
(2016) 02 BOM CK 0135
In the Bombay High Court
Case No : Income Tax Appeal No. 910 of 2007

B.L. Shah

APPELLANT

Vs

ACIT

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Income Tax Act, 1961 — Section 143(3), Section 17, Section 17(3)(ii), Section 260-A

Citation : (2016) 284 CurTR 165

Hon'ble Judges : M.S. Sanklecha and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : R. Murlidharan and A.K. Jasani, for the Appellant; Ashok Kotangale, Arun Nagarjun and Arun Kumar Bagul i/b. Anuradha Mane, for the Respondent

Final Decision : Disposed Off

Judgement

M.S. Sanklecha, J.—1. This appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 9th May, 2006 of the Income Tax Appellate Tribunal (Tribunal). This appeal relates to Assessment Year 2002-03.

2. This appeal was admitted on 22nd August, 2008 on the following substantial question of law:--

"Whether on the facts and in the circumstances of the case, the finding of the Tribunal that the amount received by the Appellant was not in the nature of non-compete fees is perverse and/or contrary to the material on record and is given ignoring the documents in the Paper Book and overlooking the written submissions made by the Appellant?".

3. Briefly, the facts leading to the present appeal are as under:--

"(a) On 31st March, 2002, the Appellant at the age of 81 years, retired from employment with M/s. Grasim Limited (Grasim). This was after having worked for over 33 years with Grasim;

(b) At the time of retirement, the Appellant received retirement benefits of more

than Rs. 95 lakhs from Grasim. A monthly pension of Rs. 3 lakhs per month for life, reimbursement of medical expenses for life etc. Besides, the above, in addition, the Appellant received an amount of Rs. 3,80,48,100/- which the Appellant claimed was non-compete fees and in support, relied upon an Agreement dated 31st March, 2002 entered into by the Appellant with Grasim;

(c) The amount of Rs. 3,80,48,100/- was received by the Appellant prior to the execution of the Agreement dated 31st March, 2002 for non-compete fees in the following tranches:--

(d) In its return of income for the subject Assessment Year, the Appellant claimed that the amount of Rs. 3,80,48,100/- received by him as non-compete fees from Grasim was not taxable;

(e) The Assessing Officer in his Assessment Order dated 30th January, 2004 passed under Section 143(3) of the Act noted the following further facts:--

(i) Grasim had deducted Tax at Source (TDS) of Rs. 1,16,42,719/- on the amount of Rs. 3,80,48,100/- paid to the Appellant;

(ii) Appellant continued as an Advisor with Grasim from 1st April, 2002 to 31st December, 2002 on payment of Rs. 3.53 lakhs per month.

(f) On merits, the Assessment Order records that amount of Rs. 3,80,48,100/- claimed as non-compete fees was not a lump-sum figure but an odd figure which was claimed to have been arrived after negotiations. In the result, the Appellant was called upon to give details of the components of Rs. 3,80,48,100/- claimed as non-compete fees. The Appellant failed to furnish the details. Thus taking into account all the facts, the Assessing Officer concluded that the payment of Rs. 3,80,48,100/- claimed as non-compete fees was not in fact so. Further, he held that the agreement dated 31st March, 2002 is a subterfuge to colour an amount received in lieu of salary as a non-compete fees so as not to pay tax on the same. In the circumstances, the payment of Rs. 3,80,48,100/- was held to be not non-compete fees and was brought to tax under the head "salary" and in particular, under Section 17(3)(ii) of the Act;

(g) Being aggrieved, the Appellant carried the issue in appeal to the Commissioner of Income tax (Appeals) [CIT(A)]. By order dated 31st March, 2005, the CIT(A) found that the amount aggregating to Rs. 3,80,48,100/- was received in installment of Rs. 2.00 Crore on 30th October, 2001, Rs. 30 lakhs on 20th February, 2002 and Rs. 1,50,48,100/- on 27th March, 2002. All these amounts were received prior to date of Agreement dated 31st March, 2002. It further records that the payment of Rs. 2.00 Crore was made on 30th October, 2001 was in fact an advance against non-compete fees/ex-gratia, fees etc. Thus, he concluded that the agreement dated 31st March, 2002 indicating non-compete fees is the document which has been entered into so as to only hide the real nature of transaction. All this with a view to not pay legitimate tax on it. It was further held that the Appellant had retired from Grasim at the age of 81,

having got benefit of more than Rs. 95 lakhs from his employer with monthly pension of Rs. 3 lakhs for life, along with reimbursement of medical expenses. In these circumstances, the order of the CIT(A) held that it is highly unlikely that the person having put in such a long service with Grasim and granted generous post-retirement benefit would do anything to compete with the business of his former employer. In the aforesaid circumstance, the CIT(A) by order dated 31st March, 2005 upheld the order dated 30th January, 2004 of the Assessing Officer and held that the payment of Rs. 3,80,48,100/- claimed as non-compete fees is, in fact, classifiable under Section 17 of the Act as profits in lieu of salary; and

(h) Being aggrieved by the order dated 31st March, 2005 of the CIT(A), the Appellant carried the issue in appeal to the Tribunal. The Tribunal by the impugned order took in to consideration the following facts:--

(i) payment as non-compete fees of Rs. 3,80,48,100/- was made much before the date of retirement and also before the date of agreement i.e. 31st March, 2002;

(ii) the Appellant was 81 years old when he retired from the service. Therefore, was not in a position to compete with Grasim;

(iii) Rs. 3,80,48,100/- paid as non-compete fees was an odd figure and in spite of specific request, seeking a break-up of the same and/or manner in which the same was determined, the Appellant was not forthcoming;

(iv) The Appellant was appointed as an advisor to Grasim w.e.f. 1st April, 2002 for a period of nine months i.e. up to 31st December, 2002. Thus, he continued to work for Grasim not only after the receipt of non-compete fees, date of his retirement and after the agreement for non-compete fees;

(v) Grasim did not consider the payment made to the Appellant as non-compete fees as it had deducted TDS on the payment of Rs. 3,80,48,100/- at Rs. 1,16,42,719/-. This was accepted by the Appellant as there was no protest on the part of the Appellant with Grasim on the deduction of TDS in respect of the payment of Rs. 3,80,48,100/- as non-compete fees; and

(vi) The letter dated 29th October, 2001 - wherein Grasim has been directed by the Aditya Birla Group to make a payment of Rs. 2.00 Crore subject to tax deduction as applicable as advance against non-compete fees/ex-gratia, other fees etc., payable to Appellant. Therefore, the payment made of Rs. 2.00 Crore could not be held to be payment for non-compete fees;"

In the result, the appeal of the Appellant was dismissed by the impugned order dated 9th May, 2006 while upholding the order dated 31st March, 2005 of the CIT(A).

4. Being aggrieved by the impugned order dated 9th May, 2006 of the Tribunal, this appeal has been filed to this Court. Mr. Murlidharan, learned Counsel appearing for the Appellant in support of the appeal submits as under:--

"(a) The payment received as non-compete fees is not taxable in the subject Assessment Year as settled by the order of the Supreme Court in *Guffic Chem P. Ltd. v. CIT*, 332 ITR 602;

(b) The impugned order of the Tribunal relies upon six circumstances as set out herein above to conclude that the amount of Rs. 3,80,48,100/- received by the Appellant is not non-compete fees. All the six circumstances either individually or collectively, would not result in the amount of Rs. 3,80,48,100/- being classified anything as other than non-compete fees;

(c) The amount of Rs. 3,80,48,100/- if held to be not claimable as non-compete fees, then the authorities must hold under which head is the same classifiable. This not being done, the amount of Rs. 3,80,48,100/- is classifiable as non-compete fees as claimed; and

(d) The classification of the amount of Rs. 3,80,48,100/- under the head "profit in lieu of salary" under Section 17 of the Act must fail as the obligation under the Agreement dated 31st March, 2002 is to return the same if there is a breach of the Agreement on the part of the Appellant."

5. Per contra, Mr. Kotangale, learned Counsel appearing for the Revenue in support the impugned order of the Tribunal submits as under:--

"(a) All the three authorities have independently rendered a finding of fact that the amount of Rs. 3,80,48,100/- received by the Appellant is not a non-compete fee. This finding of fact was on the basis of the evidence placed before it. This finding of fact is not shown to be perverse and/or arbitrary. Accordingly, no interference is called for with the impugned order of the Tribunal; and

(b) The authorities under the Act have come to a finding of fact that the so called agreement dated 31st March, 2002 is colourable document being a subterfuge, as in fact, no amount was in fact paid as non-compete fees to the Appellant."

6. We have considered the rival submissions. In principle, there is no dispute that the amount received as Rs. 3,80,48,100/- if held to be a non-compete fees in respect of Assessment Year 2002-03, then the same is not chargeable to tax. This issue stands settled by the decision of the Apex Court in *Guffic Chem P. Ltd.* (supra). The Revenue also does not dispute the aforesaid position in law. The only issue before us is whether the amount of Rs. 3,80,48,100/- paid in terms of the agreement dated 31st March, 2002 can be said to be a payment made as non-compete fees.

7. It is a settled position in law that where the Authorities under the Act have determined a question of fact on the basis of inferences drawn from evidence and material on record, then unless such inferences drawn are either arbitrary and/or perverse and/or such that no person trained in law could arrive at, the Court would not interfere in an appeal under Section 260-A of the Act. In other words, where the view of the authorities on facts based on inference is a possible view and sustainable then this Court will not interfere with the view of the

authorities. We shall now examine the submissions keeping in mind the above broad test.

8. In the present facts, the Assessing Officer in his order dated 30th January, 2004 had held that the agreement dated 31st March, 2002 is not believable and the whole amount shown as payment for non-compete fees with Grasim is only a camouflage. This is particularly so in view of the failure of the Appellant to explain the manner in which the compensation arrived at an odd figure of Rs. 3,80,48,100/- even when it is the case of the Appellant that it was a negotiated fees. The Appellant at no stage thereafter either before the authorities under the Act or even before us at the hearing of the appeal made any attempt to explain the circumstances in which the non-compete fees was negotiated at an odd figure of Rs. 3,80,48,100/-. The submission of the Appellant that the figure of the compensation being odd or round, cannot by itself determine the character of the Appellant cannot be disputed. However, it is only one of the factors which the authorities have been relied upon to determine whether or not the amount of Rs. 3,80,48,100/- is in fact a non-compete fee. In fact, the Appellant had claimed that an amount of Rs. 3,80,48,100/- was arrived at after negotiations. Thus, if it was so, the Appellant ought to have made available the break-up of the constituents of the odd figure of Rs. 3,80,48,100/- as non-compete fees. This is particularly so, when it was specifically sought for by the Assessing Officer. Further, even before the Appellate Authorities, the same was not made available. This is one of the features which suggests that the payment is not for non-compete fees as relied upon by all the authorities.

9. Similarly, the contention that the amount of Rs. 3,80,48,100/- was received by the Appellant before the date of retirement and also before the execution of the non-compete agreement dated 31st March, 2002 by itself would not determine the character of the payment. The fact that the character of payment does not undergo a change, depending upon timing of its receipt, cannot be disputed. However, in the normal course of business before any person agrees to pay such a large amount of Rs. 3,80,48,100/- as non-compete fees, it would ensure that the nature of obligation a person would not undertake and if done, would fall within the meaning of competition. This would have to be first determined and the terms set out and accepted by the parties in writing before any payment is made. Consequently, this also an indication of the fact that the payment which was made in advance was for some other purpose and not for as non-compete fees as claimed. However, as an afterthought, the same has been shown as non-compete fees to reduce the tax implication.

10. It was next contended by Mr. Murlidharan, learned Counsel appearing for the Appellant that the impugned order incorrectly places reliance upon the letter dated 29th October, 2001 to hold that the amount of Rs. 3,80,48,100/- is not a non-compete fees. This on the basis that it referred to an advance of Rs. 2.00 Crore to be given by Grasim to the Appellant against non-compete fees, ex-gratia and other fees. It is submitted that on 29th October, 2001 i.e. when

advance was directed to be paid, the payment of non-compete fees was under negotiation. In any case, it is submitted that the letter dated 29th October, 2001 is not determinative of the character of payment. We find that the advance of Rs. 2.00 Crore was an advance made not only against non-compete fees but also in respect of other fees namely - ex-gratia, other fees etc., The Appellant at no point of time, gave the break-up of Rs. 2.00 Crore paid in advance on 30th October, 2001 and the amount thereof attributable to non-compete fees. Nor has the Appellant led any evidence from Grasim to show what quantum out of Rs. 2.00 Crore paid to the Appellant, is on account of non-compete fees. Thus, this factor is one more feature which leads to the view that it is improbable the payment was for non-compete fees as claimed by the Appellant.

11. Mr. Murlidharan, learned Counsel appearing for the Appellant next submits that the impugned order has incorrectly relied upon the fact that Grasim had deducted the TDS on the payment of non-compete fees of Rs. 3,80,48,100/- made to the Appellant. The Appellant accepted the TDS without any protest. This itself evidences the fact that the Appellant accepts the fact that payment is not for non-compete fees. However, the Appellant submits that there can be no estoppel against statute. Therefore, even if Appellant itself agrees to the deduction of TDS by Grasim, yet it would not prevent the Appellant from urging that in law, the non-compete fees cannot be subjected to tax. There can be no quarrel with the above submission of the Appellant. However, when this fact of non-deduction of TDS and no protest by the Appellant is taken along with other facts, the view taken by the authorities that the payment is made not on account of non-compete fees, is a reasonable and possible view. This view cannot be considered to be perverse in any way.

12. Mr. Murlidharan, learned Counsel appearing for the Appellant next points out that the impugned order relies upon the fact that the Appellant was 81 years of age at the time of retirement and thereafter, incorrectly concludes that he is unlikely to compete with his employer. Moreover, the impugned order records the fact that the Appellant was re-appointed on the very next date i.e. 1st April, 2002 as an adviser to the Grasim. On the above basis, the impugned order concludes that it is indicative of the fact that the Appellant continues to serve Grasim and, therefore, he could not have competed with Grasim. Thus, concluding that the payment of Rs. 3,80,48,100/- was not a payment for non-compete fees. It is submitted on behalf of the Appellant that competition to Grasim from the Appellant is not by physical labour but by sharing his experiences and business tactics with Grasim's competitors. We understand. However, the fact is that in normal human conduct, where a person has worked with his employer for over 33 years and himself is over 80 years of age, has received a handsome retirement package, would not compete with his former employer. Thus, this conclusion of the Tribunal is a possible view and cannot be said to be perverse and/or arbitrary.

13. It was next submitted by the Appellant that the classification of the amount

of Rs. 3,80,48,100/- as salary must fail/fall as under the Agreement dated 31st March, 2002, there is an obligation to return, if the Appellant commits a breach. This submission overlooks the fact that the Agreement dated 31st March, 2002 has on examination of the surrounding circumstances has been found to be in the nature of camouflage. Thus, being only a paper document, no right or obligations are created by the document.

14. Therefore, in the above facts, if one takes into account all factors listed out by the Tribunal in its impugned order, the view taken by the authorities in the impugned order of the Tribunal in confirming the orders of the lower authorities is a very possible and reasonable view in the facts of case. The Appellant has not been able to show that the finding of the Tribunal was in any manner perverse and/or arbitrary and/or contrary to the material available on record or arrived at over looking the submission made before them. In the circumstances, there is no warrant to interfere with the finding of the Tribunal.

15. It was submitted by Mr. Murlidharan that when the impugned order of the Tribunal has come to a finding that the amount of Rs. 3,80,48,100/- is not a payment made for non-compete fees then it had to determine the character of Rs. 3,80,48,100/- received by the Appellant. We need not dwell on this submission as it is not a question which had been framed at the admission of this appeal. Moreover in the present facts, the Assessing Officer in his order dated 30th January, 2004 has after negating the Appellant's claim that Rs. 3,80,48,100/- is a non-compete fee held that the same is classifiable as profit in lieu of salary under Section 17 of the Act. This determination by the Assessing Officer was not a subject matter of challenge by the Appellant before any of the appellate authorities. Thus, it is not an issue which even arises from the impugned order of the Tribunal.

16. In the circumstances, we see no reason to interfere with the impugned order of the Tribunal. Therefore, the question as framed is answered in negative i.e. in favour of the Revenue and against the Appellant.

17. Appeal disposed of in the above terms. With no order as to costs.