

(2010) 12 MAD CK 0276
In the Madras High Court
Case No : T.C. (A.) No. 1530 of 2008

Helios and Metheson Information Technology Ltd.	APPELLANT
Vs	
Assistant Commissioner of Income Tax	RESPONDENT

Date of Decision : 06-12-2010

Acts Referred:

Income Tax Act, 1961 — Section 143, 143(3), 147, 148, 260A

Citation : (2011) 203 TAXMAN 102

Hon'ble Judges : N. Kirubakaran, J; F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : Vijayaraghavan, for the Appellant; K. Subramanian, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Ibrahim Kalifulla, J.—The Assessee has come forward with this appeal. The challenge is to the order of the Tribunal dated March 28, 2008 in I. T. A. No. 1015/Mds/06. The assessment year is 1997-98. The substantial questions of law raised in this appeal are as under:

(1) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount received towards restrictive covenant is revenue receipt and taxable ?

(2) Whether on the facts and circumstances of the case, the Tribunal failed to appreciate that the non-compete fee would be considered for taxation within the meaning of the provisions of Section 28(va) only with effect from April 1, 2003 ?

When this appeal was taken up for hearing, the learned Counsel for the Appellant submitted that one other substantial question of law also arises for consideration viz., "reopening of assessment by invoking Sections 147 and 148 of the income tax Act was not maintainable."

2. Mr. K. Subramanian, learned senior standing counsel for the Revenue however

contended that the said issue not having been framed earlier, and not having been specifically raised in the grounds of appeal before this Court, the Appellant cannot be permitted to raise the said question at this point of time.

3. When we consider the submission of this particular issue viz., as to raising a substantial question of law apart from what has been framed by this Court while entertaining this appeal, as a matter of fact, we find that when the Appellant was issued with notice u/s 148 of the income tax Act (hereinafter referred to as "the Act"), on December 20, 2003, the Appellant submitted a reply on March 21, 2005. In paragraph (b)(vi) of the reply, the Appellant raised a contention to the effect that there was no fresh material to conclude that the transaction has not taken place at all and therefore, the notice issued u/s 148 of the Act was not in accordance with law. That apart, u/s 260A of the Act, the proviso to Sub-section (4) specifically provides that nothing in the Sub-section should be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is specified that the case involves such question. Therefore, there is every power vested in this Court to deal with the substantial question of law not formulated at the time when the appeal was entertained, subject however to the satisfaction of the court, that such a question was involved in the case and for reasons to be recorded for that purpose.

4. As pointed out by us earlier, the Appellant succeeded before the Commissioner of income tax (Appeals), after the assessing authority ordered reopening of the assessment u/s 148 of the Act. Therefore, when the issue went before the Tribunal, that issue came to be dealt with in extenso by the Tribunal. In such circumstances, the issue relating to the validity of reopening of the assessment was fully contested by the parties before the Tribunal. Therefore, merely because the said issue was not specifically formulated as a question of law while entertaining this appeal, it cannot be held that on that simple ground the said question should not be allowed to be agitated by formulating a question of law. As we are convinced that the Appellant was agitating such question right from the date of issue of the date of notice u/s 148 of the Act, there is every justification in the Appellant to now seek for framing the said issue as one of the substantial questions of law to be considered. Consequently, we formulate the said question also, which reads as under:

Whether the issuance of notice u/s 148 of the Act against the Appellant was valid in law ?

5. We heard Mr. Vijayaraghavan, learned Counsel for the Appellant and Mr. K. Subramanian, learned senior standing counsel for the Revenue.

6. Mr. Vijayaraghavan in his submissions contended that there is nothing new that has come to the knowledge of the Assessing Officer after the assessment u/s 143 of the Act and, therefore, issuance of notice u/s 148 of the Act on the same set of facts on mere change of opinion was not maintainable. The learned

Counsel would therefore contend that when the Appellant disclosed the receipt of Rs. 542 lakhs as an extraordinary item in the profit and loss account, specifically referring to the same as by way of transfer of division, it cannot be held that there was no true and valid disclosure of the transaction in order to state that the reopening of the assessment u/s 148 beyond the four years period was maintainable. According to the learned Counsel, there being no fresh material and there being no allegation of lack of true and full particulars in the disclosure of accounts, the reopening of the assessment u/s 148 of the Act by notice dated December 20, 2003 was beyond the four year period which ended on March 31, 2002 and consequently, the whole proceedings are liable to be set aside.

7. The learned Counsel for the Appellant then contended that in the notice dated December 20, 2003, the Assessing Officer proceeded on the footing that the transfer of forex business was like transfer of export import licence which is covered u/s 28(iia) and could be treated as a business income, whereas forex licence issued by the Reserve Bank of India was non-transferable and that, what was really transferred by the Appellant was the entirety of its business prospects, which was nothing but transfer of capital asset. Consequently, the sum of Rs. 542 lakhs secured by the Appellant by way of transfer of such capital asset cannot be construed as income of the Appellant for the relevant year.

8. As against the above submissions, Mr. K. Subramanian, learned senior standing counsel for the Revenue contended that the Appellant did not even produce a copy of the agreement, either along with the return of income or the so-called explanatory letter dated February 8, 2000 and therefore, there was no true and full disclosure of the transfer of forex business. According to the learned senior standing counsel, the Appellant commenced the forex business only on January 3, 1995, while the assessment order related to the year 1997-98 and therefore, it was not known how there would have been any greater business asset created in relation to forex business. The learned senior standing counsel further contended that there was no true disclosure of the nature of transaction and consequently, the reopening of the assessment by issuance of notice u/s 148 of the Act cannot be held to be invalid.

9. The learned senior standing counsel also contended that, on behalf of the Revenue, an appeal was preferred before the Tribunal and the facts relating to the commencement of the forex business, location and conduct of the said business by the transferor and the transferee in the same place, and the directors of both companies being the same were raised in the grounds of appeal. According to the learned Counsel, the same were not controverted by the Appellant before the Tribunal. The learned senior standing counsel further contended that the whole transaction was rightly construed not to be a true transaction and with the very meagre materials placed by the Appellant before the assessing authority, there was every scope to hold that there was a goodwill earned, in order to hold that the receipt of Rs. 542 lakhs by way of extraordinary items (from transfer of division) was rightly brought to tax and also confirmed by

the Tribunal. The learned Counsel therefore contended that the order of the Tribunal does not call for interference.

10. Having heard the learned Counsel for the respective parties and having perused the materials placed before us, we find that the Tribunal has analysed various factors before it to arrive at the conclusion that there was no true and full disclosure of material facts necessary for making the assessment at the original stage. The proviso to Section 147 of the Act, among other things, empowers the assessing authority to invoke Section 148 of the Act to issue notice for reopening the assessment beyond the prescribed period of four years, from the end of the relevant assessment year, if the Assessee failed to disclose fully and truly all material facts necessary for the assessment for that year. It is true that in the case on hand, the last date for the four year period expired on March 31, 2002 and the notice u/s 148 of the Act came to be issued only on December 20, 2003.

11. Assessment u/s 143(3) came to be made on March 29, 2000. In the return filed by the Appellant, there was no specific reference to the receipt of a sum of Rs. 542 lakhs. However, in the profit and loss account, in the schedule, after ascertaining the profit, an extraordinary item was shown with the additional expression to the effect "from transfer of division". The sum was indicated as Rs. 542 lakhs. That apart, the Appellant is stated to have submitted a note on the extraordinary item on February 8, 2000 stating that the said sum of Rs. 542 lakhs represents consideration as a restrictive trade covenant for not engaging in forex business. Reliance was placed upon a decision of this Court in support of the said claim. In the letter written by the chartered accountant dated March 15, 2000 the Appellant, however, admitted that the date of commencement of forex business was only on January 3, 1995 with the details of RBI license. Significantly, neither the copy of the agreement, nor the date of the agreement was disclosed at any time before the issuance of notice u/s 148 of the Act, viz., December 20, 2003. In fact, even after the issuance of the notice u/s 148 of the Act, copy of the agreement was not furnished before the Assessing Officer. By making a reference to the clarificatory letter dated February 8, 2000, the Appellant wanted to contend that the assessment completed u/s 143(3) ought not to have been reopened after the expiry of the period of four years.

12. As rightly pointed out by Mr. K. Subramanian, learned senior standing counsel for the Revenue, the factum of common directors of the transferor company and the transferee company, and the location of both offices in the same place, though specifically raised in the grounds of appeal before the Tribunal, were not controverted by the Appellant. A conspectus consideration of the above factors would only go to show that the Appellant did not forward a true and full disclosure of the whole of the transaction relating to the receipt of Rs. 542 lakhs. The Appellant cannot therefore, be heard to say that while issuing notice u/s 148 of the Act, no doubt was raised as regards the bona fides of the business prospects which earned a substantial sum of Rs. 542 lakhs in the

transfer of the business relating to forex business and therefore, the Respondent was not entitled to seek for reopening of the assessment. We are not therefore, inclined to countenance the plea that the reopening of the assessment u/s 148 of the Act has not been validly made.

13. When we examine the merits of the claim made on behalf of the Appellant, we find that the Appellant's chartered accountant himself, in his letter dated March 15, 2000 disclosed that the date of commencement of forex business by the Appellant was only on January 3, 1995. We are at a loss to understand as to how, for a business that commenced hardly two years prior to the relevant assessment year, there could have been any scope at all for the Appellant to negotiate for a substantial receipt of Rs. 542 lakhs by way of non-compete fee. Apparently, the said claim of the Appellant on the face of it looks wholly unacceptable and devoid of any merit.

14. Moreover, as rightly pointed out by the Tribunal, the failure of the Appellant in not having disclosed the agreement before the Assessing Officer really raises very many doubts as to the genuineness of the alleged transaction by way of transfer of division. In fact, only in the order of the Commissioner (Appeals) there is a reference to the agreement dated March 15, 1997, by which, forex business was stated to have been transferred by the Appellant. The two sentences from the agreement which the Commissioner (Appeals) has noted are "... EFE confirms that EFE shall not carry on forex service business from the date of this agreement; and based on the preliminary due diligence both parties agreed that the price payable by the PFL for the transaction shall be INR 5: 42 crores (INR five crores and forty-two lakhs only) for the EFE agreeing to cease to carry on forex services and not to take forex services in the company in future for the next 14 years." From these set of expressions, it is not known how the Appellant could be said to have satisfactorily explained that the earning of Rs. 542 lakhs was by way of non-compete fee and thereby, treat the same as value of the transfer of capital asset. The various authorities relied on by the Tribunal in order to hold that there was absolutely no acceptable materials placed by the Appellant either before the Appellate Tribunal or before the lower appellate authority to substantiate such claim that the payment of Rs. 542 lakhs as a non-compete fee was therefore, perfectly justified. As rightly held by the Tribunal, when admittedly, the business of the Appellant itself was convened on February 13, 1995, that the directors were common, that the transferor and the transferee companies functioned in the same place, were all factors which made it explicit that the payment of Rs. 542 lakhs as a non-compete fee was shrouded with mystery, when it agreed not to deal in forex business with its assets concerned.

15. We are in full agreement with the conclusion of the Tribunal in holding that the Appellant miserably failed to establish how the receipt of Rs. 542 lakhs as compensation could be taken as non-compete fee for transfer of its forex business. The order of the assessing authority and consequently, the impugned order of the Tribunal in having set aside the order of the Commissioner of income

tax (Appeals) and restoring the order of the Assessing Officer, was perfectly justified. Therefore, while answering the third question of law in favour of the Revenue and against the Appellant that the reopening of the assessment by issuance of notice u/s 148 of the Act was valid in law, we answer the other two questions of law also against the Appellant.

16. The appeal fails and the same is dismissed. No costs.