(2009) 02 GUJ CK 0093

In the Gujarat High Court

Case No : Tax Appeal No. 14 of 1999

ACIT APPELLANT

Vs

Patel Specific Family Trust RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:
Income Tax Act, 1961 — Section 260A(3), 260A(4), 41(2)

Citation : (2009) 02 GUJ CK 0093

Hon'ble Judges : S.R. Brahmbhatt, J;D.A. Mehta, J

Bench : Division Bench

Advocate : B.B. Naik, for the Appellant; S.N. Soparkar, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—On 1st March 1999, the Court made an order ''Admit''. Hence, when the Tax Appeal was called out for hearing today, a preliminary objection was raised on behalf of the respondent, based on provisions of Section 260A(4) of Income Tax Act 1961 (''the Act''), to submit that, under Sub-section (3) of Section 260A of the Act, an appeal can be heard only after a substantial question of law is formulated by the High Court, and the said provision requires that a substantial question of law must be formulated by the High Court. That, in the present case, in absence of any questions of law having been formulated, the respondent is entitled to urge that the questions as proposed in the memorandum of appeal are not substantial questions of law.

2. As against that, the learned Counsel for the Appellant Revenue submitted that, in the memorandum of appeal in paragraph No. 7, two questions have been proposed by the appellant when the Tax Appeal was filed, and it should mean that at the time of admission, the appeal has been admitted on the questions so proposed and the said questions are deemed to have been formulated by the High Court, hence the appeal should be heard on merits of the questions so formulated. Alternatively, it was submitted that it was open to the Court to formulate any other question which the Court feels is required to be determined.

The two proposed questions read as under:

(1) Whether, the Appellate Tribunal is right in law and on facts in holding that the amount of Rs. 50 lacs received by the assessee was by way of transfer of its goodwill and not profit on stock as well as fixed assets as held by the Assessing Officer and confirmed by the Commissioner of Income Tax (appeal)?.

(2) Whether, the Appellate Tribunal ought not to have appreciated that in the facts and circumstances of the case there was transfer of business which attracted capital gains as held by the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. M/s. Artex Manufacturing Co.,

3. On behalf of respondent Assessee, learned senior advocate also submitted in support of the preliminary objection that the questions as formulated do not arise out of the Tribunal''s order, in as much as, in so far as proposed question No. 2 is concerned, same has not been dealt with by the Tribunal at all, and in so far as the 1st question is concerned, same is a question of fact based on evidence on record.

4. This Court is of the opinion that the preliminary objection is required to be accepted. However, even if the submission made on behalf of appellant Revenue is accepted, that the proposed questions should be treated as substantial questions of law formulated by the Court, the appeal does not merit acceptance for the reasons stated hereinafter.

5. The Assessment Year in question is 1985-1986, the relevant previous year being Financial Year from 1-4-1984 to 31-3-1985. The controversy relates to treatment of a sum of Rs. 50,00,000/- (Rs. Fifty lakhs only) received by respondent Assessee, a proprietary business concern running business in the name of ''M/s Patel Detergent'', on transfer of its business. The case of respondent assessee was that the said sum was the price of ''Goodwill'' transferred by the Assessee in favour of the purchaser ''Harsiddh Specific Family Trust'' and the said amount of Rs. 50=00 lakhs was not taxable in light of Apex Court decision in case Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . As against that the Assessing Officer came to the conclusion that, the aforesaid judgment of the Apex Court was not applicable and no goodwill had been generated, the Assessee being mere user of the trademark of the original owner. The matter was carried in appeal and the Assessment was set side with specific directions to inquire into adequacy of sale consideration for the entire business as a whole. The Assessing Officer was also directed to inquire, whether payment of goodwill was ''disguised profit'' towards taking over business as a going concern. A further direction by Commissioner (Appeals) was, as to whether provisions of Section 41(2) of the Act were applicable to the facts of the case.

6. In the second Assessment order framed by the Assessing Officer on 18/3/1991, the Assessing Officer gave reasons, different from the reasons given in original Assessment order and held that the sum of Rs. 50=00 lakhs was received by the Assessee as ''disguised profits'' which ought to have been

charged on the closing stock and the fixed assets which were valued at book value.

7. When the matter was carried in appeal before Commissioner (Appeals), the addition was confirmed by Commissioner (Appeals) in the second round on altogether different grounds, and the said reasons have been summarized by the Tribunal in its impugned order dated 8/10/1998 in the following manner:

(i) Portion of Rs. 12 lakhs (profits at 15% of finished goods) was business profit of the appellant trust. Reliance was placed on A.L.A. Firm Vs. Commissioner of Income Tax, Madras,

(ii) Remaining sum of Rs. 38 lakhs represented profit earned by the appellant not on account of transfer of any goodwill but on account of transfer of facility which was enjoying for using the brand name of ''NIRMA''.

(iii) Alternatively he held that it represented part of consolidated consideration which has been received by the appellant for transfer of its business as a whole as a gong concern and accordingly would be assessable as short term capital gain.

8. It is against the aforesaid order made by Commissioner (Appeals) on 25/9/1992 that the matter came up before the Tribunal. The Tribunal has for the reasons stated in the impugned order upheld the claim made by respondent Assessee, and negatived the contention of Revenue. Leaned counsel appearing for appellant Revenue has assailed the impugned order of Tribunal by submitting that the impugned order of Tribunal has to be based on facts and evidence, whereas the finding recorded by the Tribunal that the sum of Rs. 50=00 lakhs was received by the Assessee as goodwill is not based on any evidence and hence, the impugned order of Tribunal is perverse. It was submitted that, even if no question of perversity was proposed or raised, the same is to be considered as being inbuilt in Question No. 1. In support of this submission, learned advocate read extensively from the order of Commissioner (Appeals). It was submitted that there was no evidence, in absence of any documentary proof, to show as to how the sum of Rs. 50=00 lakhs had been worked out by the parties towards goodwill, considering the fact that the Assessee had carried on business for a period of six months only, and there was no evidence on record to show any negotiations stated to have been carried out between the parties. Lastly, it was contended that no reasons have been assigned by the Tribunal while passing impugned order for disagreeing with order of Commissioner (Appeals). In support of the submissions made, the following 3 judgments of this Court were pressed into service.

(1) Commissioner of Income Tax Vs. Deepak Nitrite Ltd.,

Gautam Harilal Gotecha Vs. DCIT,

Rameshchandra M. Luthra Vs. Assistant Commissioner of Income Tax,

9. As against that, learned senior advocate appearing on behalf of respondent Assessee submitted that the law regarding perversity was well settled and before treating an order to be perverse, it was necessary that the party assailing such order has to point out that either the Tribunal has not considered a relevant piece of evidence, or has considered an irrelevant piece of evidence, or has omitted to consider any evidence at all and recorded a finding which no reasonable person would have arrived at in the facts & circumstances of the case. Inviting attention to the impugned order of Tribunal, it was submitted that the Tribunal''s order does not suffer from the vice of perversity. The Tribunal has taken into consideration the facts and evidence on record, including the agreement entered into between the parties, the orders made by, including order of Assessing Officer and Commissioner (Appeals) in both the rounds; and after considering the submissions made by both the sides, the Tribunal has made the order impugned. It was further submitted that the second contention that the Tribunal had not given any reason for disagreeing with the view expressed by Commissioner (Appeals) was also not correct, in as much as, the Tribunal has specifically summarized the findings recorded by Commissioner (Appeals) and thereafter gone on to observe that the sum of Rs. 50=00 lakhs was received towards transfer of goodwill only.

9.1. On merits, it was submitted that Revenue was not disputing the receipt of sum of Rs. 50=00 lakhs. That, both the Assessing Officer and Commissioner (Appeals) had bifurcated said sum of Rs. 50=00 lakhs towards the stock-in-trade and the other assets of the business, and the Commissioner (Appeals) had also in the alternative allocated sum of Rs. 38=00 lakhs, over & above Rs. 12=00 lakhs allocated to stock-in-trade, towards transfer of business as a whole. That, such an exercise could not have been done by the authorities as laid down by the Apex Court in case of Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), That the said judgment in case of Mugneeram Bangur & Co. (supra) has since been confirmed and reiterated once again by the Apex Court in an unreported decision rendered on 6/11/2008 in Civil Appeal No. 3721 of 2002 in case of PNB Finance Ltd. v. Commissioner of Income Tax-I, New Delhi, wherein the earlier case law on the subject mater has been referred to and explained and relied upon. It was therefore submitted that it was incorrect to state that the Tribunal has not assigned any reasons or that the order of Tribunal suffers from vice of perversity. It was further submitted that, as recorded by the Assessing Officer, from the extract of the relevant balance-sheet, against capital of Rs. 1,39,00,000=00 & odd, within a span of about 6 to 7 months the Assessee had earned profits of Rs. 2,27,00,000=00, but the Revenue had not been able to show by any of the known methods of accounting, as to what should be the goodwill in such circumstances, except bifurcating the amount of Rs. 50=00 lakhs.

10. As can be seen from the impugned order of Tribunal in paragraph No. 2, basic facts are recorded. The Tribunal has reproduced salient features of the agreement between the assessee and the purchaser '' Harsiddh Specific Family

Trust''. The Tribunal has, thereafter, in the same paragraph referred to the balance-sheet as on 31/3/1984 and taken note of the value of the fixed assets as well as the inventories, stock of raw materials and stock of finished goods. The Tribunal has further taken note of the historical backdrop of the litigation in the first and second rounds. This is followed by the summary of the findings recorded by Commissioner (Appeals) referred to herein before. After referring to the submissions made by the parties, the Tribunal has recorded following findings of fact:

The fact of the case is not in dispute that the assessee was carrying on business of manufacture and sale of detergent washing power till 31/3/84. In the month of April, 1984 the business was transferred for which an agreement was executed between the parties on 7/4/84. The business was sold as going concern to M/s. Harsiddh Specific Family Trust. The assets of the business was transferred on its book value. The appellant had valued the stock on generally accepted method of valuation of stock which have been followed by the assessee and other assessees of Nirma Group. It was specifically stipulated in the agreement that apart from the price of the assets under book value the purchaser had to pay Rs. 50 lacs for goodwill. Accordingly the aforesaid payment of Rs. 50 lakhs was made in respect of the goodwill. The price was fixed by mutual negotiation. The purchaser has debited the amount to its books of accounts which has been accepted by the department. The assessee has filed the deed of transfer along with the paper book which was considered by the A.O. while passing the order.

11. The Tribunal has thereafter referred to the Apex Court decision in the case of Srinivasa Setty (supra) and applied the principles of the said decision to the facts of the case.

12. When one reads the order of the Tribunal as a whole, it becomes apparent that not only there is application of mind but the Tribunal has taken into consideration the entire set of facts, circumstances, and evidence on record. The agreement entered into by the parties on 7/4/1984 stipulates taking over the business as a going concern with all assets & liabilities at book value along with all rights as to goodwill, trade name, trade mark, tenancy rights, royalty agreement etc. of the said business. The Tribunal has also referred to the fact that the agreement has recorded that as a result of transfer of the business as a going concern, the net value of the business was pegged at a sum of Rs. 50=00 lakhs by the trade name of the business. It is further noted by the Tribunal that the fixed assets of the assessee did not include any immovable property and were only 1.5 % of the total worth of all the assets. In relation to the valuation of stock of raw materials and finished goods, the finding recorded by the Tribunal is that the assessee has followed generally accepted method of valuation, namely at cost, and the said method of accounting has been accepted by the Assessing Officer for the immediately preceding Assessment Year, namely Assessment Year 1984-1985. It is in the aforesaid backdrop that the Tribunal has not accepted the stand of Revenue of valuing the stock of goods at rounded off figure of Rs.

12=00 lakhs as against the book value adopted by the Assessee.

13. Similarly, in relation to the value of the goodwill, the Tribunal has found that the price was fixed by mutual negotiation. That, during a short span of about 6 to 7 months the Assessee earned net profit of Rs. 2,27,00,000/- from the business upon capital of about Rs. 1,39,00,000/-, namely almost double the amount of capital employed.

14. Hence, on facts, it is not possible to state that the Tribunal has not considered any evidence or that this was a case of ''no evidence''. It is also not possible to accept the contention raised on behalf of the Revenue that the impugned order suffers from vice of perversity. It is not shown which relevant factor has been ignored or which irrelevant factor had gone into consideration. In the circumstances, the various decisions on which reliance has been placed cannot carry the case of Revenue any further.

15. In relation to the contention that the burden was not discharged by the Assessee, suffice it to state that the Assessee had made a claim duly supported by the evidence on record in the form of the agreement between he parties, the audited accounts and the figures of net profit earned by the Assessee. To say that there is no evidence as regards mutual negotiations, is an incorrect proposition. There is no prescribed mode & manner of negotiations. Therefore, absence of any correspondence in this regard per se cannot be treated to be an adverse factor. In this context, it is necessary to note that the debit of the amount of Rs. 50=00 lakhs by the purchaser of the business in its books of accounts is not doubted and in fact the Tribunal has found that the same has been accepted by the Department as ''purchase price''. Therefore, if the same transaction has been found to be a genuine transaction, treated as such in the hands of the purchaser, there is no reason why a different consideration should prevail in hands of the seller.

16. In fact when one goes to the orders made by the Assessing Officer and Commissioner (Appeals), it becomes clear that the said authorities have merely worked out the value of the closing stock by adopting a profit rate of 15% on an assumption, as can be seen from the following paragraph in the order of Commissioner (Appeals):

If a profit rate of 15% is assumed the finished goods of the cost of Rs. 65.71 lacs would be sold for Rs. 77.30 lacs with the result that the profit would be quantified at Rs. 11.59 lacs. Presuming that the cost of raw materials might have increased marginally during the course of accounting year, the total profit in respect of the entire stock in trade can be reasonably estimated at Rs. 12,00,000/-

17. Similarly the Assessing Officer treated the sum of Rs. 38=00 lakhs towards transfer of all other assets of the business, whereas Commissioner (Appeals) treated this balance as having been received on account of transfer of facility which the assessee was enjoying for using brand name ''NIRMA''. Commissioner

(Appeals) has thus treated this as ''business income'' and in the alternative, assumed that the amount was received on transfer of business as a going concern. Thus the authorities have proceeded only on assumption as to value of the closing stock by bifurcating the sum of Rs. 50=00 lakhs, without actually bringing any evidence on record to point out any material for changing the heads towards which the payment has been received.

18. In light of the view that the Court has adopted, the ratio laid-down by the Apex in the case of Mugneeram Bangur & Co. (supra) is applicable, as reiterated by the Apex Court in the subsequent unreported decision in case of Civil Appeal No. 3721 of 2002 (supra), that in case of sale of the entire business, including all assets and liabilities, as a going concern, it is not possible to bifurcate the consideration received on account of said transfer.

19. In so far as the second question is concerned, same does not arise out of the impugned order of Tribunal, hence is not required to be dealt with, as no such contention was ever raised before the Tribunal. Question No. 1 is, therefore, answered accordingly, holding that, there is no error in the impugned order of Tribunal. The appeal is accordingly dismissed, with no order as to costs.