
(1984) 05 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 1412 of 1983

Indian Metals and Ferro Alloys Ltd.

APPELLANT

Vs

Specified Authority and Others

RESPONDENT

Date of Decision : 07-05-1984

Acts Referred:

Income Tax Act, 1961 — Section 72A, 72A(1)

Citation : (1984) 149 ITR 418

Hon'ble Judges : P.C. Misra, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : Bijoy Kr. Mohanty, P.K. Misra and Debi Prasad Pal, for the Appellant;
S. Roy, for the Respondent

Judgement

Patnaik, J.—Petitioner--Indian Metals and Ferro Alloys Limited, a public limited company--impugns in this application the decision dated May 6, 1983, of the Specified Authority, annexed as annexure 1 to the writ petition, inter alia, on the grounds that the said authority did not consider relevant materials and considered irrelevant materials in coming to the conclusion that the amalgamation of Messrs Kalinga Tubes Limited with the petitioner-company did not satisfy the conditions enumerated in Clause (b) of Sub-section (1) of Section 72A of the I.T. Act, 1961 (hereinafter referred to as " the Act"). The petitioner has also prayed for a direction to opposite party No. 2, the Union of India, to issue a declaration u/s 72A(1) of the Act.

2. Some admitted facts and events necessary in the context of a decision in the case may be briefly stated hereunder: On July 1, 1978, the petitioner-company acquired controlling interest in Messrs Kalinga Tubes Ltd. after receiving due permission u/s 372(4) of the Indian Companies Act, 1913. On August 8, 1979, the petitioner-company filed a petition u/s 72A(3) of the Act with the Specified Authority for approval of the propose amalgamation of Messrs Kalinga Tubes Limited with the petitioner-company to be effective from January 1, 1979, A scheme of amalgamation was also given to the Specified Authority. On December

11, 1979, the Screening Committee directed the petitioner-company to make some changes in the scheme of amalgamation. On July 17, 1980, the Specified Authority declined to recommend the petitioner's case for getting a declaration u/s 72A(1) of the Act. On February 23, 1981, the Central Government evolved certain objective guidelines for the purpose of determining whether a scheme of amalgamation will fulfil the conditions enumerated therein. These guidelines were in the nature of revised guidelines and indicated as to what should be the criteria for the Specified Authority while taking a view on financial non-viability of the amalgamating company. It also indicated the criteria to be considered by the Specified Authority while taking a view whether public interest will be served by the amalgamation or not. In view of the aforesaid revised guidelines, the Specified Authority intimated the petitioner on April 20, 1981, that the petitioner's case would be reconsidered. On April 24, 1981, the Specified Authority heard the petitioner. In the meantime, the petitioner had made necessary applications under the Monopolies and Restrictive Trade Practices Act and had moved the Orissa High Court under the provisions of the Companies Act for amalgamation of Messrs. Kalinga Tubes Limited with the petitioner-company. On November 26, 1981, the proposed amalgamation was approved by the competent authority under the Monopolies and Restrictive Trade Practices Act and on December 11, 1981, the Orissa High Court sanctioned the amalgamation of Messrs Kalinga Tubes Limited with the petitioner-company to be effective from January 1, 1979. On December 31, 1981, the Specified Authority informed the petitioner that the authority was satisfied that if the amalgamation was effected in accordance with the schema of amalgamation, it would be in a position to recommend to the Central Government that the conditions referred to in Section 72A(1) of the Act were fulfilled. On January 15, 1982, the petitioner made an application u/s 72A(1) to the Specified Authority for making necessary recommendations to the Central Government. On May 31, 1982, the petitioner approached the Specified Authority to expedite the recommendation so that the benefits provided u/s 72A of the Act could be availed of by the petitioner-company for the assessment year 1980-81. On January 24, 1983, the petitioner sent a letter to the Specified Authority that the petitioner had decided to discontinue the production of steel tubes in view of substantial fall in the demand for the tubes and further the petitioner intimated that they were thinking of diversification to a completely unconnected product for which they had the necessary expertise as well as letter of intent from the Government of India. On May 7, 1983, the Specified Authority informed the petitioner that the amalgamation of Messrs Kalinga Tubes Limited with the petitioner-company did not satisfy the pre-conditions enumerated in Section 72A(1)(b) of the Act. This order of the Specified Authority is being impugned in this writ application.

3. It would be profitable at this stage to trace the history of Section 72A of the Act and the object with which the said provision was brought into the statute book. Section 72A (1) and (2) of the Act was introduced by Finance (No. 2) Act of 1977 with effect from April 1, 1978, The Union Minister of Finance in his

budget speech for 1977-78 indicated :

" Sickness among industrial undertakings is a matter of grave national concern. Closure of any sizeable manufacturing unit in any industry entails social costs in terms of loss of production and employment, and also waste of valuable capital assets. Experience has shown that taking over of such units by Government is not always the most satisfactory or the most economical solution. A more effective course would be to facilitate the voluntary amalgamation of sick industrial units with sound ones by providing certain incentives and by removing impediments in the way of such amalgamation. It is accordingly proposed to provide that where an amalgamation is accepted by the Central Government to be in public interest, the accumulated losses and unabsorbed depreciation of the amalgamating company will be allowed to be carried forward and set-off in the hands of the amalgamated company. "

4. Thus on and from April 1, 1978, the amalgamated company was entitled to carry forward and set-off accumulated losses and unabsorbed depreciation of the amalgamating company wherever the amalgamating company was not, immediately before such amalgamation, financially viable and where the amalgamation was in public interest and the Central Government made a declaration to that effect in exercise of powers conferred under Sub-section (1) of Section 72A of the Act. But before issuing the necessary declaration, the Central Government must be satisfied as to the fulfilment of the pre-conditions provided for in Section 72A(1) (a), (b) and (c). Sub-section (3) to Section 72A was introduced by the Finance Act of 1978 with effect from May 12, 1978, and the said sub-section provided that the Specified Authority after examining the proposed scheme of amalgamation and on being satisfied that conditions referred to in Sub-section (1) could be fulfilled if the amalgamation be effected should intimate the company that after amalgamation was effected in accordance with the scheme, it would make a recommendation to the Central Government under Sub-section (1) unless there was any material change in the relevant facts.

5. Dr. Pal and Mr. B. K. Mohanty, the learned counsel appearing for the petitioner, contended that the relevant point of time when the pre-conditions prescribed u/s 72A(1) (a) and (b) were to be fulfilled was the date of amalgamation and not a few years after the said date. In this particular case, the amalgamation having been made under orders of the court with effect from January 1, 1979, and, admittedly, the pre-conditions prescribed in Clauses (a) and (b) of Section 72A(1) having been satisfied at that point of time, the Specified Authority committed gross error of law in not recommending the case of the petitioner to the Central Government on the ground that there had been a diversification of the industry in the year 1983. According to the learned counsel, the Specified Authority had taken irrelevant materials into consideration which have vitiated the impugned order. The further contention of the learned counsel is that diversification of the industry is permissible under the guidelines issued by the Central Government and in this particular case the Central Government itself

having granted Letter of Intent, the Specified Authority committed gross error in holding that it would not be in the public interest only on the ground that there has been a diversification of the industry in question.

6. Mr. S. Roy, the learned standing counsel on behalf of the Department on the other hand, contends that the object of Section 72A being revival of a sick industry and other benefits stipulated therein being in the nature of incentive, the Specified Authority having come to know that the industry in question is no longer going to be revived, the said authority was fully justified to hold that the proposed amalgamation would not be in the public interest. According to the learned counsel, the considerations made by the Specified Authority in coming to the aforesaid conclusion were germane and not extraneous and, therefore, this court should not interfere with the same.

7. It is not necessary for us to examine the correctness of the rival contentions in view of the order we are proposing to pass in this case. u/s 72A(1) of the Act, the Specified Authority is merely to make a recommendation as to the existence or non-existence of the pre-conditions prescribed in Section 72A(1) (a) and (b) (Clause (c) has no application, inasmuch as there has been no notification by the Central Government with regard to any other conditions). The power to pass final order u/s 72A(1) of the Act lies with the Central Government itself who on the recommendation of the Specified Authority is to be satisfied as to the existence or non-existence of the pre-conditions as provided in Clauses (a) and (b) of Section 72A(1) of the Act. To us it is clear that the Central Government has to apply its mind to the recommendation as well as other relevant factors and must have its own satisfaction as to the fulfilment of the pre-conditions prescribed in Clauses (a) and (b) of Section 72A(1). It is, therefore, open to the Central Government to override the recommendation of the Specified Authority and come to its own conclusion if it is satisfied that on the materials on record, the preconditions provided for in Clauses (a) and (b) of Section 72A(1) of the Act are satisfied in a given case. Admittedly, the Central Government has not applied its mind to the relevant materials in this particular case and no order of the Central Government has been passed u/s 72A(1). The petitioner has approached this court only at the stage of recommendation of the Specified Authority against the petitioner. In our opinion, the Central Government should apply its mind to all relevant materials on record independently and pass appropriate orders u/s 72A(1) of the Act. We would, therefore, dispose of this writ application by directing the opposite party No. 2, the Union of India, represented by the Ministry of Finance, New Delhi, to pass final orders in the matter u/s 72A(1) of the Act after considering the recommendation of the Specified Authority as well as other relevant materials on record by giving a reasonable Opportunity to the petitioner to put forward its Case as to the fulfilment of the pre-conditions prescribed in Section 72A(1) (a) and (b) of the Act. The Central Government would do well to pass final orders u/s 72A(1) of the Act within two months from the date of receipt of this order.

8. The writ application is disposed of with the aforesaid direction, but in the facts and circumstances of the case without any order for costs.

P.C. Misra, J.

9. I agree.