

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.06.2016

CORAM:

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

T.C.A.No.2398 of 2006

The Commissioner of Income Tax,
Chennai.

.. Appellant

versus

M/s.Mohan Breweries & Distilleries Ltd.,
158, Anna Salai, Chennai 600 002.

.. Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order made in I.T.(SS)A.No.99(Mds)/2003, dated 20.10.2005.

For Appellant

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

For Respondent

:Mr.R.Vijaya Raghavan
for Mr.Subbaraya Aiyar

ORDER

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

Instant Tax Case Appeal arises out of an order made in

I.T.(SS)A.No.99(Mds)/2003, dated 20.10.2005, passed by the Income-Tax Appellate Tribunal, “A” Bench, Chennai, for the block periods, viz., from 01.04.1989 to 31.03.1999 and from 01.04.1999 to 25.11.1999.

2. Brief facts leading to the appeal are as follows:

Assessee's premises were searched under Section 132 of the Income-Tax Act, on 25.11.1999. After following the procedure under Section 158BC of the Income-Tax Act, the Assessing Officer held that there was an undisclosed income of the block period, apart from Rs.1.02 Crores. Being aggrieved by the order of block assessment, the assessee filed an appeal before the Commissioner of Income-Tax (Appeals). While holding that the income accrued to the assessee, as a result of the Memorandum of Understanding, dated 18.12.1995, ought to have been shown in the return for the assessment year 1996-97, the Commissioner of Income-Tax (Appeals), dismissed the appeal and upheld the assessment order.

3. Thereafter, the assessee filed an appeal before the Income-Tax Appellate Tribunal and the Tribunal, by order, dated 13.10.2004, held that the

assessee had acted upon the basis of the Memorandum of Understanding-I and the income was earned during the block period and thus, dismissed the appeal filed by the assessee. When the assessee filed Tax Case Appeal before this Court, under Section 260A of the Income-Tax Act, this Court, vide order, dated 14.02.2005, remanded the matter to the Tribunal to give a finding, as to whether, there was undisclosed income in terms of Chapter XIVB of the Income-Tax Act, 1961. This Court further held that,

“If the Tribunal finds that there was no undisclosed income, then there cannot be any block assessment. However, if the Tribunal holds that there was undisclosed income for the block period, then the impugned order of the Tribunal will stand with liberty to the parties to challenge the said order in appeal on merits or in appropriate proceedings.”

4. Consequent to the directions of this Court, dated 14.02.2005, the Income-Tax Appellate Tribunal passed a fresh order, holding that there was no undisclosed income. Being aggrieved by the same, the Commissioner of Income-Tax, Chennai, has filed the instant Tax Case Appeal, on the following substantial questions of law,

“(1) Whether in the facts and circumstances of the case, the

Tribunal was right in going beyond the specific remand order of the High Court to find out if there was undisclosed income by changing even the factual findings of its earlier order regarding accrual of income?

(ii) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the income had accrued to the assessee only by the 2nd MOU and that the first MOU was not acted upon, contrary to the findings given in order prior to the remand by the High Court?

(iii) Whether in the facts and circumstances of the case, the MOU 2 & MOU 3 ought to have been rejected as bogus devises created purely for the purpose of tax evasion?

5. We have heard Mr.T.R.Senthil Kumar, learned Senior Standing Counsel for the Income-Tax Department.

6. In I.T.(SS)A.No.99(Mds)/2003, after considering the material on record and rival submissions, vide order, dated 20.10.2005, the Income Tax Appellate Tribunal, at Paragraphs 12 to 19, held as follows:

“12. To decide the issue we shall now deal with the contentions of both the sides. The contentions as well as the facts available before us on record reveal that the MOU-I, dated

18.12.1995 was never acted upon for the reason that in that agreement the consideration was for transfer of shares. No shares were transferred and the assessee did not even have a single share and was not entitled to receive any amount under the agreement. MOU-II, dated 21.12.1998 was acted upon and is found accepted by the department. It is evident from the fact that the entire consideration payable under this MOU was assessed in the hands of GEC for the assessment year 1999-2000. Further the non compete fee received by the assessee under the MOU-III, dated 04.10.1999 was accounted by the assessee in its books and it was taxed for the assessment year 2000-01. The entry in the ledger of the assessee of GEC account is available at page 309 of the typedset-II and page Nos.311, 312, 326, 329, 330, 331 and 332 show that on various dates payments were received by the assessee and were recorded in the books. All the payments were through cheques or pay order or demand draft.

13. At the cost of repetition we again mention that this was not a case of concealment of income by the assessee company which had been found or unearthed due to search and seizure. The memorandum of agreements are in three stages and the actual implementation of the MOU-II and MOU-III is the effective agreement and the assessee was able to prove that MOU-I was not acted upon. This cannot be taken as a case of concealment of income by the assessee when there is no transfer of shares itself.

14. The fact that whether income had been hidden or not is not to be seen with reference to the date of search if prior to the date of search the assessee had disclosed particulars of the income either in the return or in the course of the assessment proceedings to the Assessing Officer or where the return has not become due the same are duly recorded in the regular books of accounts accounts, then such income cannot be treated as undisclosed income. This analogy is drawn from the words 'has not been or would not have been disclosed'. For the purpose of this case we have to see whether income has been hidden or not with reference to the date of search. If prior to the date of search the assessee has disclosed particulars of income either in the return or where the return has not become due the same are duly recorded in the regular books of accounts then such income cannot be treated as undisclosed income. The meaning of the word undisclosed is that something which is hidden from the knowledge of others. The word 'hide' shows deliberate intention of the person hiding a fact. Where the fact is brought within the knowledge of a person then it cannot be said that such fact is hidden from his knowledge. Applying the above principle to the case present before us it is not disputed that the entry in the ledger shows that payments were received by the assessee under the head non compete fees and further it was assessed to tax for the assessment year 2000- 2001. As the amount was accounted for by

the assessee and taxed for the assessment year 2000-2001 it cannot be taken as undisclosed income. Therefore we reject the contention of the learned departmental representative that it is the undisclosed income unearthed.

15. From a bare reading of the provisions of section 158B(b) it is clear that undisclosed income means income which is liable to be taxed but the assessee had not disclosed the same in the return. It would inter alia include any income based on any entry made in the books of accounts or other document or transaction which had not been or would not have been disclosed for the purposes of the Act. Here in this case the disclosure is sufficient and it will not come within the ambit of undisclosed income. The assessee has given plausible explanation as to why MOU-I was not acted upon and it is found convincing to us.

16. The intention of the Legislature for enacting the block assessment is to tax every kind of income which has been hidden from the knowledge of the department. Here in this case the assessee disclosed the entire income received by way of non compete fees in its books of accounts and subsequently it was taxed also by the department. There was no amount receivable by the assessee under the MOU-I. To add further the very same income has been assessed once in the hands of GEC for the assessment year 1999-2000 and again in the hands of the assessee for the assessment year 2000-2001. It cannot be said as

undisclosed income of the assessee for the assessment years 1996-97 and 1999-2000.

17. The learned departmental representative's argument that the income accrued to the assessee under MOU-I is far fetched. On the basis of accrual theory the learned departmental representative relied on the decision of the Hon'ble Supreme Court in the case of Sumathi Dayal, 214 ITR 801 wherein the Hon'ble Supreme Court held that the apparent must be considered to be the real one. The reliance of the learned departmental representative is misplaced in this case. In the case before us there are two other MOUs and the assessee could establish that the MOU-I could not be acted upon. Once it could not be acted upon there is no transfer. When there is no transfer there is no occasion for capital gains. The accrual theory cannot come into play in such cases, wherein the assessee has received the non compete fees and the same had been accounted for in the books of accounts and based on the accounts the department has brought it to tax in the assessment year 2000-2001. While taxing the non compete fees the department took the assistance of the agreement under MOU-III dated 4-10-1999. Under the above facts and circumstances we are of the view that the Revenue failed to establish that there is undisclosed income either tangible or intangible which can be found or unearthed as a result of search and seizure, whereas, on the other hand, the assessee disclosed

the same for the purpose of the Act and the department never unearthed or found any material out of search and seizure operations. That being the case the higher tax rate applicable to undisclosed income cannot be levied as there is no undisclosed income found as a result of search and seizure. Under the above circumstances we are in full agreement with the contention of the learned counsel for the assessee that this is a case where the assessee has disclosed and accounted the sum and nothing has been revealed out of the search. Therefore it cannot be treated as undisclosed income at the hands of the assessee.

18. Before parting we have to appreciate the able assistance of the learned counsel for the assessee Shri Arvind P Datar and Shri V.S Jayakumar and the learned departmental representative Shri Shaji P Jacob. We have to appreciate their efforts in assisting the Bench to arrive at the conclusion.

19. As we have found that there is no undisclosed income as per Chapter XIV-B and the income has already been duly recorded in the books maintained and taxed we are of the view that the orders of the Revenue authorities have to be set aside. Accordingly we set aside the orders of the Revenue authorities allow the appeal of the assessee.”

7. Going through the material on record and the order impugned

before us, we do not find that there is any perversity in the findings of the Tribunal, on the aspect of undisclosed income. The issue raised in the second substantial question of law, has also been elaborately dealt with, in the abovesaid paragraphs. Added further, it is also brought to the notice of this Court by Mr.R.Vijaya Raghavan, learned counsel appearing for the respondent that an appeal filed by the assessee in I.T.A.No.3396/Mds/2004, challenging the order of the Commissioner of Income-Tax (Appeals), Chennai, dated 20.10.2004, for the assessment year 2000-01, the ITAT, 'B' Bench, Chennai, vide order, dated 10.08.2007, set aside the order of the authorities and allowed the appeal.

8. Not satisfied with the above orders, the Commissioner of Income-Tax, Central-I, Chennai, filed T.C.A.No.319 of 2008, under Section 260A of the Income-Tax Act. Facts in nutshell in T.C.A.No.319 of 2008, are as follows:

“This Tax Case Appeal relates to the Assessment Year 2000-2001. Assessee, a company engaged in the business of manufacture and sale of liquor, claimed an extent of Rs. 7 Crores received from M/s UTV and the same was rejected by the Assessing Officer. Further, since under the special provisions of Section 115JA of the Act, the income declared was nil, the Assessing officer

requantified the book profit. Against the aforesaid order of the Assessing Officer, the Assessee preferred appeal before the Commissioner of Income Tax (Appeals) (in short "CIT(A)"), who, by order dated 20.10.2004, confirmed the order of the Assessing Officer holding that once the appellant has credited in the profit and loss account by virtue of treating the receipt as revenue receipt and if there is no provision in the Act to give deduction for the said sum, it is not possible to exclude the said sum of Rs.7 Crores while computing the total income of the appellant. Aggrieved by the order of the CIT (A), the assessee preferred appeal before the Income Tax Appellate Tribunal, which, by order dated 10.8.2007, allowed the appeal of the assessee holding that it is not a taxable receipt and hence, it cannot be included in the computation of book profit as envisaged under Section 115JA of the Act. Aggrieved by the said order, Revenue has come up with the present appeal.”

Substantial questions of law raised therein are as follows:

“1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the non competition fees of Rs. 7.00 Crores received by the assessee is capital receipt, is valid in law?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding the non competition

fees received by the assessee, cannot be included in the computation of book profit as envisaged in Section 115JA of the Act is valid?”

As regards first substantial question of law, after considering the submissions of the learned counsel appearing for the parties therein, the decision of the Supreme Court in **Apollo Tyres Ltd. vs. Commissioner of Income Tax [(2002) 255 ITR 273 (SC)]**, this Court answered the same in favour of the assessee.

S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.
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9. As we have already observed that pursuant to the remand, ITAT, 'A' Bench, Chennai, in I.T.(SS)A.No.99(Mds)/2003, for the block periods, viz., from 01.04.1989 to 31.03.1999 and from 01.04.1999 to 25.11.1999, vide order, dated 20.10.2005, has considered all the records and categorically found that there was no undisclosed income. Subsequent decision in T.C.A.No.319 of 2008, dated 30.03.2012, rendered on merits, between the same parties, also

lend support to the case of the assessee. Substantial questions of law raised are answered against the revenue and in favour of the assessee.

10. In the result, the Tax Case Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

(S.M.K., J.) (D.K.K., J.)
29.06.2016

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To

The Income Tax Appellate Tribunal,
“A” Bench, Chennai.

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