

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "C",
MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI RAJENDRA SINGH(A.M)

ITA NO.6476/MUM/2009(A.Y. 2006-07)

Mr. Purvez A. Poonawalla,
Kamala Niwas, 1st Floor,
Proctor Road, Grant Road,
Mumbai – 400 007
PAN:AACPP 0586C
(Appellant)

The ITO 16(1)(2),
Mumbai.

Vs.

(Respondent)

Appellant by : S/Shri S.E.Dastur/Madhur Agarwal
Respondent by : Shri Narendra Singh

ORDER

PER N.V.VASUDEVAN, J.M,

This is an appeal by the assessee against the order dated 20/10/2009 of CIT(A)-27, Mumbai relating to assessment year 2006-07. The grounds of appeal raised by the assessee read as follows:

“1.On the facts and in the circumstances of the case and in law the CIT(Appeals) 27/16(1)/2 erred in confirming the addition of Rs. 3,73,95,334/- as an amount chargeable under section 56(2)(v) of the Income Tax Act.

2. The CIT(Appeals) 27/16(1)/2 failed to appreciate that the withdrawal by the appellant of his caveat thereby enabling Mr. Rajesh Karsandas Bhavsar(hereinafter referred to as the “said Bhavsar”) to apply for and obtain Letters of Administration to the estate of the deceased Mr. Mani Cawas Bamji and also to apply for and obtain probate of the will of the deceased Mr.Dinshaw Jamshedji Mistry was the consideration which made the said Bhavsar pay the said amount of Rs. 4,78,80,000 to the Appellant and in any event was to be regarded as received by way of inheritance.

3. The CIT(Appeals) 27/16(1)/2 erred in holding that the Appellant” willingly offered to surrender the amount for taxation and also submitted as cheque of Rs.1,60,46,844/- dated 28/11/07 drawn HSBC Bank, Mumbai.”

4. The CIT(Appeals) 27/16(1)/2 failed to appreciate that the amount of Rs. 1,60,46,840/- was collected by Mr. Karun Kant Ojha, Deputy Director of Income Tax (Investigation), Unit-II(2) Room 437, Scindia House, N.M. Road, Ballard Pier, Mumbai – 400 038 and was recovered from the Appellant under duress, without any formal notice to the Appellant, without any jurisdiction over the Appellant, outside of and in breach of the Income Tax Act and the Law.

5. The CIT(Appeals) 27/16(1)/2 erred in directing the assessing officer to consider the addition of Rs. 1.047 crores for the assessment year 2004-05.

6. The CIT(Appeals) 27/16(1)/2 erred in holding that the appellant is not the legal heir of the testatrix Mrs. Mani Cawas Bamji.”

2. The assessee is an individual. The facts and circumstances under which the present appeal of the assessee arises for consideration are as follows. One Mrs. Mani Cawas Bamji was a childless widow and she died in Bombay on 6/01/2001. She possessed considerable movable properties in the form of shares, debentures and fix deposits and also immovable property known as Avasia House in her sole name at Nepean Sea Road, Mumbai. During her life time she had allegedly executed a will dated 2/5/1997. She left behind as legal heirs entitled to succeed her properties, the assessee being son of a pre-deceased sister and a brother one Mr. Dinshaw Jamshedji Mistry. Under the will dated 2/5/1997 she had bequeathed all her properties to her brother Mr. Dinshaw Jamshedji Mistry, who was also appointed as one of the executors in the will. There were three executors named in the aforesaid will. It appears two of the other executors renounced their executorship. Mr. D.J Mistry, the brother of the deceased, filed a petition before the Hon’ble Bombay High Court for grant of probate of the last will testamentary of Mrs. Mani Cawas Bamji. The same was

numbered as petition 387 of 2001. As already stated the assessee was admittedly a person entitled to succeed to the property of the deceased Mrs. Mani Cawas Bamji by virtue of section 55 r.w. Part II, Schedule II of the Indian Succession Act, 1925. The assessee, therefore, received a citation from Hon'ble Bombay High Court in the petition for grant of probate filed by Mr. Dinshaw Jamshedji Mistry. The assessee filed a caveat against the grant of probate in respect of the last will and testamentary of Mrs. Mani Cawas Bamji. In the affidavit filed in support of the caveat the assessee set out the various reasons as to why alleged will dated 2/5/1997 is not valid. On such objection being filed Petition No.387 of 2001 was converted into a testamentary suit being TIL suit No.27 of 2001.

3. The assessee also filed a notice of motion for restraining Mr. Dinshaw Jamshedji Mistry by an order of injunction from transferring, disposing, alienating etc. of the shares, operating bank lockers and dealing with properties of the deceased Mrs. Mani Cawas Bamji. The Hon'ble High Court by order dated 21/2/2000 restrained Mr.Dinshaw Jamshedji Mistry from dealing with properties of the deceased.

4. On 28/9/2002 Mr. Dinshaw Jamsheji Mistry died. During his life time he had executed his last will and testament dated 29/10/2001 appointing Mr. Rajesh K. Bhavsar as the sole executor and legatee. Mr.Rajesh K.Bhavsar got himself impeded as plaintiff in PIL Suit No.27 of 2001 before Hon'ble Bombay High Court for granting of probate of the last will testament of Mrs. Mani Cawas Bamji in place of Dinshaw Jamsheji Mistry.

5. Mr. Rajesh K. Bhavsar and the assessee entered into a compromise whereby the assessee agreed to receive a sum of Rs. 5,08,80,000/- in consideration for agreeing to the Court granting probate in respect of the last will of Mrs. Mani Cawas Bamji dated 2/5/1997. This agreement by which

they agreed to comprise their disputes was dated 22/11/2002. There is no dispute that this sum of Rs. 5,08,80,000/- later reduced by Rs.30,00,000/- and ultimately the assessee received a sum of Rs. 4,78,80,000/- in the following manner.

For Fin. Year 2003-04 (Asst. Year 2004-05)

Date of payment	Amount	Mode of payment	Drawn on bank
03/04/2003	17,47,000.00	Cheque	HSBC 484087
10/4/2003	12,61,585.25	Cheque	HSBC 484087
24/04/2003	4,19,777.60	Cheque	HSBC 484087
28/04/2003	13,21,486.38	Cheque	HSBC 484087
28/04/2003	1,33,411.54	Cheque	HSBC 484087
12/05/2003	16,80,739.50	Cheque	HSBC 484087
19/05/2003	6,60,489.85	Cheque	HSBC 484087
19/05/2003	6,99,935.19	Cheque	HSBC 484087
28/05/2003	3,96,293.87	Cheque	HSBC 484087
28/5/2003	10,39,884.50	Cheque	HSBC 484087
17/07/2003	6,28,066.10	Cheque	HSBC 484087
17/07/2003	63,317.75	Cheque	HSBC 484087
14/10/2003	4,25,044.75	Cheque	HSBC 484087
Total (A)	1,04,77,032.28		

For Fin.Year 2005-06(A.Y. 2006-07)

Date of payment	Amount	Mode of payment	Drawn on bank
6/4/2005	1,39,033.15	Cheque	HSBC 484087
19/10/2005	3,72,56,301.00	Cheque	HSBC 484087
Total (B)	3,73,95,334.15		

For Fin Year 2006-07 (A.Y. 2007-08)

Date of payment	Amount	Mode of payment	Drawn on bank
10/8/2006	7,633.57	Cash	HSBC 484087
Total (C)	7,633.57		

Total A + B + C = 4,78,80,000.00

6. On entering into the agreement dated 22/11/2002, the parties also signed a consent terms before the Hon'ble High Court, which consent terms were identical to the agreement dated 22/11/2002. This consent terms was dated 12/12/2002. It was filed in Court and recorded as a compromise

between the parties. In notice of motion No.2432 of 2001 by order dated 12/12/2002, the Hon'ble Court recorded the consent terms and modified its earlier order restraining D.J.Mistry from alienating any part of the estate of the deceased Mrs. Mani Cawas Bamji, permitting Mr.R.K.Bhavsar to alienate some of the properties to enable him to raise funds to discharge the obligation to pay monies to the Assessee. In this order the Hon'ble Court has recorded that the compromise and has held that the consent terms are lawful. The Assessee on receipt of agreed sum, has to withdraw his caveat to enable issue of Letters of Administration with the Will annexed in respect of the estate of the deceased Mrs.Mani Cawas Bamji.

7. We have already seen that one of the property belonging to Mrs.Mani Cawas Bamji was the property known as "Avasia House" at Nepean Sea Road, Mumbai. Mr.R.K.Bhavsar had entered into a agreement for sale of this property to an entity belonging to "Orbit Group". In a search at the premises conducted by the Revenue u/s.132 of the Act, it was noticed that "Avasia House" was agreed to be sold to Orbit Group. It also transpired that Mr.R.K.Bhavsar had paid a sum of Rs.4,78,80,000/- to the Assessee, the details of which have already been set out in the earlier part of this order. In a statement recorded during the search of Mr.RK Bhavsar, he narrated the sequence of events as described in the earlier paragraphs. The Deputy Director of Income Tax (Investigation) Mumbai in purported exercise of his powers u/s.131 of the Act, issued summons to the Assessee and recorded his statement on 24/11/2007. The Assessee also narrated the sequence of events as set out above. The Assessee also agreed to offer the sum so received to tax and also paid tax payable on such receipts.

8. In the return of income filed on 27/09/2007 for AY 06-07, the Assessee did not offer the aforesaid receipts to tax. In the order of assessment there is a reference to the opinion of Mr.Soli Dastur, Senior Advocate, given regarding non-taxability of the receipts in question. In this

opinion there is a reference to a query by the AO regarding taxability of the receipts in question u/s.56(2)(v) of the Act. The opinion is to the effect that u/s.56(2)(v) any receipt to be treated as income should be receipt of monies without any consideration but in the case of the Assessee the receipts in question are in consideration for the Assessee withdrawing his caveat and giving up his right to challenge the legality and validity of the will of late Mrs.Mani Cawas Bamji. It has further been opined that the case of the Assessee would, in any event, be covered by the exceptions provided u/s.56(2)(v) being a receipt by way of inheritance.

9. The AO however referred to the will of Mrs.Mani Cawas Bamji as well as that of DJ Mistry wherein they had disinherited the Assessee and was of the view that the Assessee was only a close relative and not a legal heir. He also held that the consent terms were arrived at between the parties out of Court. He further held that the receipt in question was a casual receipt and not a receipt by way of inheritance.

10. The AO taxed on substantive basis the sum of Rs.3,73,95,334 in the year of receipt and the sum of Rs.1,04,77,032 (received in previous year relevant to AY 04-05) on a protective basis.

11. On appeal by the Assessee, the CIT(A) confirmed the order of the AO, holding as follows:

“6. The learned counsel of the appellant has argued that the appellant should be treated as a legal heir because only because of his being a close relative of the testatrix could he file a caveat in the court for contesting the will and the money has come as a part of the judicial settlement, hence, should be treated as an inheritance and should not be taxed u/s. 56(2)(v). This contention of the appellant’s counsel is not acceptable as the appellant had not filed a case in the court, but only a caveat against the probate of the will. Hence, he could not be said that he had contested the will and received the sum as an inheritance. He had only received the sum of money for withdrawing his caveat from the court and not creating a nuisance for Mr. Rajesh

K. Bhavasar and delaying his getting his will Mr. Rajesh K. Bhavasar as per his statement had paid the appellant the money so that he should not create hurdles for him and delay in getting the inheritance. The provisions of sec. 56(2)(v) are clearly attracted in this case as the money has not been received as a legal inheritance and as stated by the AO he was only a close relative and not a legal heir mentioned in the will and as claimed by the appellant. Hence, the action of the AO in taxing this amount u/s. 56(2)(v) is absolutely correct and is upheld and this ground of appeal of the appellant is dismissed. Their other argument that this money had accrued in the earlier years when the agreement was reached and hence, should not be taxed in this year is also not correct. Since the money was received in this year, it has to be taxed in this year. Even if the agreement was made in the earlier year, it did not become full contract as no payment was made in the earlier year. Only when the payment is received, then the agreement comes into force.”

12. The main issue to be decided in this appeal is as to whether the provisions of Sec.56(2)(v) are attracted. The said provisions read as follows: (As amended by the TL (Amend.) Act, 2006, w.ef. 1-4-2006.)

56. Income from other sources.--(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources" if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes shall be chargeable to income-tax under the head "Income from other sources", namely:--

(v) where any sum of money exceeding twenty-five thousand rupees is received without consideration by an individual or a Hindu undivided family from any person on or after the 1st day of September, 2004, but before the 1st day of April, 2006, the whole of such sum :

Provided that this clause shall not apply to any sum of money received—

- (a) from any relative ; or
- (b) on the occasion of the marriage of the individual ; or
- (c) under a will or by way of inheritance ; or
- (d) in contemplation of death of the payer ; or
- (e) from any local authority as defined in the Explanation to clause (20) of section 10 ; or
- (f) from any fund or foundation or university or other educational institution or hospital or other medical

institution or any trust or institution referred to in clause (23C) of section 10 ; or
(g) from any trust or institution registered under section 12AA.

Explanation.—For the purposes of this clause, “relative” means—

- (i) spouse of the individual ;
- (ii) brother or sister of the individual ;
- (iii) brother or sister of the spouse of the individual ;
- (iv) brother or sister of either of the parents of the individual ;
- (v) any lineal ascendant or descendant of the individual ;
- (vi) any lineal ascendant or descendant of the spouse of the individual ;
- (vii) spouse of the persons referred to in clauses (ii) to (vi).

13. Thus prior to 1-9-2004, receipts of any sum of money would not be income u/s.56(2)(v) of the Act. The disputed receipts of Rs.3,73,95,334.15 Ps. were received after 1-4-2005 and upto 19/10/2005. A sum of Rs.1,04,77,032.28 Ps. were received between 3/4/2003 to 14/10/2003. Therefore these receipts could not be taxed as income u/s.56(2)(v) of the Act. As far as the sum of Rs.3,73,95,334.15Ps. is concerned, the taxability of the said sum has to be examined in the light of the provisions of Sec.56(2)(v) of the Act. The condition precedent to attract the main provisions of Sec.56(2)(v) of the Act, are that the receipt of any sum of money should be “without any consideration”. The question is was there any consideration for the receipt of money by the Assessee.

14. It was the contention of the Id. Counsel for the assessee that the sum received by the assessee was in consideration of the assessee withdrawing the caveat filed in the proceedings for grant of Probate/Letters of Administration in respect of will of late Mani Cawasa Bamji. In this regard Id. Counsel for the assessee drew our attention to the provisions of section 2(d) of the Indian Contract Act, 1872 which defines consideration as follows:

“(d) When, at the desire of the promisor, the promise or any other person had done or abstained from doing, or does or abstains from

doing or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.”

15. In this regard Id. Counsel for the assessee drew our attention to the affidavit filed by the assessee in support of the caveat filed opposing the grant of Probate in respect of last will of Mrs. Mani Cawasa Bamji in favour of Mr. Dinshaw Jamshedji Mistry. He further drew our attention to the agreement dated 22/11/2002 whereby it was agreed that the assessee will receive a lumpsum consideration of Rs. 5,08,80,000/- and in consideration of the said payment assessee will withdraw his caveat and request the Hon'ble Court to grant the Letters of Administration with will annexed of the deceased of Mrs. Mani Cawasa Bamji in favour of Mr. R.K.Bavasar. Our attention was also drawn to the consent terms dated 12/12/2002 wherein similar terms as contained in the agreement dated 22/11/2002 were incorporated and the same were filed before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court in Notice of Motion No.2432 of 2001 in testamentary Suit No.27 of 2001 has recorded the consent terms. Our attention was also drawn to the decision of the Hon'ble Bombay High Court in the case of I.Chatterjee vs. CGT 185 ITR 610(Bom), wherein in the context of the provisions of section 2(xii) of the Gift Tax Act,1958 the Hon'ble Bombay High Court held that where shares are transferred in consideration of the transferee agreeing to marry transferor without any monetary consideration the same would amount to a gift. It was argued on behalf of the assessee that promise to marry was valid consideration for transfer of shares but the Hon'ble Bombay High Court after referring to the definition of gift under Gift Tax Act 1958 which defines gift as a transfer by one person to another of any existing movable or immovable property made voluntarily and for consideration in money or money's worth, held that promise to marry is not a consideration in money or money's worth. The Id. Counsel for the assessee submitted that in the case of the assessee in this appeal the

promise to withdraw caveat was in consideration of payment of a sum of money and therefore, the receipt in question was not without consideration. Further reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Keshub Mahindra & Others vs. CGT 70 ITR 1. This case related to applicability of provisions of section 4(a) of the Gift Tax Act 1958 which provide that any transfer for inadequate consideration could be treated as a gift to the extent to which the consideration is inadequate i.e. to the extent which the market value of the property on the date of transfer exceeds the value of consideration for the transfer. The Hon'ble Bombay High Court held as follows:

“(ii)As the term “consideration” is not defined in the Gift-tax Act, it must be construed according to the definition of the term in section 2(d) of the Contract Act. Though the assessee must be distinguished from the company of which they were only the shareholders, directors or officers, yet there was nothing in the definition of “consideration” in section 2(d) of the Contract Act to show that when” the promise has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing something”, the benefit of that act or abstinence must “directly” go to the promisor”

.....

(ii) The provisions relating to “consideration” have been modified by the provisions of the Gift tax Act in two respects; first, in the Gift-tax Act an agreement to transfer property “otherwise than for adequate consideration”[see section 4(a)] gives rise to a gift to the extent of the inadequacy, while under the definition in the Contract Act that is not so. Under the Contract Act the adequacy or inadequacy of the consideration is immaterial. Under Explanation 2 of section 25 of the Contract Act, an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; it is still a valid agreement. But under section 4(a) of the Gift-tax Act, such an agreement or transfer would be partially bad, to the extent of the inadequacy. It would be a gift only to the extent to which the market value of the property at the date of the transfer exceeds the value of the consideration for the transfer. Secondly, the Gift-tax Act has modified the definition in the Contract Act by the use of the words “consideration in money or money’s worth” in the definition of “gift”. Under the Contract Act consideration must be something which the law can deem of some value but it need not necessarily be ‘money or money’s worth.’”

16. According to the ld. Counsel for the assessee in the present case the assessee abstained from contesting the proceedings for grant of Letters of Administration in respect of the will of late Mani Cawasa Bamji. Even that act of abstinence would constitute valid consideration. In this regard ld. Counsel for the assessee submitted that the assessee withdrew his caveat in the testamentary suit on 25/11/2005. It was further submitted that in the present case the assessee received the consideration in money or monies worth and, therefore, it cannot be said that the receipt in question was without any consideration. It was thus submitted by the ld. Counsel for the assessee that the main provisions of section 56(2)(v) of the Act could not be applicable. Apart from this the ld. Counsel for the assessee addressed arguments on the applicability of the exceptions provided under section 56(2)(v) of the Act.

17. The ld. D.R on the other hand, submitted that the assessee claims that he was entitled to half share in the estate of late Mrs. Mani Cawasa Bamji but he received something less than what could be value of the half share in the said estate. According to him this shows that the assessee was not validly entitled to inherit the estate of late Mrs. Mani Cawasa Bamji. Accordingly to him the caveat filed by the assessee had no sanctity. It was also submitted the settlements arrived at between the assessee and Mr. R.K.Bavasa was out of Court settlement and, therefore, those terms could not be accepted as genuine.

18. We have considered the rival submissions. In our view the contentions put forth on behalf of the assessee have to be accepted. Admittedly the assessee was the legal heir of the deceased late Mrs. Mani Cawasa Bamji being the son of a pre-deceased sister of the deceased. He together with Mr. Dinshaw Jamshedji Mistry , brother of the deceased were alone entitled to

the estate of late Mrs. Mani Cawasa Bamji in the event of intestacy of late Mrs. Mani Cawasa Bamji. It was because of the fact that the assessee was entitled a half share in the asset of late Mrs. Mani Cawasa Bamji that a citation was issued to the assessee by Hon'ble Bombay High Court before granting the Probate in respect of the last will of late Mrs. Mani Cawasa Bamji to Mr. Dinshaw Jameshedji Mistry. The assessee promptly filed the caveat opposing the grant of Probate in favour of Mr. Dinshaw Jamshedji Mistry and consequently the proceedings became a testamentary suit. In such proceedings it was the duty of Mr. Dinshaw Jamshedji Mistry to establish that the will of late Mrs. Mani Cawasa Bamji was the last will and that was executed in accordance with law and that the testatrix executed the will in a sound and disposing state of mind. The assessee also obtained an order of injunction restraining Mr. Dinshaw Jamshedji Mistry from dealing with estate of the deceased in any manner. After the death of Mr. Dinshaw Jamshedji Mistry Mr. R.K.Bavasa became the party to the testamentary suit in respect of Mr. Dinshaw Jamshedji Mistry and settled the issue with the assessee by a sum of Rs.5,08,80,000/-. It was thereafter that the Court accepted the terms of settlement and allowed Mr. R.K.Bavasa to deal with some of the properties of the estate of the deceased. Later on the assessee also withdrew his caveat on 25/11/2005. It is thus clear that the sum in question was received by the assessee in consideration of giving up his rights to contest the will of late Mrs. Mani Cawasa Bamji. As rightly contended on behalf of the assessee the consideration referred to in the provisions of section 56(2)(v) of the Act have to be understood as per the definition of consideration as given in the Indian Contract Act, 1872 in section 2(d). The assessee has abstained from contesting the will and this constitute the consideration for payment by Mr. R.K.Bavasa to the assessee. Thus the amount received by the assessee is not without any consideration. Therefore, the provisions of section 56(2)(v) of the Act were not applicable. In that view of the matter we hold that the receipts by the assessee from Mr. R.K.Bavasa cannot be treated as income under section 56(2)(v) of the Act.

The additions made by the AO are directed to be deleted. In view of the decision on the main provision we have not dealt with the other arguments regarding applicability of the exceptions set out in section 56(2)(v) of the Act.

19. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on the 9th day of March,
2011.

Sd/-

Sd/-

(RAJENDRA SINGH)
ACCOUNTANT MEMBER

(N.V.VASUDEVAN)
JUDICIAL MEMBER

Mumbai, Dated. 9th Mar.2011

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R”E” Bench.

(True copy)

By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.

	Details	Date	Initials	Designation
1	Draft dictated on	1/3/2011		Sr.PS/PS
2	Draft Placed before author	2/3/2011		Sr.PS/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/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			