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

INCOME TAX APPEAL NO. 541 OF 2003

WITH

INCOME TAX APPEAL NO. 535 OF 2003

WITH

INCOME TAX APPEAL NO. 540 OF 2003

M/s. Poonawalla Estate Stud &
Agricultural Farm ***...Appellant***

: Versus :

Commissioner of Income Tax ***....Respondent***

Alongwith

INCOME TAX APPEAL NO. 175 OF 2005

M/s. Poonawalla Estate Stud &
Agricultural Farm ***...Appellant***

: Versus :

Dy. Commissioner of Income Tax,

Special Region-4 ***....Respondent***

Mr. P.J. Pardiwalla, Senior Advocate *with Mr. B .V. Jhaveri and Ms. Bhargavi Raval, for Assessee-Appellant.*

Mr. Akhileshwar Sharma, *for the Revenue-Respondent.*

CORAM : ALOK ARADHE, CJ. &

SANDEEP V. MARNE, J.

Judgment Reserved On : 3 July 2025.

Judgment Pronounced On : 9 July 2025.

JUDGMENT (PER: SANDEEP V. MARNE, J.)

1) These four Appeals are filed raising a common issue as to whether the receipt towards insurance claim in respect of dead horses can be treated as 'profits' for the purpose of taxation under Section 41(1) of the Income Tax Act, 1961 **(the Act)** ? The horses, being treated as capital assets by the Revenue, whether the amount of insurance claim received towards loss of such capital assets, which would ideally be taxable only under Section 45 of the Act as capital gain, can be taxed by treating the claim amount as 'profits' under Section 41(1) of the Act? After noticing that the income is not taxable under one head, whether it is permissible to shift the same to another head, for bringing the same to taxation?

2) The Assessee has challenged Orders passed by the Income Tax Appellate Tribunal (**ITAT**), which has dismissed the appeals preferred by it by upholding the orders passed by the Commissioner of Income Tax (Appeals) and the Assessing Officer. The Appeals arise out of the assessments made in respect of the following Assessment Years :-

Income Tax Appeal No.	Assessment Year
541 of 2003	1988-1989
535 of 2003	1990-1991
540 of 2003	1991-1992
175 of 2005	1995-1996

3) The Appeals have been admitted by formulating the following solitary question of law in each of them :-

ITXA 541/2003

Whether on the facts and in the circumstances of the case as well as in law, the Tribunal was right in holding that the receipt of claim of Rs.7,00,000/- from the Insurance Company by the appellant firm on death of the mares was chargeable to tax under Section 41(1) of the Act ?

ITXA 540/2003

Whether on the facts and in the circumstances of the case as well as in law, the Tribunal was right in holding that the receipt of claim of Rs.4,00,000/- from the Insurance Company by the appellant firm on death of the mare was chargeable to tax under Section 41(1) of the Act?

ITXA 175/2005

Whether on the facts and in the circumstances of the case as well as in law, the Tribunal was right in holding that the receipt of claim of Rs. 19 lac from the insurance company by the appellant firm on death of the mares was chargeable to tax under Section 41(1) of the Act?

ITXA 535/2005

Whether on the facts and in the circumstances of the case as well as in law, the Tribunal was right in holding that the receipt of claim of Rs. 75,000/- from the Insurance Company by the appellant firm on death of the mares was chargeable to tax under Section 41(1) of the Act?

4) Thus same question of law has been framed in each of the four Appeals, which needs to be answered by deciding the issues broadly set out in the opening paragraph of the judgment. Since common question of law of permissibility to tax the insurance claim received against dead horses as 'profits' under Section 41(1) of the Act arise for consideration in all four Appeals, for ease of reference, facts of Income Tax Appeal No.541 of 2003 are discussed as under :-

The Assessee was carrying on the business of breeding, rearing and selling racehorses since the year 1967. At its Stud Farm, there were several mares and stallions. When a male horse or female horse was born, it was being treated as a stock in trade till it attained the age of 2 years. The value of such horses was determined by the Assessee on the basis of expenditure incurred on feeding, medical treatment, training etc. After the horse crossed the age of 2 years, it was either sold or was given on lease for horse racing or transferred to the Plant for being used for breeding activities. The horses have racing life of about 3 to 5 years whereafter they are mainly used for breeding and therefore such horses are treated as Plant and Machinery and accordingly in the Books of Accounts, the costs of such horses were added to the total of cost of livestock plant. Therefore, all expenses incurred on a horse till attaining the age of 2 years formed part of costs of such horse. After the horse was transferred to the Plant, the expenses incurred on feeding, medical treatment etc. was being claimed as a revenue expenditure. Though the horses were treated as plant by the Assessee, the depreciation is stated to be not allowed in view of provisions of Section 43(3) of the Income Tax Act, 1961. Therefore, the revenue income generated upon sale, lease of a horse, the same was offered for taxation. During the year ending 31 October 1987, relevant to Assessment Year 1988-89, two mares namely, 'Certainty' and 'Gracian Flower' died, the costs of which in the Books of Accounts of the Assessee was Rs.40,000/- and Rs.30,000/- respectively. Both the horses were insured with M/s. New India Assurance Co. Ltd. at Rs.6,00,000/- and Rs.1,00,000/- respectively on the basis of the market value of the said two mares. Accordingly, the Insurance Company sanctioned the insurance claim and paid Rs.6,00,000/- and Rs.1,00,000/- respectively to the Assessee. However, the Assessing Officer on its own, allowed Rs.40,000/- and Rs.30,000/- being debited to the Profit & Loss Account under Section 36(1)(vi) of the Act which provides for deduction. In the same year, the Assessee had debited to its Profit & Loss Account, an amount of Rs.3,60,902/- being the loss on disposal of assets (Mares and Stallions).

5) In the Assessment Order, the Assessing Officer held that the Assessee ought not to have added such loss on the death of mares while computing the total income chargeable to tax as loss on death of an animal is an allowable deduction under Section 36(1)(vi) of the Act. Accordingly, the said loss of Rs.3,60,902/- was allowed under Section 36(1)(vi) while computing the total income which included Rs.40,000/- being the costs of Mare-Certainty for which the Assessee had received insurance claim of Rs.6,00,000/-. The cost of Mare-Gracian Flower of Rs.30,000/- was not allowed in Assessment Year 1988-89 as the same had remained to be debited to the Profit & Loss Account. The details of amount of Rs. 3,60,902/- are as under :-

Name of the horse	Cost
Mare ‘Argentina’	Rs. 50,000/-
Mare ‘Certainty’	Rs. 40,000/-
Mare ‘Tribute’	Rs. 1,00,000/-
Stallion ‘Gombos’	Rs. 1,60,902/-
Mare ‘Shrimati’	Rs. 10,000/-
	Rs. 3,60,902/-

6) The Assessing Officer further held that the insurance claim received by the Assessee from the Insurance Company for death of the Mares-Certainty and Gracian Flower was to be deemed as income of the Assessee under Section 41(1) of the Act. The said findings recorded by the Assessing Officer have been upheld in Appeal by Commissioner of Income Tax (Appeals) **[CIT (A)]** and Income Tax Appellate Tribunal. Aggrieved by the decision of ITAT, the Appellant has filed the present Appeal under Section 260-A of the Act.

7) Mr. Pardiwalla, the learned Senior Advocate appearing for the Assessee has made following submissions :-

(i) Insurance claim paid upon the destruction of property is a capital receipt which is not chargeable to tax.

(ii) The horses with respect to which the claim was received was treated by the Assessee as capital assets and therefore the receipt arising therefrom could only have been considered as capital receipt.

(iii) That only those capital receipts which are chargeable under Section 2(24)(vi) read with Section 45 of the Act are chargeable to tax. In support, reliance is placed on judgments in ***Cadell Wvg. Mill Co. (P.) Ltd. Versus. Commissioner of Income-tax***[1] and ***Commissioner of Income-tax Versus. D. P. Sandhu Bros. Chembur (P.) Ltd.***[2]

(iv) All heads of income under the Act are mutually inclusive and that if an income falls in one head, it cannot be assessed under another head merely because under the former heading, the income is not chargeable to tax. In support reliance is placed on the judgment of Hon'ble Apex Court in ***Nalinikant Ambalal Mody Versus. Commissioner of Income-tax***[3]***.***

(v) Reliance in placed on judgments of this Court in ***Commissioner of Income Tax Versus. Pfizer Ltd.***[4] and ***Somaiya Organo Chemicals Ltd Versus. Commissioner of Income-tax***[5] holding that receipt under insurance claim would be treated in the like manner as if the receipt had arisen on the sale of assets.

(vi) That the Assessing Officer himself has held that insurance receipt is not chargeable to tax under the head 'capital gains'. Therefore, death of a horse cannot amount to 'transfer' under Section 2(47) of the Act. Reliance is placed on judgment of the Apex Court in ***Vania Silk Mills (P.) Ltd. Versus.***

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[1] [2001] 249 ITR 265 (Bombay)
[2] [2005] 273 ITR 1 (SC)
[3] [1996] 61 ITR 428
[4] [2011] 330 ITR 62 (Bomba)
[5] (2016) 388 ITR 423

Commissioner of Income-tax[6] and of Madras High Court in ***Neelamalai Agro Industries Ltd. Versus. Commissioner of Income-tax***[7]**.**

(vii) An insurance contract is one of indemnity, which indemnifies the insured against the loss of asset insured. If what is insured is the capital asset, the loss therefrom can only be capital loss which is sought to be recouped by insurance receipt. Such receipt can therefore only be a capital receipt. Provision for making capital asset chargeable to tax resulting out of damage, destruction thereof was made for the first time by insertion of sub-section (1A) in Section 45 by Finance Act, 1999 w.e.f. 1 April 2000. That the said provision was not available at the relevant time for the Assessment Years and that it was therefore impermissible to treat insurance receipt towards destruction of capital assets chargeable to tax. In any event, Section 45(1A) applies only where the damage/destruction is attributable to only events enumerated therein and does not cover damage/destruction arising out of unspecified event.

(viii) As capital receipt is not chargeable to tax under the head 'capital gains' it cannot be brought to tax under Section 41(1) which falls under the head 'Profit and Gains of business or profession'.

(ix) Without prejudice it is submitted that the case does not satisfy the conditions laid down under Section 41(1) of the Act which

[6] [1991] 191 ITR 647 (SC)
[7] [2003] 259 ITR 651 (Madras)

can only be pressed into service if an allowance is granted in a year and subsequently an amount is received in another year. In the present case, insurance receipt is sought to be assessed in the same year in which the deduction could be granted and therefore Section 41 of the Act has no application.

(x) Again without prejudice, it is submitted that out of the six horses that died during the relevant previous year, insurance claim was received only in respect of the two horses and therefore no deduction was allowable under Section 36(1)(vi) as the amount realised in respect of such animals, being insurance receipt, was more than their respective costs. As no deduction is allowable, there is no question of invocation of Section 41(1) of the Act. So far as the other four horses are concerned, their costs would be allowable under Section 36(1)(vi) and since no insurance claim was received *qua* their deaths, nothing can be brought to tax under Section 41(1) of the Act.

(xi) Without prejudice to the submission that Section 41(1) cannot be invoked, it is submitted that even if the said provision was to be applied, the addition could not have exceeded the expenses sought to be allowed by the Assessing Officer.

On above broad submissions, Mr. Pardiwalla would pray for setting aside the impugned orders passed by the ITAT.

8) The Appeals are opposed by Mr. Sharma, the learned counsel appearing for the Revenue. He has canvassed the following broad submissions while opposing the Appeals:-

(i) There are concurrent findings recorded by the adjudicating authority, by the First and the Second Appellate Authorities and in absence of any element of perversity, the view taken by the three authorities, being a plausible view, the same cannot be interfered by this Court. Tax under the Act is chargeable on income of Assessee after allowing loss/expenditure as given under the Act and therefore to the extent of loss, the income of the Assessee is reduced and the tax is charged on such reduced income. However, in a case where the Assessee obtains any amount, in respect of such loss, the amount so obtained is added in the income of the Assessee as per the mandate of Section 41(1) of the Act.

(ii) The Assessee had claimed a debit upon death of the mare in the Profit and Loss Account and therefore after receipt of the insurance claim, provisions of Section 41 of the Act would apply by treating the same as deemed profit of the Assessee.

(iii) It is immaterial as to whether a mare is a plant or a machinery or whether it is a capital asset. For deciding the controversy in hand, the limited issue is, applicability of provisions of Section 41(1) of the Act. What was lost, was allowed to be deducted from the income of the Assessee and consequently the amount obtained *in lieu* of such loss would naturally be deemed to be the income of the Assessee under the provisions of Section 41 of the Act.

(iv) In this case, mares were not held as Plant and Machinery. The manner in which the Mares were used in the Assessee's business, it cannot be said to be stock and trade of the Assesse. However, there is specific provision in the Act under Section 36(1)(vi) under which if an animal dies or becomes permanently incapable of further use, the difference between the actual cost of the animal and the amount realised in respect of the carcasses of such animal is allowed as deduction under Section 36(1)(vi) of the Act. Consequently, the amount obtained *in lieu* of such dead animal has to be treated as an income as per the mandate of Section 41.

On above broad submissions, Mr. Sharma would urge this Court not to interfere in the concurrent findings recorded by the Assessing Officer and first and second Appellate Authorities. He would pray for dismissal of the Appeals.

9) Rival contentions of the parties now fall for our consideration.

10) After going through the orders passed by the assessing officer and by the first and second appellate authorities, it is seen that what has been done in the present case is to shift the income of the Assessee under the head 'capital gains' to the head 'profits and gains of business or profession' for the purpose of applicability of provisions of

Section 41(1) of the Act after realising that the said income was not chargeable to tax under Section 45 of the Act. There is no dispute to the position that the Mares were being treated as Livestock Plant and hence considered as capital assets of the Assessee. Their capital value was Rs.40,000/- for Mare 'Certainty' and Rs.30,000/- for Mare 'Gracian Flower' in the books of accounts. Upon death of the said two Mares, there occurred loss in capital account of the Assessee. The Insurance Company allowed the claims submitted by the Assessee and disbursed amount of Rs.6,00,000/- in respect of the Mare-Certainty and Rs.1,00,000/- in respect of the Mare-Gracian Flower. The issue for consideration is whether the loss of capital asset, which is recouped in the form of insurance claim can be shifted from the head 'Capital Gain' under Section 45 of the Act to the head 'Profits and Gains of business or profession' under Section 41(1) of the Act?

11) Before proceeding further, we must note the cardinal principle of taxation that the heads of income provided in various sections of the Income Tax Act are mutually exclusive and where any item of income falls specifically under one head, it is to be charged for taxation under that head alone and no other. To paraphrase, the income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. Thus, it is impermissible for the Revenue to impose tax on income forming part of particular head and governed by particular section, by shifting the same under another head for the purpose of applicability of another section of the Act. If the department finds that an income under a particular head does not become liable to tax on account of provision of a Section governing that head, it is impermissible to shift that income to another head merely because the Department thinks that the very same income, upon its shift to another head, can be taxed under another Section of the Income Tax Act. These principles have been reiterated in several judgments and we proceed to make reference to few of them.

12) In ***Cadell Wvg. Mill Co. (P.) Ltd. Versus. CIT*** (supra) the issue before the Division Bench of this Court was whether the surrender value of tenancy rights, if not chargeable to tax as capital gains under Section 45, would be liable to be taxed as 'income from other sources' under Section 56. The Assessee had surrendered tenancy in respect of the property and received certain consideration towards surrender of tenancy. Since nothing was paid towards acquisition of tenancy rights, the receipt of amount towards surrender of tenancy rights was not chargeable to tax as 'capital gain' under Section 45 of the Act. Therefore, the Department proceeded to tax such income by shifting it to another head 'income from other sources' and proceeded to tax the income under the provisions of Section 56 of the Income Tax Act. The Division Bench did not approve the approach and held in paras-10 and 12 as under :-

> **10.** The short point which arises for determination is: whether the surrender value of a tenancy right, if not chargeable to tax as capital gains under section 45, is liable to be taxed as "income from other sources" under section 56 of the Act?
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> **12.** We find merit in the submissions advanced on behalf of the assessee. Both the parties before us have proceeded on the basis that the tenancy right is a capital asset. This is clear from the submissions advanced on both sides. Even the Tribunal has proceeded on the basis

> that if the tenancy right is a property, then the consideration received for transfer thereof would not be chargeable as revenue receipt. It is well-settled that all receipts are not taxable under the Income-Tax Act. Section 2(24) defines "income". It is no doubt an inclusive definition. However, a capital receipt is not income under section 2(24) unless it is chargeable to tax as capital gains under section 45. It is for this reason that under section 2(24)(vi) that the Legislature has expressly stated, inter alia, that income shall include any capital gains chargeable under section 45. Under section 2(24)(vi), the Legislature has not included all capital gains as income. It is only capital gains chargeable under section 45 which has been treated as income under section 2(24). If the argument of the Department is accepted then all capital gains whether chargeable under section 45 or not, would come within the definition of the word "income" under section 2(24). Further, under section 2(24)(vi), the Legislature has not stopped with the words "any capital gains". On the contrary, the Legislature has advisedly stated that only capital gains which are chargeable under section 45 could be treated as income. In other words, capital gains not chargeable to tax under section 45 fall outside the definition of the word "income" in section 2(24). It is true that section 2(24) is an inclusive definition. However, in this case, we are required to ascertain the scope of section 2(24)(vi) and for that purpose we have to read the sub-section strictly. We cannot widen the scope of sub-section by saying that the definition as a whole is inclusive and not exhaustive. In the present case, the words "chargeable under section 45" are very important. They are not being read by the Department. These words cannot be omitted. In fact, the prior history shows that capital gains were not chargeable before 1946. They were not chargeable between 1948 and 1956. Therefore, whenever an amount which is otherwise a capital receipt is to be charged to tax, section 2(24) specifically so provides. …..

13) So far as the issue of permissibility to shift the income falling under one head for being taxed under another head, the Division Bench held in para-14 of the judgment as under:-

> **14. It is essential also to bear in mind that income which falls-under one specified head could not be brought to tax under any other head.** In the present matter, the Department did apply section 45. They did apply the head, viz., "Capital gains". However, when it came to computation, the Department found that cost of acquisition cannot be computed. Hence, it is now sought to be argued that such capital gains would constitute "income from other sources" under section 56. **In the case of *United Commercial Bank Ltd.* v. *CIT*, [1957] 32 ITR 688**

> **(SC), it has been held that income which falls under one specific head could not be brought to tax under any other head. If for any reason, the computation machinery fails, it is not open to the Department to apply the residuary clause.**
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> *(emphasis added)*

14) The view expressed by the Division Bench in ***Cadell Wvg. Mill Co. (P.) Ltd*** that the income falling under one specified head cannot be brought to tax under another head has been affirmed and reiterated by the Apex Court in ***CIT Versus. D. P. Sandhu Bros. Chembur (P.) Ltd.*** (supra). The Apex Court has discussed the ratio of judgments in ***United Commercial Bank Ltd. Versus. CIT***[8], ***East India Housing and Land Development Trust Ltd.*** **Versus.** ***CIT***[9] and ***CIT Versus. Chugandas and Co.***[10] and has held as under :-

> **13.** Were it not for the inability to compute the cost of acquisition under Section 48, there is, as we have said, no doubt that a monthly tenancy or leasehold right is a capital asset and that the amount received on its surrender was a capital receipt. But because we have held that Section 45 cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other section. This Court, as early as in 1957 had, in ***United Commercial Bank Ltd.*** **v.** ***CIT*** [(1957) 32 ITR 688 : 1958 SCR 79] held that the heads of income provided for in the sections of the Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. It has been further held by this Court in ***East India Housing and Land Development Trust Ltd.*** **v.** ***CIT*** [(1961) 42 ITR 49 (SC)] that **if the income from a source falls within a specific head, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head.** (See also ***CIT*** **v.** ***Chugandas and Co.*** [(1965) 55 ITR 17 : (1964) 8 SCR 332])
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> *(emphasis and underlining added)*

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8 [1957] 32 ITR 688 (SC)

9 (1961) 42 ITR 49 (SC)

10 (1965) 55 ITR 17

15) In our view, therefore the Revenue has grossly erred in shifting the amount of insurance claim received by the Assessee from the head 'capital gains' to another head 'Profits and gains of business or profession' for the purpose of bringing the same to taxation under Section 41(1) of the Act. This is the first folly committed by the Department in the present case.

16) As observed above, the Revenue itself has treated the horses as 'capital assets'. This position is affirmed by all the three Authorities. It would be relevant to quote the finding recorded by the ITAT in this regard which is as under:

> The fact that the Revenue authorities allowed deduction u/s. 36(1)(vi) only means that they are treated as capital asset of the assessee.

17) After treating the horses as 'capital assets' of the Assessee, the insurance receipt would obviously become capital gain for the Assessee, which can only be taxed under the provisions of Section 45 of the Act. The Revenue however found that it was not possible to tax the said 'capital gain' under Section 45 of the Act and therefore decided to treat the income as 'profit' under Section 41(1) of the Act. This is clearly impermissible for the reasons discussed above.

18) We now proceed to deal with the manner in which the receipt under an insurance claim is required to be treated for the purpose of Income Tax Act. As observed above, the Revenue itself has treated the horses as 'capital asset' of the Assessee. Therefore, if a capital is lost on account of death of a horse, any amount received towards insurance claim of such loss would obviously be on capital account.

19) Section 45 of the Act deals with capital gains and sub-section (1) thereof provides that any profits or gains arising from 'transfer' of capital assets effected in the previous year shall be chargeable to income tax under the head 'capital gains'. The issue therefore is whether insurance receipt consequent to death of a horse would amount to 'transfer' within the meaning of Section 45 of the Act. The term 'transfer' has been defined under Section 2(47) of the Act. It is contended by the Assessee that insurance receipt on death of a horse would not be covered by definition of the term 'transfer' in relation to capital asset. Death of a horse cannot be treated as 'transfer' under Section 2(47) of the Act as a transfer presumes both existence of asset, as well as transferee to whom it is transferred. This position is well settled by the judgment in ***Vania Silk Mills (P.) Ltd.*** (supra) in which the issue before the Apex Court was whether money received towards insurance claim on account of damage/destruction of capital asset would be on account of 'transfer' of the asset within the meaning of Section 45. The Apex Court held in paras-2, 4, 5, 6 and 7 as under :-

> **2. The short question that falls for our consideration is whether the money received towards the insurance claim on account of the damage to or destruction of the capital asset is so received on account of the transfer of the asset within the meaning of Section 45 of the Act and is, therefore, chargeable to the capital gains tax under the said section.**
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> **4. When an asset is destroyed there is no question of transferring it to others.** The destruction or loss of the asset, no doubt, brings about the

destruction of the right of the owner or possessor of the asset, in it. But it is not on account of transfer. It is on account of the disappearance of the asset. **The extinguishment of right in the asset on account of extinguishment of the asset itself is not a transfer of the right but its destruction**. By no stretch of imagination, the destruction of the right on account of the destruction of the asset can be equated with the extinguishment of right on account of its transfer. Section 45 speaks about capital gains arising out of "transfer" of asset and not on account of "extinguishment of right" by itself. The capital gains is attracted by transfer and not merely by extinguishment of right howsoever brought about. The transfer may be effected by various modes and one of the modes is the extinguishment of right on transfer of the asset itself or on account of the transfer of the right or rights in it. The extinguishment of right or rights must in any case be on account of its or their transfer in order to attract the provisions of Section 45. If it is not, and is on account of the destruction or loss of the asset, as in the present case, it is not a transfer and does not attract the provisions of Section 45 which relate to transfer and not to mere extinguishment of right but to one by transfer. Hence an extinguishment of right not brought about by transfer is outside the purview of Section 45. The High Court erred in ignoring the basic postulate that Section 45 does not relate to extinguishment of right but to transfer. Having concentrated its attention on the words "extinguishment of right" rather than on "transfer", the High Court, with respect, misdirected itself and proceeded on the basis that every extinguishment of right whether by way of transfer or not, is attracted by Section 45.

5. **Transfer presumes both the existence of the asset and of the transferee to whom it is transferred**. In the case of the damage, partial or complete, or destruction or loss of the property, there is no transfer of it in favour of a third party. The money received under the insurance policy in such cases is by way of indemnity or compensation for the damage, loss or destruction of the property. It is not in consideration of the transfer of the property or the transfer of any right in it in favour of the insurance company. It is by virtue of the contract of insurance or of indemnity, and in terms of the conditions of the contract. Under an insurance contract, the assured cannot claim more amount than the sum insured. The sum insured is the maximum liability of the insurer and the assured secures it by paying his premium which is accordingly fixed. Even within the maximum limit, the insured cannot recover more than what he establishes to be his actual loss, whatever may be his estimates of the loss that he was likely to bear and whatever the premium he may have paid calculated on the basis of the said estimate.

The fact that while paying for the total loss of or damage to the property, the insurance company takes over such property or whatever is left of it, does not change the nature of the insurance claim which is indemnity or compensation for the loss. **The payment of insurance claim is not in consideration of the property taken over by the insurance company, for one is not consideration for the other. It is incorrect to argue that the insurance claim is the value of the damaged property**. The claim is assessed on the basis of the damage sustained by the property or the amount necessary to restore it to its original condition. It is not a consideration for the damaged property. In the present case, the insurance was on reinstatement basis which meant that the property was to be restored to the condition in which it was, before the fire. The insurance company paid the amount for the restoration of the machinery which had to be on the basis of its value at the time of the fire. The machinery in question was purchased in the year 1957 and the fire broke out on August 11, 1966. Although nothing has come on record on the point, taking into consideration the ordinary course of events, it is legitimate to presume that the cost of machinery had gone up during the intervening period, and the assured and, therefore, the assessee, was entitled to recover on the basis of the increased value of the machinery (refer to *Halsbury's Laws of England*, 4th edn., Vol. 25 under the heading 'Insurance', in para 654).

6. It is true that the definition of "transfer" in Section 2(47) of the Act is inclusive, and therefore, extends to events and transactions which may not otherwise be "transfer" according to its ordinary, popular and natural sense. It is this aspect of the definition which has weighed with the High Court and, therefore, the High Court has argued that if the words "extinguishment of any rights therein" are substituted for the word "transfer" in Section 45, the claim or compensation received from the insurance company would be attracted by the said section. The High Court has, however, missed the fact that the definition also mentions such transactions as sale, exchange etc. to which the word "transfer" would properly apply in its popular and natural import. Since those associated words and expressions imply the existence of the asset and of the transferee, according to the rule of *noscitur a sociis*, the expression "extinguishment of any rights therein" would take colour from the said associated words and expressions, and will have to be restricted to the sense analogous to them. If the legislature intended to extend the definition to any extinguishment of right, it would not have included the obvious instances of transfer, viz., sale, exchange etc. Hence the expression "extinguishment of any rights therein" will have to be confined to the extinguishment of rights on account of transfer and cannot be extended to mean any extinguishment of right independent of or otherwise than on account of transfer.

7. The High Court, as stated earlier, read the expression "extinguishment of any rights" in the assets as any extinguishment of

> right whether it resulted in or was on account of transfer. For the reasons which we have discussed earlier we find that that approach is not correct. **For the same reasons, we are unable to accept the reasoning of the High Court that for "transfer" within the meaning of Section 45 the asset need not exist.** We are afraid that the High Court's reliance on *CIT* v. *R.M. Amin* [(1971) 82 ITR 194 (Guj)] to hold that for the transfer contemplated by Section 45, the asset need not exist is not well merited. There, the High Court was concerned with a chose-in-action, viz., the shares, and the amount received by the assessee-shareholder on liquidation of the company representing his share in the assets of the company. The Court there had pointed out that the extinguishment of right of the assessee shareholder in his share which was an incorporeal property had come about on account of receipt by him of the amount representing the value of the shares.
>
> *(emphasis added)*

20) The above position is reiterated by the Madras High Court in Division Bench judgment in ***Neelamalai Agro Industries Ltd.*** (supra) where there was a fire accident in the factory of the Assessee who received compensation from the insurance company. The Apex Court proceeded to regard insurance receipt as 'transfer' under Section 2(47) of the Act and brought to tax, part of the said compensation claimed under Section 45 of the Act. The issue before the Madras High Court was whether an extinguishment of right in capital asset on account of destruction would amount to transfer. The Madras High Court referred to the judgment in ***Vania Silk Mills (P.) Ltd.*** (supra). Reliance was placed by the Revenue on the judgment in ***Commissioner of Income-tax Versus. Grace Collins***[11]**.** However, the Madras High Court held that the view taken in ***Vania Silk Mills (P.) Ltd.*** was not overruled by the Apex Court in ***Grace Collins*** and that ***Vania Silk Mills (P.) Ltd.*** continues to be the authority in support of the proposition that extinguishment of right in capital asset on account of its destruction does not amount to

[11] [2001] 248 ITR 323 (SC)

transfer. The Division Bench of the Madras High Court held in ***Neelamalai Agro Industries Ltd.*** as under :-

> 16. The extinguishment of rights in the capital asset referred to in the definition of "transfer" in section 2(47) of the Act, therefore, would clearly apply to a case where the rights in the shares in the amalgamating company are extinguished on amalgamation to be replaced by shares in the amalgamated company, which after amalgamation is the owner of the assets transferred to it as a consequence of the amalgamation, and which will thereafter have the ownership, use and benefit of those assets.
>
> 17. The case of amalgamation of companies and the extinguishment of rights of the shareholder in the amalgamating company is no way comparable to the destruction of the assets which as a consequence brings about the extinguishment of the rights of the assessee-owner in such assets.
>
> 18. In the case of Mrs. Grace Collis, [2001] 248 ITR 323 (SC), at page 330 of the reports, the court noticed the submission made by counsel for the Revenue thus:
>
> > "Learned counsel for the Revenue submitted that having held that the payment in settlement of the insurance claim was not in consideration of the transfer to the insurer of the damaged machinery and that, therefore, there was no transfer within the meaning of section 45, it was unnecessary for this court in Vania Silk Mills Pvt. Ltd.'s case, [1991] 191 ITR 647 to go on to consider the definition in section 2(47) and the meaning to be attached to the expression 'extinguishment of any rights therein'. In his submission, the decision in Vania Silk Mills Pvt. Ltd.'s case, [1991] 191 ITR 647 (SC) was to this extent obiter dicta."
>
> 19. It is only to the extent of that obiter dicta, that the decision rendered in the case of Mrs. Grace Collis, [2001] 248 ITR 323 (SC) can be said to be at variance with the decision rendered in the case of Vania Silk Mills Pvt. Ltd., [1991] 191 ITR 647 (SC). In the case of Mrs. Grace Collis, [2001] 248 ITR 323 (SC), the court considered the terms "extinguishment of any rights therein" and the definition of "transfer" in section 2(47) of the Act. The court did not approve limiting the effect of the words "extinguishment of any rights therein" in the definition of "transfer" in section 2(47) of the Income-tax Act, to extinguishment on account of transfers. The court held, (page 330):
>
> > "As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer."
>
> 20. In the case of Mrs. Grace Collis, [2001] 248 ITR 323 (SC), the court did not have occasion to go into the question as to whether the destruction of a

> capital asset which as a consequence brings about the extinguishment of the rights of the assessee-owner in such asset, would amount to transfer. The court did not hold that Vania Silk Mills Pvt. Ltd.'s case, [1991] 191 ITR 647 (SC) was wrongly decided, or that the definition of "transfer" in section 2(47), particularly, the use of the words "extinguishment of any rights therein" would cover cases of destruction of the capital asset. **Cases such as the destruction of the capital asset in a fire, or its complete loss as in the case of sinking of a vessel in the sea, cannot be regarded as having been brought within the fold of definition of "transfer" in section 2(47), by reason of what has been said and laid down in the case of Mrs. Grace Collis**, [2001] 248 ITR 323 (SC).
>
> 21. It is well settled that the words and expression used in a judgment are not to be read as statutory provisions. Situations which did not arise for consideration and were, in fact, not considered are not to be regarded as having been considered. It is significant that the argument advanced for the Revenue before the court in the case of Mrs. Grace Collis, [2001] 248 ITR 323 (SC) was not that the case of Vania Silk Mills Pvt. Ltd., [1991] 191 ITR 647 (SC) was wrongly decided. On the other hand, the argument before the court was that though that decision on facts was correct, certain observations which were not necessary for the case and which the Revenue considered to be erroneous had been made, and were required to be overruled. **The law laid down in Vania Silk Mills Pvt. Ltd.'s case, [1991] 191 ITR 647 (SC), that extinguishment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the apex court in the case of Mrs. Grace Collis, [2001] 248 ITR 323.**
>
> *(emphasis added)*

21) In ***CIT Versus. Pfizer Ltd.*** (supra) the Apex Court held that receipt under insurance claim would be treated in the like manner as if receipt arises on the sale of the asset. The Apex Court held in para-11 as under :-

> **11.** In the present case, the insurance claim, it must be clarified, related to the stock-in-trade and it is only an insurance claim of that nature which forms the subject-matter of the appeal. Now, it cannot be disputed that if the stock in trade of the assessee were to be sold, the income that was received from the sale of goods would constitute the profits of the business as computed under the head of profits and gains of business or profession. The income emanating from the sale would not be susceptible to a reduction of ninety per cent. for the simple reason that it would not constitute a receipt of a nature similar to brokerage, commission, interest, rent or charges. A contract of insurance is a contract of indemnity. The insurance claim in essence

> indemnifies the assessee for the loss of the stock-in-trade. The indemnification that is made to the assessee must stand on the same footing as the income that would have been realized by the assessee on the sale of the stock-in-trade. In these circumstances, we are clearly of the view that the insurance claim on account of the stock-in-trade does not constitute an independent income or a receipt of a nature similar to brokerage, commission, interest, rent or charges. Hence, such a receipt would not be subject to a deduction of ninety per cent. under clause (1) of Explanation (baa).

22) Thus, following the ratio of the judgments in ***Vania Silk Mills (P.) Ltd., Pfizer Ltd*** and ***Neelmalai Agro Industries Ltd.,*** the money received towards insurance claim on account of damage to or destruction of capital asset cannot be treated as transfer of capital assets so as to attract tax under the provisions of Section 45(1) of the Act.

23) Having realized that the insurance receipt cannot be taxed as capital gain under Section 45 of the Act, the Assessing Officer has taken recourse to the provisions of Section 41(1) of the Act for the purpose of bringing the insurance receipt to tax. Sub-section (1) of Section 41 reads thus :-

> **41. Profits chargeable to tax.**
> (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,—
>
> > (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

> (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

24) Section 41 provides for taxation of 'profits'. We have already held that it is impermissible to shift the insurance receipt as a part of 'capital asset' from the realm of Section 45 by treating it as 'profits' merely because the tax becomes leviable under Section 41. The heading '*capital gains*' governed by the provisions of Section 45 is mutually exclusive from the heading '*profits and gains of business or profession*' governed by Section 41 of the Act. Following these principles, it was impermissible for the Revenue to treat insurance receipts on loss of horses as profits under Section 41 of the Act.

25) Even if it is assumed that provisions of Section 41 of the Act can be invoked in the facts of the present case, the receipt towards insurance claim would still be outside the purview of Section 41(1) of the Act as the same does not satisfy the conditions laid down therein. Section 41(1) can be pressed into service only if an allowance is granted in one year and subsequently the amount is received in another year. In the present case, the insurance receipt is assessed by the Assessing Officer in the same year in which the deduction was granted. Section 41(1) essentially applies to a situation where deduction is made by the Assessee in respect of loss, expenditure or trading liability and subsequently the Assessee secures an amount in respect of such loss or expenditure, the amount obtained by such person becomes 'profits' and accordingly can be charged to income tax.

26) It is strenuously contended on behalf of the Revenue that the expression used under Section 41(1) is 'any amount' and that even insurance receipt would be covered by the expression 'any amount'. It is contended that the Assessee claimed deduction or loss of horses and thereafter secured insurance claim for death of the very same horses and that therefore the case is clearly governed by Section 41 of the Act. This submission on behalf of the Revenue appears to be totally unfounded as no deduction is allowable under Section 36(1)(vi) of the Act in respect of the two horses for which insurance claim is received. The value of two horses, 'Certainty' and 'Gracian Flower' was Rs.40,000/- and Rs.30,000/- respectively in the books, whereas the Assessee received higher value towards insurance receipt (Rs.6,00,000/- and Rs.1,00,000/- respectively). It is only in respect of the four horses where no insurance claim was received, deduction would be allowable under Section 36(1)(vi). In case of the two horses, 'Certainty' and 'Gracian Flower' for whom insurance claim is received, the capital cost in the Books of Accounts got replaced by the amount claimed under insurance claim and there was no question of seeking any deduction in income under Section 36(1)(vi) of the Act. In our view therefore, the insurance claim received towards death of the two horses could not be charged to tax under Section 41(1) of the Act, even independent of the principle of impermissibility to shift income of Assessee from one head to another for the purpose of taxation.

27) We are therefore of the view that the horses in respect of which the insurance claim was received were Assessee's capital assets and that therefore insurance receipt arising therefrom could only have been considered as capital receipt, not chargeable to tax.

28) Also of relevance is the fact that the Legislature made a provision by inserting sub-section (1A) to Section 45 to cover the amount received under insurance claim on destruction of capital asset to tax. Sub-section (1A) of Section 45 reads thus :-

> **45. Capital Gains**
> (1) ….
> (1A) Notwithstanding anything contained in sub-section (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to, or destruction of, any capital asset, as a result of—
>
> (i) flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature; or
> (ii) riot or civil disturbance; or
> (iii) accidental fire or explosion; or
> (iv) action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),
>
> then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.
>
> *Explanation.*—For the purposes of this sub-section, the expression "insurer" shall have the meaning assigned to it in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938).

29) However, the said provision came to be introduced by Finance Act, 1999 w.e.f. 1 April 2000 and the same has no application to the present case. Thus, insurance claim received towards destruction of capital asset has been brought to taxation for the first time from 1 April 2000. This is yet another reason for holding that the amount received by the Assessee towards insurance claim on death of the horses cannot be brought to tax before introduction of the said amount.

30) Going further, it is seen that provisions of sub-section (1A) of Section 45 apply only where the destruction occurs on account of one of the four specified events. It is therefore highly doubtful whether destruction of capital asset of livestock on account of death of the animal would really be covered by the provisions of sub-section (1A) of Section 45. However, since the said provision under Section 45(1A) was not even available during the relevant Assessment Year, in our view, the issue of applicability of the said provision in case of destruction of asset of livestock on account of death of an animal is left open to be decided in an appropriate case.

31) The questions of law in each of the Appeals are accordingly answered in the negative.

32) Accordingly, the Appeals succeed and we proceed to pass the following order:

(I) The orders passed by the Assessing Officer, CIT(A) and ITAT are set aside to the extent of bringing to taxation the amount of insurance claim received by the Assessee on account of death of its horses.

(II) The Revenue is directed to treat the entire amounts of insurance claim received by the Assessee for death of horses as capital receipt governed only by provisions of Section 45(1) of the Act.

33) With the above directions, all the four Appeals are **allowed and disposed of.**

[SANDEEP V. MARNE, J.] **[CHIEF JUSTICE]**

NEETA SHAILESH SAWANT

Digitally signed by NEETA SHAILESH SAWANT
Date: 2025.07.09 19:05:05 +0530