated first towards liability due to the Stock Exchange and then to members of the Exchange and then to settle all such debts and obligations due to Exchange and Department/Clearing House. Finally, it is made very clear in the said clause that if any balance is left after making payments as stated therein, the same shall be paid to the defaulting member or to his nominee or his legal heirs, if the member is dead. In other words, the appellant happens to be the

beneficiary of the sale of his membership by Stock Exchange because the sale proceeds are adjusted to discharge his debts and the balance if any is also payable to him. Since the Stock ITA No.1548/09 -: 6 :- Exchange membership card which is sold in auction is property covered by the description "capital asset" under section 2(14) of the I.T Act, it's sale by stock Exchange amount to "transfer" within the meaning of Section 2(47) of the I.T.Act. Therefore, in our view, the Tribunal is right in upholding the assessment for capital gains.

7. Even though the senior counsel referred to a judgment of the Supreme Court in Vinay Bubna v. Stock Exchange Mumbai and Others (155 CTR 519) and contended that Stock Exchange member card is not personal property of the member, we are unable to accept the argument because the case decided is not as to whether the membership card is a capital asset or not. Further, Stock Exchange rules vary from Exchange to exchange and, so far as the Cochin stock Exchange is concerned, we found that rules provide for sale in auction of the membership of a defaulter by the Stock Exchange and adjustment of sale proceeds towards his debt and his entitlement for payment of the balance if ITA No.1548/09 -: 7 :- any to him. So much so, the decision has no application in this case. In the circumstances of the case, there is no merit in the appeal and the same is dismissed accordingly. However, considering the plight of the appellant stated by the Senior Counsel appearing for him, we direct the Department to show leniency in waiver of interest for him to settle liability.

C.N.RAMACHANDRAN NAIR JUDGE V.K.MOHANAN, JUDGE kvm/- ITA No.1548/09 -: 8 :- V.K.MOHANAN, J.

O.P.No. JUDGMENT Dated:..