

Income Tax Appellate Tribunal - Mumbai

Bomi S. Billimoria, vs Department Of Income Tax on 30 June, 2009

IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "F", MUMBAI  
BEFORE SHRI D. MANMOHAN (VICE-PRESIDENT)  
&  
SHRI J. SUDHAKAR REDDY (ACCOUNTANT MEMBER)  
M.A.No.27/Mum/2010  
(Arising out of ITA No.2120/Mum/98)  
(A.Y. 1993-94)

Mr. Bomi S. Billimoria,  
11, Jupiter, Anstey Road,  
Off Akltamount Road,  
Mumbai-400 026.  
PAN:

Asst. Commr. of Incomesa-tax-  
23(1), Charni Road,  
Mumbai-400 026,

Vs.

Applicant

Respondent

Applicant by  
Respondent by

Shri Prakash Jotwani.  
Shri Mohd. Usman.

O R D E R

PER D. MANMONAN, VICE-PRESIDENT:

By this application, the Revenue submits that certain observation of the Tribunal, in its order dated 30-06-2009, suffers from a mistake apparent from record in terms of sec. 254(2) of the Act. The case of the Revenue, as could be noticed from the misc. application, is as follows :

"It may be seen that the assessee, Sh. Bomi S. Billimoria was as employee of M/s. Johnson and Johnson, Bombay, a subsidiary of M/s. Johnson and Johnson of USA. He was granted option of 2500 shares of US Co. @ \$57.88 but due to restructuring no. of shares allotted increased to 5000 and price of share halved to \$28.94 per share. Assessee did not pay any amount to purchase these share, owing to the RBI restrictions to remit the purchase amount. However, the fact remains after the sale of 1000 shares in A.Y. 1993-94 assessee did not receive the net amount from broker i.e. net of purchase amount. It is correct to say that assessee did not pay the purchase cost but it is not the case that it was not deducted from the sale value. Merely because the cost of share was deducted from the sale amount does not mean that purchase cost was never paid. No where assessee has contended that it was not deducted by the broker and hence Hon'ble ITAT has erred in appreciating the case in the light of the facts observed by A.O. in his A.O. and confirmed by the Ld. CIT(A) in his appellate order. The decision of B.C.Srinivas Shetty is applicable if the cost is nill or cost is not 2 MA 27/M/10 Bomi S. Billimoria ascertainable, but the ratio-decidenti of the case of B.C. Srinivas Shetty is not applicable to the facts of this case, as assessee did not receive the full sale value of shares but he actually received amount of sales less cost of shares from broker."

2. The ld. D.R. submitted that the factum of deduction of cost of shares from the sale amount implied that there was cost of purchase of those shares, in which event the Appellate Tribunal was not justified in applying the ratio of the decision of the Apex Court in the case of B.C. Srinivas Shetty (128 ITR 294) to hold that the cost of acquisition is nil/unascertainable and hence the ultimate sale consideration is not assessable to tax under "capital gains".

3. On the other hand, the ld. counsel appearing on behalf of the assessee submitted that the Bench had taken a conscious decision, after analyzing the facts of the case, and came to the conclusion that there was no cost of acquisition and thus acceptance of the plea of the Revenue at this stage would amount to review of the matter, which is not permissible under law. It was further submitted that the Bench had also decided the issue by accepting the alternative contention of the assessee by observing that even if any amount is assessable to tax, it would be the difference between the market value on the date of purchase and the market value on the date of sale, whereas in the instant case, the difference being nil, nothing is assessable to tax under the head "short-term capital gains". The Revenue has not challenged the order passed by the Bench on the alternative contention and hence the decision on the first issue is merely of academic importance since it has no tax effect. He has also adverted our attention to page 4 of the paper book to submit that ESOP was offered as per the strict RBI norms, whereby no payment at any point of time, either in India or abroad, need be made by the employees for acquiring the shares. The Bench 3 MA 27/M/10 Bomi S. Billimoria having taken note of the detailed facts, there is no mistake apparent from the record in the order passed by the Tribunal.

4. We have carefully considered the rival submissions and perused the record. In our considered opinion, the order passed by the Tribunal does not suffer from any mistake apparent from record inasmuch as the Tribunal had taken note of the scheme of ESOP and letter of RBI in coming to the conclusion that there was no cost of acquisition and, thus, reconsideration of the same issue would amount to review of the matter, which is not permitted in exercise of the powers u/s.254(2) of the Act. Even otherwise, as rightly pointed out by the ld. counsel, in view of our decision on the alternative contention, against which the Revenue having not challenged either by filing an appeal before a higher forum, or by way of a misc. application, any decision on the limited issue of cost of acquisition would be of academic importance. Thus, even on this ground, the misc. application deserves to be rejected.

5. In the result, the misc. application filed by the Revenue is dismissed.

Order pronounced on the 14th day of May, 2010.

Sd/-  
(J. SUDHAKAR REDDY)  
ACCOUNTANT MEMBER

Sd/-  
(D. MANMOHAN)  
VICE - PRESIDENT

Mumbai: 14th May, 2010.

NG:

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MA 27/M/10  
Bomi S.Billimoria

Copy to :

1. Assessee.
2. Department.
- 3 CIT(A)-XXXV,,Mumbai.
- 4 CIT-MC-XI,Mumbai.
- 5.DR,"F" Bench,Mumbai.
- 6.Master file.  
(TRUE COPY)

BY ORDER,

Asst.Registrar, ITAT, Mumbai.  
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MA 27/M/10  
Bomi S.Billimoria

	Details	Date	Initials	Designation
1	Draft dictated on	7-5-2-10		Sr.PS/
2	Draft Placed before author	7-5-2010		Sr.PS/
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/
6.	Kept for pronouncement on			Sr.PS/
7.	File sent to the Bench Clerk			Sr.PS/
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			