(2008) 11 P&H CK 0140

In the Punjab And Haryana At Chandigarh

Commissioner of Income Tax APPELLANT

Vs

Max India Ltd. RESPONDENT

Date of Decision : 04-11-2008

Acts Referred:
Income Tax Act, 1961 — Section 2, 260A, 41, 48, 50

Citation : (2009) 319 ITR 68 : (2009) 178 TAXMAN 196

Hon'ble Judges : L.N. Mittal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Adarsh Kumar Goel, J.—This appeal has been preferred by the revenue u/s 260A of the Income Tax Act, 1961 (for short ''the Act'') against the order of Income Tax Appellate Tribunal, Amritsar Bench, Amritsar passed in ITA No. 372 (Asr.) of 2002 on 18-5-2007 for the assessment year 1998-99 proposing to raise following substantial questions of law:

(i) Whether, on the facts and in the circumstances of the case and in law, the IT AT is right in holding that the sale of Betalactum Division by the assessee-company was a slump sale to which Sections 50 and 50A are not applicable and that long-term capital gain is to computed by indexing the cost of acquisition of the Betalactum Division and its improvement?

2. The assessee claimed loss of Rs. 12,67,69,823 under the head "Long-term capital loss" or the sale of Betalactum Division on slump sale basis by deducting, from the sale proceeds, the acquisition of the Betalactum Division and improvement. The Assessing Officer rejected the plea of the assessee and held that by virtue of provisions of Sections 50 and 50A, excess of sale consideration over the written down value of block of assets, was liable to tax as short-term capital gain. It was also held that sale of Betalactum Division was not slump sale as technical know-how was separately sold on a later date ie., 1-7-2000 while the rest of the undertaking had been sold on 1 -7-1997. The Commissioner of

Income Tax allowed the appeal of the assessee, which view has been upheld by the Tribunal.

3. We have heard learned Counsel for the parties and perused the record.

4. In para 20 of its order, the Tribunal held that the sale was slump sale if it was a sale of going concern, even if some of the assets were retained by the transferor and, thus, Sections 50 and 50A of the Act, were not applicable. Para-29 of the order is reproduced below:

29. From the above, it is evident that for a sale to be termed as a ''slump sale'', it is not essential that all the assets and liabilities must be transferred. Even if some assets and liabilities are retained by the transferor, the sale would not lose the character of being a slump sale, if the transfer is of a going concern, on that basis and the transferee is in a position to carry on the business without any interruption. In the present case, the right to use the technical know-how developed by the assessee was granted by the assessee to the transferee against the payment of a separate consideration. The proprietary rights therein were retained till 30-6-2000. On facts, in view of the above numerous judicial pronouncements, it cannot be said that what the transferee acquired was not a going concern. Rather, after the transfer, the transferee carried on the business without any disruption therein. In West Coast Chemicals & Industries Ltd''s case (In Liquidation){supra),F.X.Periera& Sons (Travancore) (P.) Ltd. 5 case (supra), Premier Automobiles Ltd. ''s case (supra) and Raka Food Products ''case (supra), amongst others, it has been held that in the case of a sale of an undertaking as a whole, on a going concern basis, if some assets are retained by the transferor or some liabilities are not taken over by the transferee, this fact does not render the slump sale as not a slump sale. A similar view has been expressed by the Delhi Bench of the Tribunal in ITA. Nos. 2584/Delhi/2003, for assessment year 1999-2000 & 5507/Delhi/2003, for assessment year 2000-01, in the case of M/s. ECE Industries Ltd. vide order dated 29-9-2006 (copy placed on record). Therefore, the findings of the learned CIT(A) in this regard are upheld.

5. Learned Counsel for the revenue submitted that sale in question was sale of block of assets which was liable to be treated as short-term capital gain and the assessee was not entitled to the benefit of indexing u/s 48 of the Act, in view of provisions of Sections 50 and 50A of the Act.

6. Learned Counsel for the assessee submitted that concept of sale of block of assets was different from sale of the entire undertaking as a going concern which included land and goodwill to which principle of depreciation did not apply. It was also submitted that the sale was not item-wise and it was not possible to ascertain the value of block of assets or individual assets as has been rightly held by the Tribunal. Reference has also been made to definition of block of assets u/s 2(11) of the Act, which is to the following effect:

''block of assets'' means a group of assets falling within a class of assets comprising -

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, in respect of which the same percentage of depreciation is prescribed;

7. Learned Counsel for the assessee relied upon judgment of the Hon''ble Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), . In the said judgment, the question for consideration was whether receipt of money by sale of business concern was taxable profit or capital gain.

8. The test applied was that in sale of the whole concern, there could be no question of profit taxable to Income Tax. The sale price will represent appreciation of capital. It was held that slump sale price could not be attributed partly the cost of land and partly to other assets. It was concluded that since no part could be attributed to the cost of land which was stock-in-trade in that case, there was no profit liable to tax.

9. Reference has been next made to Commissioner of Income Tax, Gujarat Vs. Electric Control Gear Mfg. Co., . In the said case, the question was whether sale of entire business by the assessee was assessable u/s 41(2) of the Act. Section 41(2) of the Act was substantially similar to Section 50 of the Act, inasmuch as in Section 41(2) of the Act, sale of block of assets was treated as business income and in Section 50 of the Act sale of block of assets is treated as short-term capital gain. The case of the assessee was to treat the sale proceeds on the sale of the entire concern as long-term capital. The Hon''ble Supreme Court held that the sale proceeds could not be treated as profit of business and Section 41(2) of the Act was not applicable. In CIT v. Artex Mfg. Co. [1997] 93 Taxman 357, another judgment delivered on the same day by the same Bench it was held that the price attributable to plant, machinery and dead stock being ascertainable, the case of the Artex Mfg. Co. (supra), was distinguishable.

10. The assessee also relied upon judgment of Delhi High Court in PNB Finance Ltd. v. CIT [2001] 252 ITR 491'' (Delhi), wherein apart from referring to the judgments of the Hon''ble Apex Court in Mugneeram Bangur and Co. (Land Department)''s case (supra) and Electric Gear Control Co. ''s case (supra), reference was made to observations in 11 Judges-judgment in Rustom Cavasjee Cooper Vs. Union of India (UOI), to the effect that aggregate value of components of a company could not be valued as value of entirety of the unit especially when the property is a going concern with an organized business. The said observations were made in the context of considering the contention whether valuation of compensation for acquisition of banking companies with reference to the assets of the said Company was appropriate compensation. After referring to the said judgments, D.K. Jain, J. (as his Lordship then was) observed:

...In Rustom Cavasjee Cooper Vs. Union of India (UOI), , it was also observed that the expression ''property'' has a wide connotation and (page 354) ''it includes not only assets, but the organisation, liabilities and obligations of a going concern as a unit'' in view of the wide meaning of the expression ''capital asset'' in Section 2(14) of the Act and ''property'' as understood in its ordinary wide connotation, we have no hesitation in holding that the business undertaking of the assessee was a ''capital asset''. In fact, learned Counsel for the assessee did not dispute before us that the ''undertaking'' of the assessee was a ''capital asset'' within the meaning of Section 2(14) of the Act. The question is, accordingly, answered in the affirmative....

... The Apex Court observed that the expression ''undertaking'' in Section 4 of the Banking Companies (Acquisition and Transfer of Undertaking Act, 1969, clearly means a going concern with all its rights, liabilities and assets as distinct from the various rights and assets which compose it. In Halsbury''s Laws of England it is said that (page 354):

Although various ingredients go to make up an undertaking, the term describes not the ingredients, but the completed work from which the earning arise''. A support is lent to this view by the decision of the Karnataka High Court in Syndicate Bank Ltd. Vs. Additional Commissioner of Income Tax, , wherein, following the observations of the Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), , the court held that if the sale is of a whole concern and no part of the agreed price is indicated against different and definite items having regard to their valuation on the date of sale, the aggregate price cannot be apportioned of capital assets in specie. We, accordingly, answer the second question in the affirmative, in favour of the revenue and against the assessee.(p. 498)

11. Learned Counsel for the assessee further pointed out that the term ''block of assets'' in Section 2(11) of the Act only referred to depreciable assets. For this proposition, reliance has been placed in The Assistant Commissioner of Income Tax Vs. Raka Food Products, . Markandey Kaiju, CJ. (as his Lordship then was) observed:

Land is not a depreciable asset. Section 50 of the Act deals only with transfer of depreciable assets. Once the land forms part of the assets of the undertaking and the transfer is of the entire undertaking as a whole, it is not possible to bifurcate the sale consideration to a particular asset. As already observed above, Section 50 of the Act applies only when depreciable assets alone are transferred.

12. It is patent from the above that in the present case, sale proceeds received by the assessee are from sale of a going concern, which is slump sale and the same is not sale of block of assets which term refers only to depreciable assets. Thus Section 50 is not applicable.

13. The view of the Tribunal is, thus, consistent with the settled law.

14. No substantial question of law arises for consideration.

15. The appeal is dismissed.