
(2009) 03 RAJ CK 0056
In the Rajasthan High Court

Commissioner of Income Tax

APPELLANT

Vs

Mahindra and Co. Ltd.

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Income Tax Act, 1961 — Section 143, 147, 148, 256, 41

Citation : (2009) 179 TAXMAN 131

Hon'ble Judges : R.C. Gandhi, Acting C.J.; Mohammad Rafiq, J

Bench : Division Bench

Judgement

Mohammad Rafiq J.

1. This Reference has been made by the Income Tax Appellate Tribunal at the instance of the Revenue u/s 256(1) of the Income Tax Act, 1961 pertaining to the assessment year 1973-74 seeking opinion of this Court on the following question of law:

Whether the Tribunal was right in coming to the conclusion that the value of the assets taken over on amalgamation should be taken at book value as was existing in the hands of the amalgamated company for working out the cost of the shares for purposes of determining the gains or loss thereon?

2. Reference has been made in relation to assessment of the year 1973-74 which was sought to be reopened by the Income Tax Officer, (for short, "I.T.O.") who issued notice to the Assessee u/s 148 of the Income Tax Act, 1961 (for short, "the Act") on 2/1/1978. Assessee filed return on 14/2/1978. Assessment was reopened as according to the I.T.O., the Assessee did not disclose true facts of its income. The Assessee Company claimed loss of Rs. 48,510/- on sale of shares of M/s. Baranagore Jute Factory and M/s. Equitable Coal Co. which was allowed in the original assessment. These shares had come to the Assessee on account of amalgamation of two companies with it namely; M/s. Sri Vijay Laxmi Trading Co. and M/s. Eastern Trading Syndicate (P) Ltd. Amalgamated company M/s. Eastern Trading Company held 300 shares of M/s. Baranagore Jute Co. Ltd. which were

taken over for Rs. 54,450/- @181.50 per share, which the Assessee sold in the market for Rs. 21,000/- and thus claimed loss of Rs. 33,450/- whereas the Assessee paid only a sum of Rs. 33,333/- for its entire acquired assets worth Rs. 1,39,330/-. According to the Revenue, cost of each share comes to Rs. 43.42 and therefore cost of 300 shares work out to Rs. 13,076/- only and sale price being Rs. 21,000/-, there was profit of Rs. 7,974/- instead of loss of Rs. 33,450/- which was wrongly allowed at the time of original assessment. Similarly, the Assessee took over the assets of M/s.Vijay Laxmi Co.Ltd. worth Rs. 8,23,546/- for only Rs. 5,00,000/-. This amalgamated company held 500 shares of M/s.Equitable Coal Co. Assessee claimed cost of these shares at Rs. 31.62 per share thus totalling Rs. 15,810/-. These shares were sold @1.50 per share for Rs. 750/- only. The Assessee claimed straight loss of Rs. 15,060/- whereas I.T.O. on the basis of the purchase made by the Assessee and proportionate value of shares arrived at loss of Rs. 876/- only (Rs. 7,924 - Rs. 8,850) as against Rs. 48,510/- shown by the Assessee (Rs. 33,450 + Rs. 15,060). The I.T.O. passed the assessment order u/s 147(a)/143(3) of the Act on 22/12/1981 by disallowing the loss on sale of shares to the extent of Rs. 47,634/- and with that addition to the income of Rs. 31,954/- as per original assessment order computed the net total income of the Assessee at Rs. 79,588/-.

3. The Assessee thereupon filed appeal before the Commissioner of Income Tax (Appeals), who vide order dated 31/10/1985 while relying on the judgment of Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), held that since the assets of the amalgamated companies were taken over as a going concern with all their assets and liabilities, they could not be valued separately to determine the cost on which they were taken over and proceeds of amalgamation thus resulted in slump transaction where it was not possible to allocate the purchase price amongst taken over assets. CIT (Appeals) therefore allowed the claim of the Assessee and accepted the appeal vide its order dated 31/10/1985 reversing the order of assessment.

4. Revenue preferred appeal before the Income Tax Appellate Tribunal Jaipur which relying on its earlier order for the assessment year 1972-73 on the same Assessee, vide order dated 11/9/1986 held that once it has been conceded that the assets have to be taken at the book value as existing in the hands of the amalgamated companies for working out the cost of the shares, then only possible conclusion is that the method adopted for determination of value of the shares was not proper.

5. We have heard Shri J.K. Singhi, learned Counsel for the Revenue and Shri A.Kasliwal, learned Counsel for the Assessee and perused the impugned orders.

6. Shri J.K. Singhi, learned Counsel appearing for Revenue has argued that CIT (Appeals) has erroneously relied on the judgment of Supreme Court in Mugneeram Bangur and Co. supra, which is based on different factual aspect as in that case it was the difference in purchase consideration and value of assets

purchased, which was taxed, whereas in the present case, it is subsequent sale of assets which forms basis for levy of tax. Admittedly, Assessee itself cannot deny the value of assets calculated by it as it is only after calculating the value of assets that the amount of purchase consideration would have been arrived at by the Assessee. Thus, the assess cannot blow hot and cold at the same time adopting a lower value for the purpose of calculating purchase consideration and a higher value for showing loss in its books. Learned Counsel for the Revenue submitted that the judgment of Supreme Court in *Mugneeram Bangur and Co. supra* therefore does not apply to the facts of the present case. Learned Counsel for the Revenue relied on the judgment of Supreme Court in *Commissioner of Income Tax, Gujarat Vs. M/s. Artex Manufacturing Co.*, and another judgment of Supreme Court in *Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar*, and argued that Supreme Court in both these cases held that taxing authority is only entitled to determine true legal character of transaction but cannot displace legal effect of transaction by probing into substance of the transaction. It was further held that if an Assessee carrying on a certain business subsequently sales business to another party as a whole, profit from such sale in the hands of the Assessee would be taxable.

7. Shri J.K. Singhi, learned Counsel for the Revenue further argued that in *Artex Manufacturing Co. supra*, the Supreme Court while considering the ratio of *Mugneeram Bangur and Co.* held that if on the basis of the facts it can be found that a particular price is attributable to a particular item, then the excess amount would be chargeable to tax under Section 10(2)(vii), proviso (ii) of the 1922 Act [Section 41(2) of the 1961 Act]. It was argued that in the present case, the assets of the amalgamated company were purchased by the Assessee for Rs. 33,333/-, value of the share being indicated separately, its proportionate value has to be arrived at to determine as to what was the loss or profit when such shares were sold at a later stage by the Assessee in the market.

8. Per contra, Shri A. Kasliwal, learned Counsel for the Assessee argued that Commissioner Income Tax (Appeals) and the Income Tax Appellate Tribunal were perfectly justified in allowing the loss to Assessee. It was argued that price of the assets cannot be modified and in no case a modified cost can be adopted in present case. Notwithstanding the indicated value thereof in account books of amalgamated company, price of the shares would be determinable by forces of market and therefore, entry of specified price in the account books does not necessarily represent its correct value. The learned Counsel in support of his argument, relied on the judgment of Supreme Court in *Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department)*, and further relied on Division Bench judgment of Bombay High Court in *Premier Automobiles Ltd. Vs. Income Tax Officer and Another*, and judgment of Calcutta High Court in *East India Electric Supply and Traction Co. Ltd. Vs. Commissioner of Income Tax*,

9. In order to examine the correctness of the impugned-orders, we have to go

back to the ratio of judgment of Supreme Court in *Mugneeram Bangur and Co. supra* to find out in the first place whether the same is applicable to the facts of the present case and secondly, to ascertain whether the view then expressed by the Supreme Court still holds good.

10. In *Mugneeram Bangur and Co. supra*, the respondent *Mugneeram Bangur and Co.* (vendors) was carrying on the business of land development in Calcutta. By an agreement dated 7/7/1948, the partners of the firm agreed to sell all the business of the said firm to the amalgamated Development Limited (vendee) which company was promoted by the partners of the firm. As per agreement, 17,500 redeemable preference shares of Rs. 100 each and 17,493 ordinary shares of Rs. 100 each agreed to be given by the vendee company to the vendor in full satisfaction of the purchased price of Rs. 34,99,300/-. The Income Tax Officer held that a sum of Rs. 2,50,000/- was actually charged by the vendors as a lump-sum amount of profits on sale of valuable stock in trade and not goodwill as alleged. The Appellate Assistant Commissioner in appeal held that the said sum of Rs. 2,50,000/- was the value of the goodwill and since the transfer was a transfer of business as a going concern, the profit was the capital gain and therefore not liable to tax. In those facts, it was held by the Supreme Court that mere fact that in the schedule the prices of land is stated does not lead to the conclusion that part of the slump price is necessarily attributable to the land sold. As the vendors were transferring the concern to a company, constituted by the vendors themselves no effort would ordinarily have been made to evaluate price of the land as on the date of sale. What was put in the schedule was the cost price, as it stood in the books of the vendors. Even if the sum of Rs. 2,50,000/- attributed to goodwill is added to the cost of land, it is nobody's case that this represented the market value of the land. It would thus be seen that transaction in the aforesaid was between the vendor firm and the vendee company which agreed to purchase the said firm as a going concern. In the present case, however, it is nobody's case that it was not possible to allocate the price of the purchased/taken over assets separately. Moreover, the transaction in the instant case leading to levy of tax is sale of shares acquired by the Assessee company from the amalgamated companies at later stage. Judgment of *Mugneeram Bangur and Co. supra* therefore cannot apply to the facts of the present case.

11. Judgment of the Bombay High Court in *Premier Automobiles Ltd. supra* on which reliance has been placed by the learned Counsel for the Assessee was incidentally also a case where appellant *Premier Automobiles Ltd.* agreed to sale its plants and machinery for manufacturing of *Padmini Peugeot (AP)* to *Kalyan Motors Col.Ltd.* as a going concern on "as is where is" basis. *East India Electric Supply and Traction Co.Ltd. supra* was also a case in which the Assessee undertaking was acquired by the West Bengal State Electricity Board and when Assessee approached the Income Tax Appellate Tribunal contending that undertaking having been sold at a slump price and no amount attributable to depreciable and non-depreciable assets, the decision of the I.T.O. was a

mistake apparent from the records, which was required to be corrected. It would be evident from both the aforesaid cases that transaction of sale was between the amalgamated company and the acquiring company whereas in the present case, the sale of share in the present case has taken place at secondary stage much subsequent to amalgamation of two companies with the Assessee company which had acquired the shares. What is in question is the method of arriving at the value of the share price at which they were taken over by the Assessee as against their book value in the hands of amalgamated companies and their selling price.

12. Supreme Court in B.M. Kharwar supra was dealing with a case where Assessee carrying on the business of purchasing and selling cloth, closed its manufacturing side of the business and transferred its machinery to a private limited company in share capital of which, the partners of firm had the share and interest as they had in the assets and profits of partnership. Excess amount realised over the written down value of the machinery, was brought to tax by the income tax officer on the basis of the decision of Supreme Court in Commissioner of Income Tax v. Sir Homi Mehtas Executors, (Bom.) and decisions of High Courts of Bombay and Calcutta in Rogers & Co. v. Commissioner of Income Tax (1959) 34 ITR 336 and COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA Vs. MUGNEERAM BANGUR AND COMPANY., The Income Tax Appellate Tribunal as well as High Courts held that no profit in a business sense could be deemed to have resulted to the firm by said transfer and, therefore, second proviso to Section 10(2)(vii) of the 1922 Act was not applicable. The said view was reversed by the Supreme Court holding that taxing authority indeed is entitled to determine true legal character of transaction but cannot displace legal effect of transaction by probing into substance of the transaction. Supreme Court in para 8 of B.M. Kharwar supra, observed thus:

8. In the present case the machinery of the factory belonging to the firm was transferred to the private limited company. Assuming that thereby readjustment of the business relationship was intended the liability to be taxed in respect of the readjustment had to be determined according to the strict legal form of the transaction. The Company was a legal entity distinct from the partnership under the general. Transfer of the machinery was by the firm to the company; and the legal effect of the transaction was to convey for consideration the rights of the firm in the machinery to the company. The transaction resulted in excess realization over the written down value of the machinery to the firm, and the liability to tax if any arising under the Act could not be avoided merely because in consequence of the transfer the interest of the partners in the machinery was substituted by an interest in the shares of the company which owned the machinery.

13. In the case of Artex Manufacturing Co. supra, Supreme Court has held that where there is a slump transaction and the business is sold as a going concern, what is to be seen is whether any portion of the slump price is attributable to the

stock-in-trade and if on the basis of the facts it can be found that a particular price is attributable to a particular item, then the excess amount would be chargeable to tax u/s 10(2)(vii), proviso (ii) of the 1922 Act [Section 41(2) of the 1961 Act]. In those facts, the Supreme Court found that it was very difficult to attribute part of the slump price to the cost of the land sold in the realisation sale since there was no evidence that any attempt was made to evaluate the land on the date of the sale. Supreme Court therefore did not accept the plea of the Assessee similar to the one raised before us and held that it was an admitted case of the Assessee even before the Income Tax Officer that purchase consideration of plant & machinery and dead stock as per Assessee's books came to Rs. 11,50,400/- whereas, valuation thereof as per revaluation made by the valuer came to Rs. 15,87,296. Written down value of plant & machinery and dead stock being the difference of above two was thus Rs. 4,36,896/-. It was held that this is not a case in which it can be said that the price attributed to the items transferred is not indicated and hence Section 41(2) of the Act of 1961 cannot be applied. The view to the contrary expressed by the High Court was reversed and the question was accordingly answered in favour of the Revenue.

14. In the present case also, we find that value of 300 shares of M/s. Baranagore Jute Factory and Equitable Coal Co. before amalgamation was indicated as Rs. 54,550/- and its entire assets were taken over for Rs. 1,39,330/-. The Assessee-company at the time of amalgamation of the said company, paid sale consideration of Rs. 33,333/- towards value of the shares. Thus, as per the indicated parameters, proportionate value of 300 shares worked out to only Rs. 13,076/- which shares at later point of time were sold by the Assessee-company in the market for Rs. 21,000/-. There was thus indeed earned profit of Rs. 7,974/-. Similarly, the book value of 500 shares of M/s. Equitable Coal Co. held by M/s. Sri Vijay Laxmi Trading Co. in its account was Rs. 15,810/-. The total net value of each asset was Rs. 8,23,546/- at the time of amalgamation and on purchase consideration of Rs. 5,00,000/-, proportionate value of the shares thus would come to Rs. 9,600/- whereas such shares were sold by the Assessee company in the market for Rs. 750/- only. The I.T.O. thus rightly held that there was incurred loss of only Rs. 8,850/-. The I.T.O. was therefore also right in allowing loss of Rs. 876/- for sale of the shares of second company, as against profit of Rs. 7,974/-, out of sale of the shares of first company. Total loss of Rs. 876/- was therefore rightly allowed by the I.T.O. Instead of allowing total claimed loss, the I.T.O., in our view correctly disallowed loss of Rs. 48,510/- (Rs. 33,450 + Rs. 15,060/-) as claimed by the Assessee.

We are, therefore, of the opinion that the view taken by the Commissioner of Income Tax (Appeals), Jaipur and the Income Tax Appellate Tribunal, Jaipur was erroneous in law and, therefore, we answer the question of law referred to this Court accordingly, in favour of the Revenue and against the Assessee.