

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.No.516 of 2016

Commissioner of Income-Tax - 2,
Chennai.

... Appellant

versus

M/s.ISC Investments and Finance Pvt. Ltd.,
No.5, Mezzanine Floor, Thapar House,
37, Monteith Road, Chennai 600 008.

... Respondent

Prayer: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders made in I.T.A.No.1987/Mds/2014, dated 28.10.2015, against the Order of DCIT.Co.Circle II(3), Chennai 34, order dated 24.12.2010 for the Assessment Year 2008-09 against the Order of the Commissioner of Income Tax (Appeals)-II, Chennai, dated 30.01.2014 made in I.T.A.No.432/2013-14.

For Appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel
for Income-Tax

COMMON ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Tax Case Appeal is directed against the order made in I.T.A.No.1987/Mds/2014, dated 28.10.2015, for the assessment year 2008-09.

2. Facts leading to the appeal are that the assessee company, engaged in the business of providing automated teller machine (ATMs) infrastructural facilities under outsourcing, filed its return of income on 25.09.2008, declaring loss of Rs.9,45,617/-. The Assessing Officer has noticed that the assessee has received interest income of Rs.2,56,64,169/- and this interest income has been adjusted against business loss of Rs.2,86,09,185/-, apart from showing Rs.7,00,000/-, as income

during the assessment year 2008-09. The Assessing Officer was of the view that the assessee has transferred its business in the financial year 2004-05 to eFunds International Pvt. Ltd., through business transfer agreement, and by virtue of this agreement, the assessee sold its business in the year 2005, and that the assessee was barred from entering into same line of business for three years. According to the assessing officer, in the absence of any business activity during the assessment year 2008-09, the expenses claimed by the assessee were not prima-facie incidental to business and therefore, the interest expenses cannot be allowed to set off against business losses. Thus, the assessment officer, vide order, dated 24.12.2010, assessed the income of the assessee, under Section 143(3) of the Income-Tax Act, 1961, at Rs.2,56,64,169/-.

3. Being aggrieved by the same, the assessee has preferred an appeal in I.T.A.No.432/2013-14, before the Commissioner of Income Tax (Appeals)-II, Chennai, contending inter alia that assessee has not sold its entire undertaking as lock-stock-barrel, as observed by the Assessing Officer. The assessee also contended that it had transferred only its business of "outsourcing of ATMs business" to M/s.eFunds International Pvt. Ltd. Before the Commissioner of Income Tax (Appeals), it was also contended that business currently carried on by the assessee was on Sun-Oasis platform and this business had been sold on slump sale basis, while retaining Tandem-Base 24 platform related business with the assessee. Thus, it was contended before the Commissioner of Income Tax (Appeals), that assessee has not sold its entire undertaking, so as to say, that it is a slump sale.

4. According to the assessee, even as per the agreement, it was not restricted to carry on various businesses. Contention has also been made that the assessee in fact carried on job work of outsourcing of ATMs business during the financial years 2005-06 and 2006-07, for eFunds International Pvt. Ltd., and earned substantial revenue of Rs.12.81 crores, as business income, though business transfer agreement was entered into, in the financial year 2004-05 with M/s.eFunds International Pvt. Ltd.

5. Before the Commissioner of Income-Tax (Appeals), a contention has also been made by the assessee that during the financial year 2007-08 relevant to the assessment year 2008-09, the assessee carried on job work for its sister concern and earned income of Rs.7,00,000/- and therefore, it contended that the conclusion of the assessing officer that the assessee has not carried on any business at all, during the assessment year 2008-09, is incorrect and for the abovesaid reasons, prayed to set aside the assessment order, dated 24.12.2010.

6. Adverting to the abovesaid submissions and details filed by the assessee, the Commissioner of Income-Tax (Appeals)-II, Chennai, vide order, dated 30.01.2014, allowed the appeal of the assessee. Perusal of the abovesaid order shows that none represented the department. Being aggrieved by the aforesaid order, the Assistant Commissioner of Income-Tax, Company Circle-II(3), Chennai, has filed, I.T.A.No.1987/Mds/2014, before the Income Tax Appellate Tribunal, 'C' Bench, Chennai.

7. Before the Tribunal, the very same rival contentions have been made by both parties. Adverting to the above, the Tribunal has referred to the following clauses from the agreement dated 31.03.2005.

"iii) For the avoidance of doubt, it is hereby agreed that nothing contained in this Agreement shall prevent or restrict ISC, Capven or their associates, affiliates or owners from carrying on any or all of the following activities:

(A) sale, lease or sale on hire-purchase of ATMs, ATM-related hardware and operating software; security products;

(B) the sale, lease or sale on hire-purchase of PO? terminals, related hardware and operating software; provision of ATM maintenance, health monitoring and content management except that these services may not be solicited for ATMs contracted with ISC prior to Closing, or for those ATMs added on to those existing contracts post-Closing or from a customer of ISC as of Closing, without consent of Purchaser;

(C) maintenance services for POS terminals and related hardware and software;

(D) sale and support of 'plastic cards (but not including their production and issuance under outsourcing arrangements as performed in the Business); development, sale and/ or licensing of HMA Data / HMA Starware's proprietary software;

(E) the business currently carried on by HMA Starware of licensing and support of Oasis IST switches, card related solutions and other such business; and

(F) any other business whether or not related to the foregoing, which was not part of ISC Transferred Business or agreed to be extensions of the Business as of Closing.

(iv) During the Restricted Period, Purchaser shall offer to ISC or its Affiliates the rights of

first refusal for Second Line Maintenance (SLM) for ATMs implemented or under contract for future implementation on an outsourcing basis under ISC contracts with customers as of the Go sing Date, and for ATMs supplied by ISC or its Affiliates in the future to Purchaser or any other Affiliate of the Purchaser in India in the event of such entity seeking to engage a third party service provider for such service. 'Purchaser shall also offer to ISC or its Affiliates the rights of first refusal for the supply of Triton Automated Teller Machines and Cash Dispensers and other self service devices where these are qualified for consideration provided that ISC or its Affiliate is an authorized distribution channel for those devices at the time of the transaction.

(v) Reciprocally, ISC and its Affiliates shall, during the Restricted Period, provide the Purchaser with a right of first refusal for third party processing and networking solutions that may be required by them in relation to the deployment of ATMs, Cash Dispensers, Self-Service Terminals, pas terminals or other electronic transaction devices, and for the production and supply of plastic cards as may .be required by ISC or its Affiliates.

(vi) The Parties agree that these rights of first refusal for both Parties as mentioned in this Agreement are intended to enhance opportunities for mutual benefit by enabling them to work together and are subject to each party meeting the requirements of functionality, adherence to Service Level Agreements, preferential pricing reflecting competitive market conditions, and customer requirements which may apply in each instance."

8. After considering the rival submissions, orders passed by the authorities, at Paragraphs 6 and 7, the Tribunal, held as follows:

"6. Heard both sides. Perused orders of lower authorities. The Assessing Officer while completing the assessment did not allow business loss against interest income stating that assessee did not carry on any business during this assessment year under consideration and the assessee sold its business in the year 2004-05 to M/s. eFunds International Pvt. Ltd. The Assessing Officer also ignored income of Rs.7,00,000/- shown by the assessee for the job work done by the assessee for M/s. Cash Link Global Systems (P)Ltd., during the assessment year under consideration. The Assessing Officer was of the

opinion that the entire businesses were sold in the year 2005 by the assessee and further barred from entering into same line of business for three years. On appeal, the Commissioner of Income Tax (Appeals) allowed the claim of the assessee holding that even though entered into business transfer agreement, the assessee conducted job work in the subsequent two financial years i.e. 2005-06 and 2006-07 to the very same M/s. eFunds International P.Ltd. by retaining portion of fixed assets and employees. Therefore, Commissioner of Income Tax (Appeals) elaborately considered the submissions of the assessee and the contentions of the Assessing Officer and concluded that the assessee carried on the business during the assessment year under consideration and therefore loss has to be allowed observing as under:-

"I have considered the assessee's submissions as well as the assessment order carefully. The Assessing Officer's observations that consequent to the transfer of its "outsourcing of ATMs business" to M/s. Efunds International P Ltd in F.Y.2005, the assessee has not carried out any business, is factually not correct. No doubt the assessee is prohibited for entering into the same line of business for a period of 3 years. But the assessee is free to take up any other business. In fact, the assessee company has got the sub-contract work from M/s.Efunds International P Ltd itself in the following two years i.e. In F.Y. 2005-06 and 2006-07. This clearly shows that the assessee was carrying on the business activities even after the transfer of its "outsourcing of ATMs business" to M/s.eFunds International P Ltd, in the form of sub-contracts from M/s. eFunds International P Ltd. Further as could be seen from the assessee's P&L accounts and the balance sheets of the F.Ys. 2005-06, 2006-07 and 2007-08, the assessee has not transferred the entire income earning apparatus as such. While transferring the "outsourcing of ATMs business" to M/s. eFunds International P Ltd, only the business activity along with contracts, customers, business debtors, some employees, some fixed assets were transferred. In other words, the assessee still left 'with several employees and some of the business infrastructure, which are enough to carry on business, though on a lesser scale. The incomes generated from 'outsourcing of ATMs business' in FY 2004-05, its sub-contracts (job work) income in FYs 2005-06 & 2006-07, other business incomes, interest income etc, the employee cost, administration costs, depreciation etc, of the

FYs. 2004-05, 2005-06, 2006-07 and 2007-08 are as under:-

Particulars	F.Y. 2004-05	F.Y. 2005-06	F.Y. 2006-07	F.Y. 2007-08
Income				
Income from operations	27,38,53,217*	5,84,55,191*	6,97,22,850*	7,00,000
Other revenues	-	-	30,931	-
Dividends	-	-	2,27,371	-
Interest received	1,84,124	1,58,29,240	1,50,51,701	2,56,64,169
Profit (loss) - Sale of assets	(3,92,661)	48,824	(12)	(740)
Total	27,39,31,695	7,67,72,005	8,50,32,841	2,63,63,429
Expenses				
Employee cost	1,40,74,318	59,22,153	21,31,874	38,63,639
Operation expenses	14,79,61,108	6,11,39,654	4,90,23,967	2,45,80,807
Administrative expenses	3,41,24,253	5,26,02,444		
Depreciation	1,92,06,509	49,95,275	14,92,079	16,95,222
Preliminary expenses	1,22,088	1,22,062	-	-
Deferred rev. expenses	1,15,11,382	21,58,250	-	-
Total	22,69,99,658	12,69,39,858	5,26,47,940	3,01,39,668
Net Profit (loss)	4,69,32,037	(5,01,66,953)	3,23,84,901	(37,76,239)

Note : *from the original business of "outsourcing of ATMs business"

** from the job-work of "outsourcing of ATMs business"

Perusal of the above data clearly shows that even after the transfer of "outsourcing of ATMs business" to M/s. Efunds International P Ltd in 2005, the assessee retained a portion of the employees' and infrastructure (fixed assets like computers,

electrical equipment, furniture etc). These employees and the infrastructure are capable of running the business either in the same line or any other business. In fact, these employees and the infrastructure were utilized by the assessee to run the sub-contract business of "outsourcing of ATMs business" awarded by M/s. eFunds International P Ltd, in next following 2 years i.e. FYs 2005-06 & 2006-07. This clearly shows that the assessee was carrying on the business in the FY s 2005-06 & 2006-07, by way of job-work to M/s. eFunds International P Ltd, that too in the same line of business of "outsourcing of ATMs business". The incomes generated by the said job-works during these financial years are Rs.5,84,55,191/- and Rs.6,97,22,8501/-, respectively, which is about 1/4th to 1/5th of the regular business prevailing in F.Y.2004-05. Thus the assessee company was carrying on the business during the financial years and also offered the same under the head 'income from business'. These are the undisputed facts.

As mentioned above, after the transfer of "outsourcing of ATMs business" to M/s. eFunds International P Ltd, the assessee retained portion of employees and infrastructure. These facts are clearly available from above details of P&L accounts of the assessee. The employee cost in F.Y.2004-05 (i.e. before the transfer of "outsourcing of ATMs business" to M/s. eFunds International P Ltd) was Rs.140.74 lakhs. In the following year (i.e. after the transfer of "outsourcing of ATMs business") employee cost was Rs.59.22 lakhs, which is about 42% of the previous year's employee cost. In other words, the assessee retained more than 40% of the employees/manpower even after the transfer of the business. With these employees/ manpower, the assessee company carried out the job-work to the transferee company M/s. eFunds International P Ltd in the following two financial years. Though the employee/ manpower cost of the F.Y.2006-07 was reduced to Rs.21.31lakhs, it again increased to Rs.38.63 lakhs in F.Y.2007-08. These facts clearly show that the assessee's employee / manpower and infrastructure remained intact during the F.Ys. 2005-06, 2006-07 and 2007-08.

Even the perusals of the depreciation schedules of these financial years clearly shows that the assessee, even after the transfer of "outsourcing of ATMs business" to M/ s. eFunds International P Ltd, retained certain infrastructure like computers, electrical equipment, premises, furniture etc with

which it was carrying on the job- work business to M / s. eFunds International P Ltd, during the financial years 2005-06 and 2006-07, in the field of "outsourcing of ATMs business". These infrastructural facilities are remaining intact in the financial year 2007-08 as well. These facts are clearly available from the depreciation schedules of the balance sheets enclosed along with the returns of income.

From the above details it is clear that the assessee's employee/manpower and the infrastructural facilities are remaining intact in the financial year 2007-08 and the assessee has been exploring to undertake new activities. In fact, during the financial year 2007-08, the assessee, by utilizing the said employee/manpower and the infrastructural facilities, also carried out a new contract work for M/s Cash Link Global Systems (P) Ltd and earned a business income of Rs.7,00,000/- and the same was also included in the P&L account and offered to tax in the present A.Y.2008-09. The Assessing Officer acknowledged the said contract receipts by allowing the credit for TDS, but surprisingly ignored the said income while computing the income under the head 'income from business'. Further, as held by several courts, earning of income is not the criteria to prove that the business is in existence. What is required to be seen is the existence of income earning apparatus (like employees/manpower, plant and machinery etc) and the efforts made by the assessee into carry out the business. In the present case, all these criteria are clearly existing in favour of the assessee.

In view of the above reasons and since the assessee's employee/manpower and the infrastructural facilities are remaining intact in the financial year 2007-08 and also carried out a new contract work for M/s Cash Link Global Systems (P) Ltd and earned a business income of Rs.7,00,000/- during the year, the Assessing Officer is not justified in coming to the conclusion that the assessee did not carry out any business activities during the year. On the other hand, the above facts clearly proves that the assessee's business activities are in existence and also earned a business income of Rs.7,00,000/- during financial year relevant to the A.Y.2008-09, Hence the assessee has the right to claim all the expenses under the head 'income from business' and the resulting losses, if any, are also eligible for set. off against the income from other heads as per the law. The Assessing Officer is directed to allow the assessee's

claim of losses under the head 'income from business' and their set off against the income of other heads."

7. On going through the order of the Commissioner of Income Tax (Appeals), it is very clear that the assessee has not transferred the entire undertakings but only portion of it was transferred by way of business transfer agreement and the assessee has carried on the business of job work of outsourcing of ATMs business in the financial years 2005-06 and 2006-07 and earned income of Rs.12.81 crores with the very same M/s. eFunds International P.Ltd. to whom part of the business was already sold. It was also the finding of the Commissioner of Income Tax (Appeals) that the assessee has retained portion of employees and infrastructure i.e. Fixed assets like computers, electrical equipments, furniture etc. These employees and infrastructures are capable of running the business either in the same line or in any other business. It is the finding of the Commissioner of Income Tax (Appeals) that during the financial year 2007-08 relevant to the assessment year under consideration, the assessee utilizing the said employees, manpower and infrastructural facilities carried out a new contract work for M/s. Cash Link Global Systems (P)Ltd. and earned business income of Rs.7,00,000/-, therefore he concluded that assessee in fact carried on the business even after the business transfer agreement in the year 2005. On going through the above order of the Commissioner of Income Tax (Appeals), we do not find any infirmity in the findings holding that assessee engaged in the business during the assessment year 2008-09 and therefore loss is to be allowed. Thus, we sustain the order of the Commissioner of Income Tax (Appeals) and reject the grounds raised by the Revenue."

Thus, the Tribunal has dismissed the appeal.

9. Assailing the correctness of the order of the Tribunal, dated 28.10.2015, revenue has filed the instant Tax Case Appeal, on the following substantial questions of law,

(i) Whether the Appellate Tribunal was correct in law in holding that the assessee was entitled to claim expenses in the absence of any income from business during the assessment year?

(ii) Whether the Appellate Tribunal was right in holding that the assessee was carrying on the business even after the Business Transfer Agreement, which barred the assessee from entering into the same line of business for three years on signing such agreement?

(iii) Whether the Hon'ble ITAT was right in holding that the assessee was carrying on sub-contracting business with its sister concern, in the absence of alternative business of sub-contracting in its Memorandum of Association?

10. Though, supporting the abovesaid substantial questions of law, Mr.T.R.Senthil Kumar, learned standing counsel appearing for the Income-Tax Department, submitted that the Tribunal has failed to consider that the assessee had sold the business entirely in the year 2005, and therefore, barred from entering into the same line of business for 3 years, and further contended that alternative business of sub-contracting in the Memorandum of Agreement, is not at all relevant and therefore, set off expenses, made by the Commissioner of Income-Tax (Appeals), vide order in I.T.A.No.432/2013-14, dated 30.01.2014 and confirmed by the Tribunal, in I.T.A.No.1987/Mds/2014, dated 28.10.2015, is erroneous in law, and opposed to the facts and circumstances of the case, going through the material on record, we find that the Commissioner of Income-Tax (Appeals)-II, has categorically held that even after transfer of "outsourcing of ATMs business" to M/s. Efunds International P Ltd in 2005, the assessee has retained a portion of the employees' and infrastructure (fixed assets like computers, electrical equipment, furniture etc). Similarly, after perusal of the depreciation schedules of the financial years 2005-06, 2006-07 and 2007-08, the appellate authority has also found that even after transfer of "outsourcing of ATMs business" to M/s.eFunds International P Ltd, the assessee was carrying on job-work business to M/s.eFunds International Pvt. Ltd, during the financial years 2005-06 and 2006-07. It is also the finding of the appellate authority, infrastructural facilities have been retained in the financial year 2007-08, as well.

11. The appellate authority has also found that by utilizing the said employees and infrastructural facilities, the assessee has also carried out a new contract work for M/s.Cash Link Global Systems (P) Ltd, and earned a business income of Rs.7,00,000/-, which was also included in the Profit and Loss Account and offered to tax in the assessment year 2008-09. The appellate authority has also noticed that the assessing officer has acknowledged the said contract receipts, by allowing credit for TDS, but surprisingly, ignored the said income, while computing the income under the head 'income from business'.

12. In I.T.A.No.1987/Mds/2014, appeal filed by the Revenue, the Tribunal has extensively considered all the particulars, such as, income from operations, other revenues, dividends, interest received and profit (loss) - sale of assets and the

expenses incurred on employee cost, operation expenses, administrative expenses, depreciation, preliminary expenses and deferred revenue expenses, for the financial years 2004-05, 2005-06, 2006-07 and 2007-08 and thus, arrived at the net profit (loss).

13. The Tribunal, after going through the entire materials on record, has also categorically concurred with the views of the Commissioner of Income-Tax (Appeals)-II that the assessee was engaged in business, during the assessment year 2008-09 and thus, dismissed the appeal filed by the revenue. As we have already adverted to the details of the orders of the Tribunal, in the earlier paragraphs of this judgment, there is nothing to add, excepting to state, what is sought to be raised before us, is nothing but adjudication of facts. Analysing the reasons given by both the Commissioner of Income Tax (Appeals), the appellate authority and the Tribunal, there is proper appreciation of evidence. We do not find any perversity in the finding recorded by the authorities, warranting interference.

14. A substantial question of law does not arise on the findings of fact, unless it is substantiated that there is perversity. In *Bhagat Construction Co. (P) Ltd., v. CIT* reported in (2001) 250 ITR 291 (Del.), the Delhi High Court held that a question of fact, becomes a question of law, if the finding is either without any evidence or material or, if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to the correct conclusion on a matter of fact.

15. In *M. Janardhana Rao v. Joint CIT* reported in (2005) 273 ITR 50 (SC), the Hon'ble Supreme Court held that in the exercise of the powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. In the said judgment, the Apex Court further held that the tests for determining whether a substantial questions of law, is involved in an appeal are,

- (a) whether directly or indirectly it affects substantial rights of the parties, or
- (b) the question is of general public importance, or
- (c) whether it is an open question in the sense that the issue is not settled by a pronouncement of the Supreme Court or Privy Council or by the Federal Court, or

(d) the issue is not free from difficulty, or
(e) it calls for a discussion for alternative
view.

16. In the light of the above discussions, the substantial questions of law, raised by the Revenue, are answered against them. In the result, the Tax Case Appeals are dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

skm

To

- 1.The Income Tax Appellate Tribunal,
"C" Bench, Chennai.
- 2.The Deputy Commissioner of Income Tax,
Circle II, 131,
Chennai 34.
- 3.The Commissioner of Income Tax(Appeals)-II,
Chennai.

+1cc to Mr.T.R.Senthil Kumar, Advocate, S.R.No.44968

T.C.A.No.516 of 2016

NM(CO)
CA(14/09/2016)

सत्यमेव जयते

WEB COPY