OD-18

ITAT/31/2018
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4
VERSUS
M/S. AKZO NOBLE INDIA LIMITED
(FORMERLY KNOWN AS M/S. ICI INDIA)

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 24th November, 2021

Appearance :-

Mr. P.K. Bhowmick, Adv.
... For Appellant
Mr. Avra Majumder, Adv.
Mr. Vishal Karla, Adv.
Md. B. Hosen, Adv.
... For Respondent

The Court : This appeal by the revenue filed under Section 260A of the Income Tax, 1961 (the Act, for brevity) is directed against the order dated 8th March, 2017 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata in ITA No.1829/Kol/2013 for the assessment year 2006-07, ITA No.2121/Kol/2013 for the assessment year 2006-07, ITA No.1830/Kol/2013 for the assessment year 2007-08 and ITA No.2122/Kol/2013 for the assessment year 2007-08. The appellant revenue has framed the following substantial question of law for consideration :-

"Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench, Kolkata has erred in law in deleting the disallowance of sum of Rs.3.50 Crores and Rs.2.11 Crores for the assessment year 2006-07 and 2007-08 respectively on account of slump sale of chemical undertaking under Section 50B of the Income Tax Act, 1961 by relying on its own decision for assessment year 1994-95 which has not been accepted by the revenue and the appeal has been filed before this Hon'ble Court which is pending adjudication ?"

We have heard Mr. P.K. Bhowmick, learned Standing Counsel appearing for the appellant revenue and Mr. Vishal Kalra, learned Counsel, assisted by Mr. Avra Majumder and Mr. B. Hosen, learned Advocates appearing for the respondent assessee.

The appellant revenue has challenged the order of the Tribunal by contending that the Tribunal ought not to have followed the decision in the assessee's own case for the assessment year 1994-95. Learned Senior Counsel appearing for the respondent assessee submitted that the order passed by the Tribunal in the assessee's own case for the assessment year 1994-95 has been upheld by the Hon'ble Division Bench of this Court in the case of Commissioner of Income Tax, Kolkata-IV Vs. AKZO Noble India Ltd., reported in (2020) 121 Taxmann.com 216 (Calcutta). There is nothing on record to show

whether the said decision has been reversed or modified. Therefore, the issue stands concluded in favour of the assessee. The operative part of the judgment reads as follows :-

> ***"11.*** *The matter went up to the tribunal. The tribunal made a detailed analysis of the agreements. It came to the conclusion that the entire businesses of the undertakings were transferred to its subsidiary. The transfer was on an as is where is basis. It held that the transfer was genuine, although it was by a holding to a subsidiary company.*

The objection of the Revenue was with regard to "excluded assets" mentioned in the agreement. They were described in the said agreement as follows:—

"(f) Excluded Assets means—

(a) cash in bank, cheques deposited in bank account and other unrealized cheques of ICI.

(b) all unpaid and outstanding insurance claims pertaining to the Fertilizer Business as at the Transfer Date;

(c) all other assets whether tangible or intangible pertaining exclusively to ICI's various business other than the Fertilizer Business".

12. *The Revenue contended that since these assets were left out, it was not a sale of the entire undertaking and did not qualify as a slump sale.*

13. *Mr. Dutta, learned counsel for the appellant reiterated this submission. The tribunal by its impugned judgment and order dated 29th February, 2008 held that the entire fertilizer and fibre businesses of the assessee had been transferred as a going concern to CCFC. All assets and liabilities relating to these businesses had also been transferred. The left out assets were bank balance and the outstanding insurance claim. It opined:*

"Merely because these two assets have been excluded from the assets transferred, it cannot be said that it is not the transfer of the undertaking as a going concern Land, building, plant and machinery, raw material, industrial licences, technology, trade mark have been transferred to CCFC. The employees of the assess working in fertilizer business have also been taken over by the CCFC. All current liabilities relating to fertilizer business has been taken over by CCFC. The sale consideration of the undertaking as a whole has been fixed at a "slump price" of Rs. 70.00 Crores without specifying any specific value to any asset. The assets transferred includes tangible as well as intangible asset. Moreover, the seller i.e. the assessee has also agreed for not carrying on the similar business of manufacturing and marketing of urea fertilizer for a period of 10 years."

14. *Relying on the case of Coromondal Fertilisers Ltd. v. Dy. CIT [2004] 90 ITD 344 (Hyd.), it held that the transaction was a slump sale and that it fell under section 45 of the said Act and further that for determining the capital gain from the full value of the consideration, the cost of acquisition of assets as well as the cost of any improvement were to be deducted. Since the cost of acquisition of intangible assets could not be determined the income was not chargeable to capital gains tax. It upheld the order of the CIT (Appeals).*

15. *This concept of slump sale was discussed in CIT v. Mugneeram Bangur & Co. [1965] 57 ITR 299 (SC). At this stage it is quite important to appreciate the ratio of CIT v. Artex Manufacturing Co. [1997] 93 Taxman 357/227 ITR 260 (SC). The written down value of the plant, machinery and dead stock according to the assessee's books was Rs. 4,36,896/-. The undertaking was sold on a valuation of these items as Rs. 15,87,296/-. According to the department, the written down value was Rs. 3,32,276/-. The difference between (Rs. 15,87,296 - Rs.*

3,32,276) = Rs. 12,56,020 was the bone of contention in this case. Whether it would be taxed as capital gains or under the head "business"?

16. *The Supreme Court ruled that if the value of the individual assets could not be determined, then the value of all the assets together should be taken. In that case, the profit or gain made would be taxed as capital gain. In other cases, it would be taxed as business income. The entire matter was referred to the tribunal for a decision. In that decision the Income-tax Act, 1922 was under consideration.*

17. *Mr. Bajoria, learned Senior Advocate appearing for the respondent assessee cited PNB Finance Ltd. v. CIT [2008] 175 Taxman 242/307 ITR 75 (SC).*

18. *In that case the assessment year 1970-71 was involved. The case related to the nationalization of the Punjab National Bank Ltd. Punjab Finance Ltd., on nationalization of the bank in 1969 received Rs. 10.20 crores as compensation calculated on capitalization of profits for the last 5 years. The compensation was received in 1969. From the sale consideration, cost of acquisition, improvement and expenses in connection with the transfer were deductible in computing capital gains under section 48 of the Income-tax Act, 1961. The assessee contended that it was not possible to allocate the full value of the consideration of Rs. 10.20 crores amongst various assets of the undertaking. Consequently, and became the assets including intangible assets like gradually value of licences, manpower etc. could not be determined, the cost of acquisition and cost of improvement could not be determined. Since this could not be done the charging Section 45 of the said Act for computation of capital gains did not apply. Hence, it was not possible to compute capital gains. Therefore, Rs. 10.20 crores was not taxable under section 45 of the said Act. This submission was upheld by the*

court.

19. *Mr. Justice Kapadia delivering the judgment and referring to Mugneeram Bangur & Co. case (supra) and Artex Manufacturing Co. case (supra). The case was different from Artex Manufacturing Co. (supra), according to his lordship.*

It is now very important to know the issues before the tribunal. The first issue was whether the alleged agreement of transfer was a genuine one or an eyewash.

20. *The second issue was whether the transaction in question was a slump sale. The Revenue contended that it was not so because the entire undertaking was not sold. Some assets like cash in the bank and the insurance claim had been left out.*

21. *The third issue was if it was determined that the transaction was indeed a slump sale, whether the gain or profit would be computed as a short term capital gain or a long term capital gain or something else."*

Thus, the above decision in the assessee's own case goes against the revenue. Therefore, we find that the appeal does not merit consideration. In the result, the appeal is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

SN/S. Das
AR(CR)