(2012) 09 BOM CK 0001

In the Bombay High Court

Case No : IT Appeal No. 127 of 2012

Sistas (P) Ltd. APPELLANT

Vs

CIT RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Income Tax Act, 1961 — Section 10(123D), 10(23D), 115AB, 260A, 94
Securities and Exchange Board of India Act, 1992 — Section 10, 2
Securities Contracts (Regulation) Act, 1956 — Section 2(h)
Unit Trust of India Act, 1963 — Section 10, 10(23D)

Citation : (2012) 09 BOM CK 0001

Hon'ble Judges : S.J. Vazifdar, J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : Arun Sathe with Ms. Aarti Sathe and Kalpesh Turalkar, for the Appellant; Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sanklecha, J.—This appeal u/s 260A of the IT Act, 1961 ("the Act") challenges the order dt. 12-8-2011 of the Tribunal arising in ITA No. 1913/Mum/2010 relating to assessment year 2005-06. On 4-8-2012 the appellant-assessee sought leave of this Court to amend the appeal by reformulating the questions of law. Leave to amend was granted. The reformulated questions of law read as under:

(1) Whether on the facts and in the circumstances of the case the Tribunal was right in law in not appreciating that all the conditions of section 94(7) of the Act were not fulfilled in the facts of the present case and hence, the same could not be invoked to disallow the legitimate losses incurred ?

(2) Whether on the facts and in the circumstances of the case the Tribunal was right in law in not appreciating the true and correct interpretation of the term "securities" in the Act thereby not appreciating that the amendment to section 94(7) does not hit the transactions carried out by the appellant ?

2. For the assessment year 2005-06 the appellant filed its return of income on 30-10-2005 declaring a total income of Rs. 7.46 lacs. During the course of scrutiny assessment, the AO disallowed the short-term capital loss on sale of mutual funds units to the extent of Rs. 64.13 lacs u/s 94(7)(b)(ii) of the Act. The above loss was disallowed as the units were held for a period of less than nine months from the record date. The above disallowance was made on the basis of the amendment made to section 94(7)(b)(ii) by the Finance Act (No. 2) of 2004 which extended the period of holding mutual fund units from a period of three months to nine months. The appellant contended before the AO that the sale of the units within a period of less than nine months had taken place before section 94(7)(b)(ii) of the Act was sought to be amended by introduction of Finance Bill on 8-7-2004 which eventually became an Act on 10-9-2004. Therefore,- the appellant contended that the amendment should not apply to the period prior to 8-7-2004 that is the period during which the appellant suffered capital loss on sale of units. The AO did not accept the appellants submission on the ground that the amendment in law by the Finance Act, 2004 in September, 2004 was effective from 1-4-2005 and would thus apply to the whole of the previous year 1-4-2004 to 31-3-2005 relevant to assessment year 2005-06. Consequently, a sum of Rs. 64.13 lacs disallowed u/s 94(7) of the Act was added back to the appellants income by order dt. 30-11-2007 of the AO.

3. The CIT(A) by an order dt. 6-12-2009 dismissed the appellants appeal holding that the amendment to section 94(7)(b)(ii) of the Act was effective from 1-4-2005. Consequently, the amendment which was effective from 1-4-2005 would cover the period during which the appellant had suffered short-term capital loss on the sale of the units.

4. On second appeal before the Tribunal the only contention raised by the appellant-assessee was that the provisions of section 94(7)(b)(ii) which were amended by the Finance Act (No. 2) of 2004 were not retrospective so as to cover the sale of units prior to July, 2004. The Tribunal by its order dt. 12-8-2011 upheld the order of the CIT(A) and further recorded that in case the appellant-assessee is aggrieved by the retrospectivity of the amendment the forum to adjudicate such a dispute was not the Tribunal.

5. Before considering the submissions, we may usefully reproduce the relevant provisions:

94 Avoidance of tax by certain transactions in securities:....

(7) Where--

(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;

(b) such persons sells or transfers--

(i) such securities within a period of three months after such date; or

(ii) such unit within a period of nine months after such date;

(c) the dividend or income on such securities or unit received or receivable by such person is exempt, then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.

Explanation: For the purposes of this section,--

(a) "interest" includes a dividend;

((aa) "record date" means such date as may be fixed by--

(i) a company for the purposes of entitlement of the holder of the securities to receive dividend; or

(ii) a mutual fund or the administrator of the specified undertaking or the specified company as referred to in the Explanation to clause (35) of section 10 for the purposes of entitlement of the holder of the units to receive income, or additional unit without any consideration, as the case may be;

(b) securities includes stocks and shares;

(c) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or in the manner in which they can be transferred;

(d) "unit" shall have the meaning assigned to it in clause (b) of the Explanation to section 115AB.

Section 115AB

(1) ....

(2) ....

Explanation: For the purpose this section--

(a) ....

(b) unit means unit of a mutual fund specified under cl. (23D) of s. 10 or of the Unit Trust of India;

Section 10--In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

(23D) subject to the provisions of Chapter XII-E, any income of

(i) a mutual fund registered under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or Regulations made there under,

(ii) such other mutual fund set up by a public sector bank or a public financial institution or authorized by the Reserve Bank of India and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in this behalf.

Explanation: For the purposes of this clause--

(a) ....

lb) ....

(c) the expression Securities and Exchange Board of India shall have the meaning assigned to it in cl.(a) of sub-s.(1) of s. 2 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).

6. Mr. Arun Sathe, senior counsel appearing for the appellant submits that the loss on account of capital gain is not hit by the amendment in 2004 to section 94(7) of the Act. Mr. Sathe contended that units would be covered by the term securities in section 94(7)(b)(i). This is so as the word securities has been defined in section 94 as including, stock and shares. In further support of his submission he invited our attention to sub-clause (d) of the Explanation to section 94 which defines units to mean the same as defined under clause (b) of the Explanation to section 115AB, wherein unit has been defined to mean a unit of a mutual fund specified u/s 10(23D) of the Act or of the Unit Trust of India. In view of Explanation. (c) to section 10(123D) of the Act securities would have the meaning assigned to it under the Securities and Exchange Board of India Act, 1992 which in turn has the meaning assigned to it under the Securities Contracts (Regulation) Act, 1956. u/s 2(h) of the Securities Contracts (Regulation) Act, 1956 securities have been defined to include units under any mutual fund scheme. In view of the above, it is his submission that the capital loss on sale of units would be covered by section 94(7)(b)(i) of the Act and in such case the units which are in fact securities are required to be kept only for a period of three months after the recorded date and not for a period of nine months as required u/s 94(7)(b)(ii) of the Act.

7. On the other hand, Mr. Suresh Kumar, counsel for the respondent-Revenue submits that this was not the issue raised by the appellant before the Tribunal. Consequently, it is not open to the appellant to raise an issue which was not urged before the Tribunal, in an appeal u/s 260A of the Act before this Court. In any event, he submits that u/s 94 the legislature has deliberately used different words "securities" and "units". The word "securities" is referred to in section 94(7)(b)(i) and the word "unit" is referred to in section 94(7)(b)(ii) of the Act. Different period of minimum holdings for securities and the units has been provided u/s 94(7)(b)(i) and (ii) of the Act respectively. Consequently, he submits that it is not open to read the word securities as also including units. This would render redundant the word "unit" in section 94(7)(b)(ii) of the Act. In view of the above he submits that the appeal be dismissed.

8. The issue raised by Mr. Sathe before us was not urged before any of the authorities under the Act including the Tribunal. The only submission made before the authorities was that the amendment to section 94(7)(b)(ii) by Finance (No. 2) Act 2004 will not have retrospective effect. Before us he has not canvassed the submissions made by the appellant before the authorities but has taken up a new point. This Court in the matter of Commissioner of Income Tax Vs. Tata Chemicals Ltd., has held that in an appeal u/s 260A only a question raised before the Tribunal can be canvassed before the Court. In this case as the question as formulated not having been raised before the Tribunal, no question of law arises for consideration of this Court. On this limited ground alone the appeal can be dismissed as not giving rise to a substantial question of law.

9. Even assuming the appellant is entitled to raise this issue as it involves only a question of law it would make no difference. The submission made by Mr. Sathe that "units" are included within the meaning of the word "securities" and therefore, section 94(7)(b)(i) of the Act is applicable and the period of holding has to be only three months does not impress us. The Parliament has not only used two different terms namely "securities" and "units" in section 94(7)(b)(i) and 94(7)(b)(ii) of the Act but has dealt with them separately providing different minimum periods of holding for "securities" and "units". It is settled position in law that Parliament would not have used words in vain and a construction which renders redundant any part of the statute must be avoided. Therefore, units would be governed by the provisions in respect thereof in section 94(7)(b)(ii) of the Act.

10. A view to the contrary would render the provisions of section 94 relating to units otiose. Further, there is no warrant to read the meaning of the word securities as defined in the Securities Contract (Regulation) Act, 1956 to interpret the meaning of the word securities in section 94(7) of the Act. Clause (d) of the Explanation to section 94(7) provides that units shall have the meaning assigned to it in clause (b) of the Explanation to section 115AB. Section 115AB Expln. (b) defines units to mean a unit of a mutual fund specified in section 10(23D) or of the Unit Trust of India. The definition therefore identifies the type of unit. It does not equate units with securities or vice versa. Section 10(23D) does not do so either.

The reliance upon section 10, Explanation (c) is entirely misplaced. It refers not to securities but to the SEBI.

In view of the above the questions as framed does not give rise to substantial questions of law. The questions of law as framed are dismissed.

The appeal is dismissed. No order as to costs.