(1984) 05 OHC CK 0013

In the Orissa High Court

Case No : O.J.C. No. 1412 of 1983

Indian Metals and Ferro Alloys Ltd. APPELLANT

Vs

Specified Authority RESPONDENT

Date of Decision : 07-05-1984

Acts Referred:
Income Tax Act, 1961 — Section 72A, 72A(1), 72A(1)(a), 72A(1)(b), 72A(3)

Citation : (1985) 20 TAXMAN 274

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

Bench : Division Bench

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

Judgement

G.B. Patnaik, J.—The petitioner-Indian Metals & Ferro Alloys Ltd., a public limited company-impugns in this application the decision dated 6-5-1983 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 Kalinga Tubes Ltd. with the petitioner-company did not satisfy the conditions enumerated in clause (b) of sub-section (1) of section 72A of the income tax Act, 1961 (''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). Some admitted facts and events necessary in the context of a decision in the case may be briefly stated hereunder: On 1-7-1978, the petitioner acquired controlling interest in Kalinga Tubes Ltd. after receiving due permission u/s 372(4) of the Indian Companies Act, 1913. On 8-8-1979, the petitioner filed a petition u/s 72A(3) with the specified authority for approval of the proposed amalgamation of Kalinga Tubes Ltd. with the petitioner to be effective from 1-1-1979. A scheme of amalgamation was also given to the specified authority. On 11-12-1979, the screening committee directed the petitioner to make some changes in the scheme of amalgamation. On 17-7-1980, the specified authority declined to recommend the petitioner''s case for getting a declaration u/s 72A(1). On

23-2-1981, 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 20-4-1981 that the petitioner''s case would be reconsidered. On 24-4-1981, the specified authority heard the petitioner. In the meantime, the petitioner had made necessary applications under the Monopolies and Restrictive Trade Practices Act, 1969, and had moved the Orissa High Court under the provisions of the Companies Act, 1956, for amalgamation of Kalinga Tubes Ltd. with the petitioner-company. On 26-11-1981, the proposed amalgamation was approved by the competent authority under the Monopolies and Restrictive Trade Practices Act and on 11-12-1981, the Orissa High Court sanctioned the amalgamation of Kalinga Tubes Ltd. with the petitioner-company to be effective from 1-1-1979. On 31-12-1981, the specified authority informed the petitioner that the authority was satisfied that if the amalgamation was effected in accordance with the scheme of amalgamation, it would be in a position to recommend to the Central Government that the conditions referred to in section 72A(1) were fulfilled. On 15-1-1982, the petitioner made an application u/s 72A(1) to the specified authority for making necessary recommendations to the Central Government. On 31-5-1982, the petitioner approached the specified authority to expedite the recommendation so that the benefits provided u/s 72A could be availed of by the petitioner for the assessment year 1980-81. On 24-1-1983, 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 7-5-1983, the specified authority informed the petitioner that the amalgamation of Kalinga Tubes Ltd. with the petitioner did not satisfy the pre-conditions enumerated in section 72A(1)(b). This order of the specified authority is being impugned in this writ application.

2. It would be profitable at this stage to trace the history of section 72A and the object with which the said provision was brought into the statute book. Section 72A(1) and (2) was introduced by the Finance (No. 2) Act, 1977, with effect from 1-4-1978. 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." [1977] 107 ITR (St.) 67.

3. Thus, on and from 1-4-1978, the amalgamated company was entitled to carry forward and set-off of 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. 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, 1978, with effect from 1-4-1978, 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 is 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.

4. Dr. Pal and Mr. B.K. Mohanty, the learned counsels 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 1-1-1979, 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.

5. 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 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.

6. It is not necessary for us to examine the correctness of the rival contentions in view of the order we ate proposing to pass in this case. u/s 72A(1), 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) 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). 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 pre-conditions provided for in clauses (a) and (b) of section 72A(1) 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). 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), 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). The Central Government would do well to pass final orders u/s 72A(1) within two months from the date of receipt of this order. The writ application is disposed of with the aforesaid direction, but on the facts and in the circumstances of the case without any order for costs.