IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM & Dr. A. L. SAINI, AM

आयकर अपीलसं./I.T.A No.1369/Kol/2019

(निर्धारण वर्ष / Assessment Year: 2009-10)

ACIT, Circle-1(1), Kolkata **4, Mangoe Lane, 7th Floor, Kolkata.**	**Vs.**	**M/s. Mcnally Bharat Engineering Co. Ltd.**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AABCM9443R**		
(Appellant)	**..**	**(Respondent)**

Appellant by : Shri Radhey Shyam, CIT
Respondent by : Shri Alpesh Gupta, AR

सुनवाईकीतारीख/ **Date of Hearing** : **16/12/2019**

घोषणाकीतारीख/**Date of Pronouncement** : **31/12/2019**

आदेश / O R D E R

Per Shri S. S. Godara:

This assessee's appeal for assessment year 2009-10 arises against the Commissioner of Income Tax (A) - 1, Kolkata dated 30.07.2018 passed in Case No.10127/CIT(A)-1/Kol./Circle-1/2013-14 involving proceedings u/s 143(3)/144C(3) of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case file perused.

2. For the reason stated in the Revenue's condonation petition explaining delay of 49 days' in filing due various procedural formalities and compilation of necessary records and on account of assessee's no objection, we condone the impugned delay and proceed to adjudicate the Revenue's instant appeal on merits.

3. The Revenue's first substantive ground seeks to reverse the CIT(A)'s action deleting retention money addition of Rs.71,46,55,726/- made by the Assessing Officer. The CIT(A)'s detailed discussion to this effect reads as under:

> *"5. Ground of Appeal No. 2 pertains to taxation of retention money not accrued during the year amounting to Rs.71,46,55,726/-. Ms. Ruchira Lakhotia, F.C.A., appeared.*

> *6. Ground of Appeal No. 2, the ld. A.O. in her order has stated that retention money has been shown as non-taxable in the computation by the assessee. Learned A.O. argued that the assessee has raised the bills upon completion of certain percentage of the work. Therefore, the assessee was required to show it as taxable income on the basis of percentage completion method of the agreed contract amount. She was also of the view that retention money was forming part of sale which had to be included in the Return of Income. She further proceeded to disallow the claim u/s. 115JB of the Income-tax Act, 1961.*
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> *7. The ld. A.R. of the assessee stated that the ld. A.O. has erred in making the addition. She stated that this aspect has been decided by the Calcutta High Court and Tribunal, She explained that retention money is not priced till the final execution of the work. Reliance was placed on decision of Calcutta High Court in Simplex Concrete Piles (India) P. Ltd.*
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> *8. I have gone through the order of the ld. A.O. and the submissions made by the ld. A.R. of the assessee. Undoubtedly, it is also observed that the Ld. CIT(Appeals)-22 had given relief to the assessee. The decision has also been in favour of the assessee in the case of Commissioner of Income Tax vs. Simplex Concrete Piles (India) Pvt. Ltd. 179 ITR 8 (Cal). Ld. A.R. has further given a list of cases where a decision has been made in favour of the assessee. Considering the fact that CIT(Appeals) has decided the case and that the jurisdictional High Court has also given a decision in favour of the assessee, on the same issue, I am convinced that the assessee deserves to succeed. Ground of Appeal No. 2 goes in favour of the assessee.*
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> *9. Ground of Appeal No. 3 pertains to the stand of the A.O. in levying Capital Gain amounting to Rs.23,73,49,836/- on the transfer of product division."*

4. The Revenue vehemently contends during the course of hearing and in the light of Assessing Officer's reasoning that the impugned addition has been rightly made during the course of assessment as well as in section 115JB MAT computation. It is not in dispute that the assessee had paid the impugned retention money as per the terms and conditions of the corresponding agreement with the other parties. Hon'ble apex court's landmark decision in ChainrupSampatram vs CIT (1953) 24 ITR 481 (SC) settled the law long back that although anticipated losses can be allowed to be deducted from commercial proceeds at the first sign of its reasonable probability, the converse is not true regarding anticipated profits to be treated as income unless the same are realized going by the principles of conservatism and commercial prudence. The Revenue fails to rebut the clinching fact that there is no surety about the impugned retention money to be finally refunded to the taxpayer. We therefore affirm the CIT(A)'s above extracted detailed reasoning.

5. Coming to MAT computation, this tribunal's coordinate bench's decision in DCIT vs. M/s. Mcnally Bharat Engineering Ltd. ITA Nos.147&109/Kol/2018 has already decided the issue against the department that such an amount does not partake the character of taxable income till the time mutual obligations are not fully satisfied. This first substantive ground is rejected therefore.

6. Next comes the capital gains addition issue of Rs.23,73,49,836/- made by the Assessing Officer holding the same to have accrued in assessee's heads on accrual of transfer of plant and machinery of "product" division. The CIT(A)'s detailed discussion deleting the impugned addition reads as follows:

> *"9. Ground of appeal no.3 pertains to the stand of the A.O in levying capital gain amounting to Rs.23,73,49,836/- on the transfer of product division.*
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> *10. The ld. A.O. was of the view that the company was incorrect in not adding the said amount. In the written submission a valid transfer of capital asset for which the company had received a consideration value and the transfer of asset had been to a subsidiary.*
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> *11. The ld. A.R. of the assessee vehemently stated that the plants of the Product Division (Kumardhubi), Asansol, Bangalore, etc. were hived of. In exchange, the assessee got equity shares of M/s. Mcnally Sayaji Engineering Ltd. This had been decided by the Hon'ble Calcutta High Court (Administered). In exchange, the assessee received equity shares of group company. She said that the ld. A.O. was wrong in considering the sale as slump sale. She relied on the order of Bombay High Court in Bharat Bijlee Ltd. 89 CCH 058 (MumHC).*
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> *12. I have considered the order of the ld. A.O. and the submissions made by the assessee.*
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> *13. The order of the Bombay High Court (Supra) has been considered by me. In that case the Bombay High Court had considered the matter in great detail and had followed the decision of High Court in the case of CIT vs. Motors & General Stores. The said decision, it had considered all aspects of a slump sale as well as the transactions in consideration. The Hon'ble Bombay High Court decided in favour of the assessee company which was adjudicating the issue. As a higher judicial forum has decided the issue, the same has to be respectfully followed as it becomes binding. Thus the decision goes in favour of the assessee in Ground of Appeal No. 3."*

7. Learned departmental representative invited our attention to Assessing Officer's reasoning that value of land and building in question could be easily quantified, section 55(2)(a) requiring computation of capital gains in case of goodwill's transfer and costs of its acquisition to be taken as nil and section 50(B) r.w. section 2(42C) had been rightly invoked in facts of the instant case to treat the assessee's transfer of product division to M/s Mcnally Sayaji Engineering Ltd. We find no merit in Revenue's instant grievance. The fact remains that the assessee

had received consideration by way of equity shares only as per hon'ble jurisdictional high court's decision (supra). Hon'ble Bombay high court's judgment in CIT vs. M/s. Bharat Bijlee Ltd. ITA No.2153 of 2011; has relied upon in the CIT(A)'s order, holds that capital gains as "slump rate" do not arise in such an instance as under:

> *"14 The definition of the term "slump sale" in Section 2(42C) meads as under:-*
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> ***Sec.2(42C):** Slump sale' means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.*
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> *Explanation 1:- For the purpose of this 'undertaking' shall have the meaning assigned to it in Explanation 1 to Clause (19AA).*
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> *Explanation 2:- For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities."*
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> *15 This definition together with the explanations, has been referred by the Tribunal in paragraph 37 of its order. Thereafter the Tribunal analyzed the transaction/transfer in the present case in the backdrop of the legal principles. The Tribunal referred to the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Andhra Pradesh v/s Motors & General Stores (P) Ltd., reported in (1967) Vol.66 ITR 692. The Hon'ble Supreme Court referred to Section 10(2)(vii) of the Indian Income Tax Act, 1922. It. also referred to a transaction dated 21st February, 1956 which was the subject matter of the appeal. It also posed the question as to whether such a transaction as was subject matter of "exchange deed" could be termed as a sale and alternatively whether the consideration of the sale is not the market value of the shares as on the date of the transaction, namely, Rs.95/- per share but the face value of the shares.*
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> *16 In answering this question, the Hon'ble Supreme Court held that, it is only if there is a sale of the cinema house and the other assets that the taxable profits and gains are to be computed under Section 10(2)(vii) as the amount by which the written down value exceeds the amount for which the assets are actually sold. The Supreme Court held that the word "sale" or "sold" have not been defined in the Indian Income Tax Act, 1922. These words, therefore, have to be construed by reference to other enactments. The Supreme Court then referred to the definition of the term "sale" as appearing in the Transfer of Property Act, 1882 and the Sale of Goods Act, 1930. The Hon'ble Supreme Court then referred to the definition of the term "Exchange" as appearing in the Transfer of Property Act, 1882. It then rejected the contention of the revenue that the transaction of 20" February, 1956 was a sale. The Hon'ble Supreme Court held that it was a transfer but by way of exchange. The Hon'ble Supreme Court then held thus -*
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> *"We pass on to consider the argument of Mr. Narasaraju that in revenue matters it was the substance of the transaction which must be looked at and not the form in which the parties have chosen to clothe the transaction. It was contended that, in the present case, there was in substance a sale of Sree Rama talkies by the assessee-company for a money consideration of Rs.1,20,000/- though the mode of payment was by transfer of shares and the resolution of the board of directors dated September 9, 1955, clearly indicated that the intention of the assessee company was to sell Sree Rama talkies along with its*

equipment concerned for a consideration of Rs.1,20,000. In the present case, however, there is no suggestion behalf of the appellant of bad faith on the part of the assessee company nor is it alleged that the particular form of the transaction was adopted as a cloak to conceal a different transaction. It is not disputed that the document in question was intended to be acted upon and there is no suggestion of mala fides or that the document was never intended to have any legal effect. In the absence of any suggestion of bad faith or fraud the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is embodied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction. In Bank of Chettinad Ltd. v/s Commissioner of Income Tax it was pointed out by the Judicial Committee that the doctrine that in revenue cases the "substance of the matter" may be regarded as distinguished from the strict legal position, is erroneous. If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In Duke of Westminister's case deeds of covenant had been executed by the Duke in favour of the employees in such amounts that the receive respectively sums equivalent to their wages and salaries. If they left the service of the Duke the payments covenantees, if remaining in the Duke's service, would still have been due, but it was in nearly all instances explained to the employee that so long as the service continued, while the deed did not prevent his claiming ordinary wages. in addition, it was expected that It was argued for the Crown that he would not do so though in form a grant of an annuity, the transaction was in substance merely one whereby the annuitant was to continue to serve the Duke at his existing salary, so that the annuity must be treated as salary. Neither the Court of Appeal nor the House of Lords agreed with this contention. To regard the payments under the deed as in effect payments of salary would be to treat a transaction of one legal character as if it were a transaction of a different legal character. With regard to the supposed contrast between the form and substance of the arrangement, Lord Russell of Killowen stated at page 524 as follows :

"If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of Secretary of State in Council of India v. Schble; that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing or the right and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

In a later case - Commissioners of Inland Revenue v.Wesleyan and General Assurance Society - Viscount Simon expressed the principle as follows:

"It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. Secondly, a transaction, which on its true construction is of a kind that would escape tax, is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax."

17. In the light of the principles laid down in the above referred decision, the Tribunal concluded in paragraph 40 that the Scheme of Arrangement approved by this

Court in the present case, cannot be said to be a sale of the Lift Division or undertaking by the assessee. The Tribunal referred to Clause 3.1 of the Scheme. It then referred to Clause 1.36 in its entirety. Then, it referred to Clause 14.1 of the scheme.

18. The Tribunal then held that, a reading of the clauses in the Scheme of Arrangement shows that the transfer of the undertaking has took place in exchange for issue of preference shares and bonds. It held that, merely because there was quantification when bonds/preference shares were issued, would not mean that the monetary consideration was determined and its discharge was only by way of issue of bonds/preference shares. In other words, the Tribunal held and as a fact that this is not a case where the consideration was determined and decided by parties in terms of money but its disbursement was to be in terms of allotment or issue of bonds/preference shares. In fact, all the clauses read together and the entire Scheme of Arrangement envisages transfer of the Lift Division not for any monetary consideration. The Scheme does not refer to any monetary consideration for the transfer. The parties were agreed that the assessee was to transfer the undertaking and take bonds/preference shares as consideration. Thus, it was a case of exchange and not a sale. Therefore, the Tribunal held that Section 2(42C) of the Act was inapplicable. If that was not applicable and was not attracted, then, Section 50B was also inapplicable.

19 We are of the opinion that the findings of fact rendered by the Tribunal from paragraph 40 and in relation to Ground No.2 are thus rendered by applying the legal principles to the facts and circumstances of the assessee's transaction. In the given facts and circumstances and going by the clauses of the Scheme and reading them harmoniously and together the Tribunal held that the transfer of Lift Division comes within the purview of Section 2(47) of the Act but cannot be termed as a slump sale.

20 This finding of fact cannot be said to be perverse or based on no material. It also cannot be said to be vitiated by an error of law apparent on the face of the record It is in these circumstances, we find that this appeal does not raise any substantial question of law.

21 It also does not raise any substantial question of law because the alternative argument, though formulated for consideration before the Assessing Officer and covered by question No.4(iii), is not pressed before us.

22 Before us, the emphasis of the revenue is on the applicabilityof Section 2(42C) of the Income Tax Act, 1961.

23 Before parting, we must make a reference and in all fairness to a Division Bench judgment of the Delhi High Court rendered in the case of SRIE Infrastructure Finance Ltd. (supra). This decision is heavily relied upon by Mr. Suresh Kumar, learned counsel appearing for the revenue in support of this appeal.) Mr. Suresh Kumar submits that the order of the Tribunal runs contrary to the law laid down in the judgment of the Delhi High Court. The Delhi High Court has considered the matter in the light of the amendments made to the Income tax Act, 1961, particularly, by the Finance Act, 1999, with effect from 1" April, 2000.

24 We see no force in the contention of Mr. Suresh Kumar. Firstly, it is not necessary for us to decide any wider question or larger controversy. The judgment of the Delhi High Court would apply provided the transfer is by way of a sale. Before the Delhi High Court, facts were that the petitioner Company was engaged in project financing through term loans and leasing in specified sectors. For the assessment year 2009-20010, the petitioner had disclosed loss of more than Rs.76 crores in their return. No return was filed for the assessment year 2010-2011. The book loss was more than Rs.72 crores. An application was filed before the Settlement Commission for the two assessment years and

disclosing additional income. The Settlement Commission passed an order and which is termed as final order in paragraph 4 of the judgment of the Delhi High Court, determining and deciding various questions which are raised in the writ petition. In the writ petition, the only aspect was that of taxability of Rs.375 lacs under Section 5OB of the Income Tax Act as capital gains on 'slump sale' paid under the Scheme of Arrangement to the petitioner by its subsidiary. The Settlement Commission held that the amount of Rs.375 lacs received by the petitioner from its subsidiary on transfer of its project finance business and assets based on financing business including its shareholding in SRIE Insurance Broking Pvt. Ltd. was taxable under Section 50B of the Act as a slump sale.

25 The argument of the petitioner was that this is a transfer under the Scheme of Arrangement but is not a sale. The Scheme of Arrangement was sanctioned by the High Court of Calcutta. The argument was that this is a transfer of a statutory interest and character. Section 50B therefore had no application as the Scheme of Arrangement is not a slump sale.

26 It is in dealing with that argument and in the peculiar facts that the Delhi High Court held that the petitioner's contentions cannot be accepted. The petitioner before the Delhi High Court had admitted that there was a monetary consideration in the Scheme of Arrangement. The money was paid and additionally shares of a third company were issued in favour of the assessee. Thus, the consideration was in money as also shares and not shares or bonds exclusively. The transfer could not be termed as an exchange but a sale. In that light the Delhi High Court held that the consideration of Rs.375 lacs was received on transfer of the project finance business of the assessee's subsidiary including its shareholding in another company. Therefore, the transaction itself was by way of a sale and not an exchange.

27 There is no necessity for us to analyze the circumstances in which the Section 50B was inserted in the statute book. Before us, the issue as to whether the conclusions reached by the Hon'ble Supreme Court in the case of Motors & General Stores (Pvt) Ltd. (supra) would still hold good or that they would not be the enabling principles after the amendment to the Income Tax Act, does not arise at all. We proceed on the footing that the statute was amended with some specific object and purpose. However, we are in agreement with the learned senior counsel appearing for the assessee before us that the applicability of Section 50B would have to be considered in the facts and circumstances of each case. If the transfer is by way of sale, only then it could be termed as a slump sale and then Section 5OB would be attracted. It is in these circumstances and going by the facts of the present case that we have decided the present appeal. No larger question or wider controversy need be decided as we are of the opinion that even the judgment rendered by the Delhi High Court is distinguishable on facts.

28 For the above reasons, we do not find any merit in the appeal. The same does not raise any substantial question of law. It is accordingly dismissed."

8. We conclude in view of above extracted detailed discussion that the CIT(A) has rightly deleted the impugned capital gains addition made by the assessing authority by invoking section 50B of the Act. The Revenue fails in its second substantive grievance as well.

9. Lastly comes the third issue of provision for leave encashment disallowance of Rs.82,13,368/-. The Assessing Officer invoked section 43B(f) of

the Act that such a provision is allowable only in case of actual payment. The CIT(A) holds that hon'ble jurisdictional high court's decision in Exide Industries Ltd. vs. Union of India (2007) 292 ITR 470 (Cal) quashed the statutory provision itself as ultra vires. Hon'ble apex court has stayed operation thereof vide order dated 08.05.2009. He has therefore directed the Assessing Officer to follow their lordships' final call on this issue. We notice in this backdrop of facts that there is no prejudice caused to the department in facts and circumstances of the case qua this last issue as well.

10. This Revenue's appeal is dismissed.

Order is pronounced in the open court on 31.12.2019.

Sd/-	**Sd/-**
(A. L. Saini)	**(S. S. Godara)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 31/12/2019
(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. The Appellant - ACIT, Circle-1(1), Kolkata
2. The Respondent - M/s. Mcnally Bharat Engineering Co. Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.