

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case (Appeal) No.17 of 2009

Marine Container Services
South Pvt. Limited,
No.18 Swami Sivananda Salai,
Chennai-600005.

.. Appellant

-vs-

The Assistant Commissioner of Income Tax,
Company Circle IV (1),
Chennai-600034.

.. Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal "B" Bench, Chennai, dated 18.07.2008 in ITA.No.384/Mds/2008 for the assessment year 2004-2005.

Against the order of the Commissioner of Income Tax Appeals-IX, Chennai, dated 26.12.2007 in I.T.A.No.697/06-07 against the order of Assistant Commissioner of Income Tax, Company Circle IV (I), Chennai-34, dated 27.12.2006 in PAN/GIR NO.AAACM6255A/MA-4 for the Assessment Year 2004-05.

For Appellant : Mr.R.Shankaranarayanan
Senior Counsel
for Ms.Harshini Jothi Raman

For Respondent : Mr.Karthik Ranganathan
Senior Standing Counsel

J U D G M E N T

(Delivered by T.S.Sivagnanam, J.)

This appeal, by the assessee filed under Section 260A of the Income Tax Act, 1961, (hereinafter referred to as "the Act") is directed against the order passed by the Income-tax Appellate

Tribunal 'B' Bench, Chennai, ("the Tribunal" for brevity) dated 18.07.2008, in I.T.A.No.384/Mds/2008 for the assessment year 2004-2005.

2. This appeal has been admitted on the following substantial questions of law, vide order dated 28.01.2009.

"(i) Whether the Income Tax Appellate Tribunal is right in holding that Section 94(8) that dividend stripping in buying and selling of shares and units is akin to bonus stripping and that they should be treated equally and that would render Section 94(8) retrospective in operation?

(ii) Whether the Income Tax Appellate Tribunal committed an error in law in holding that Section 94(8) is to operate retrospectively when the statute did not expressly so declare or impliedly so refer?"

3. Though we find that there are two substantial questions of law which have been admitted essentially, the only issue to be decided is whether Section 94(8) of the Act is retrospective in operation or prospective.

4. Mr.Karthik Ranganathan, learned Senior Standing Counsel appearing for the respondent/Revenue contended that the Revenue should be permitted to canvas other points other than the substantial questions of law, which have been entertained by this Court.

5. It is the submission of the learned counsel that the Assessing Officer while completing the assessment, vide order dated 27.12.2006, had taken a decision without reference to sub-Section (8) of Section 94, which was inserted with effect from 1st April 2005 by the Finance (No.2) Act, 2004 and therefore, the Revenue should be permitted to sustain the assessment order on certain other grounds. In this regard, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of CIT vs. India Discount Company Limited reported in [1970] 75 ITR 191 (SC), which was also referred to by the Assessing Officer. Further, the learned counsel referred to the decision of the Larger Bench of this Court in the case of Smt.S.Valliammai vs. Commissioner of Income-tax reported in [1981] 6 Taxman 240 (Madras) (FB).

6. This appeal has been filed by the assessee under Section 260(A) of the Act, and in terms of the said section, an appeal shall lie to this Court against every order passed in the appeal by the Appellate Tribunal, if the High Court is satisfied that

the case involves a substantial question of law.

6.1. Sub-Section (2) of Section 260A would be relevant, which empowers the Principal Chief Commissioner or the Chief Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal to file an appeal before this Court.

6.2. In terms of sub-Section (4) of Section 260A, an appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such a question.

6.3. In terms of the proviso under sub-Section (4) of Section 260A, nothing in sub-Section (4) shall be deemed to takeaway or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

Therefore, essentially a person has to be aggrieved by an order passed by the Appellate Tribunal to prefer an appeal under Section 260A of the Act.

7. Admittedly, the Revenue has not preferred any appeal against the order passed by the Tribunal. Therefore, at this juncture, that too, after a period of over nine years, during which the appeal was admitted and pending before this Court, we do not propose to permit the Revenue to canvas any other point before us, more so when, the Revenue is not on appeal before us. In other words, the Revenue was never aggrieved by the order passed by the Tribunal. Thus, the present attempt of the Revenue to make an alternative plea, in case, they are unable to sustain the order of the Tribunal, is to be treated as an afterthought. Thus, we proceed to decide the substantial questions of law as framed for consideration and noted above.

8. The assessee had claimed Short Term Capital Loss (STCL) for Sundaram Bond Saver against other Short Term Capital Gains.

9. The assessee contended that in case of shares, the bonus shares are distributed out of the benefit earned during the year and then, when there are no profits, bonus shares can be allotted out of accumulated results. However, at the time of purchase of shares, the primary/secondary market, there is no guarantee when bonus shares will be allotted at a later date. The Assessing Officer disagreed with the contentions raised by the assessee and held that, for the purpose of computation of capital gains/loss on purchase and sale of units within a short period, the purchase cost shall be deemed to include the cost of the unit "ex-bonus" plus the cost of bonus units and only the purchase cost of the units 'ex-bonus' shall have to be taken

into consideration in computing the loss, if any, on transfer, under the head 'Capital gains'. Before rendering the above finding, the Assessing Officer noted Section 94(8) of the Act, which was inserted with effect from 1st April, 2005 and qualified his finding that, even in the absence of Section 94(8), for the reasons assigned by him, the assessee's case cannot be accepted.

10. The assessee preferred appeal to the Commissioner of Income Tax(Appeals)-IX, Chennai. The CIT(A), after noting the finding of the Assessing Officer, held that the Assessing Officer had applied Section 94(8) of the Act, which is effective from the assessment year 2005-2006 and the assessment year under consideration relates to 2004-2005. Further, it was pointed out that the Assessing Officer has not considered Section 94(7) of the Act and in view of the same, the addition made by the Assessing Officer was deleted and the Assessing Officer was directed to apply Section 94(7) of the Act on the Short Term Capital Loss claimed by the assessee and give effect to the order, accordingly. On the above lines, the appeal was decided in favour of the assessee subject to provisions of Section 94(7) of the Act.

11. The Revenue carried the matter by way of Appeal to the Tribunal and the Tribunal, by the impugned order, held that the insertion of Section 94(8) with regard to bonus stripping can be said to be a clarificatory amendment in order to bring bonus stripping at par with dividend stripping. Therefore, in the opinion of the Tribunal, Section 94(8) can very well be said to operate retrospectively i.e., with effect from 1st April, 2002, when sub-Section (7) was inserted in Section 94.

12. Firstly, we may point out that the Tribunal is denuded of jurisdiction to grant a declaratory relief declaring a statute as prospective or retrospective, which precisely the Tribunal has done. Nevertheless, we are entitled to examine as to whether sub-Section (8) can be given retrospective effective i.e., with effect from the date on which sub-Section (7) was inserted in Section 94.

13. If we examine the relevant Notes on Clauses for Finance Act 2004, we would be in a position to find an answer the above question. Clause 23 of the Bill seeks to amend Section 94 of the Income-tax Act relating to avoidance of tax by certain transactions in securities, which reads as follows:

“Under the existing provisions of sub-section (7) of said section, where a person buys securities or unit within a period of three months prior to the record date and thereafter sells the same within a period of three months

after such date, and the dividend received on such securities or units is exempt, then, the loss arising on account of such purchase and sale of securities or unit to the extent of the exempt dividend income shall be ignored for the purpose of computing his income chargeable to tax.

Sub-clause (a) seeks to amend sub-section (7) of the aforesaid section so as to extend the time, limit in relation to sale of units from three months to nine months after record date.

Sub-clause (b) seeks to insert a new sub-section (8) in the aforesaid section so as to provide that, where a person buys or acquires any units within a period of three months prior to the record date and he is allotted or is entitled to additional units on the basis of such units without making any payment, and thereafter sells all or any of such units while continuing to hold all or any of the additional units within a period of nine months after such date, then, the loss, if any, arising to him on account of such purchase and sale of units shall be ignored for the purposes of computing his income chargeable to tax and the amount of loss so ignored shall, notwithstanding anything contained in any other provision of the Income-tax Act, be deemed to be the cost of purchase of acquisition of such additional units as are held by him on the date of such sale or transfer.

Under the existing provisions of clause (aa) of the Explanation to the said section, "record date", for the purposes of said section, means such date as may be fixed by a company of a Mutual Fund or the Administrator of the specified undertaking or the specified company for the purposes of entitlement of the holder of the securities or the unit-holder, to receive dividend or income, as the case may be.

Sub-clause (c) seeks to amend clause (aa) of the Explanation to the aforesaid Section so as to provide that "record date" also includes such date on which a unit-holder is allotted or is entitled to additional units without any payment.

This amendment will take effect from 1st April 2005, and will, accordingly, apply in

relation to the assessment year 2005-2006 and subsequent years".

14. Clause 22 of the Bill, which also amended Section 90 at the same time, would also be relevant and it reads as follows:

"Clause 22 of the Bill seeks to amend section 90 of the Income-tax Act, relating to agreement with foreign countries.

Under the existing provisions contained in the Explanation to section 90, it is declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India.

It is proposed to omit the portion "where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India" occurring in the Explanation as the same has become redundant.

This amendment will take effect retrospectively from 1st April, 1962, and will, accordingly, apply in relation to the assessment year 1962-1963 and subsequent years".

15. On a reading of above two Clauses namely, Clauses 22 and 23, it is clear that the amendment to Section 90 was retrospective from 1st April, 1962, and accordingly, made applicable in relation to the assessment year 1962-1963 and subsequent years.

15.1. Clause 23 of the Bill, which amended Section 94, had two amendments, namely, extension of the time in relation to sale of units from three months to nine months after record date and this amendment was brought to sub-Section (7) of Section 94 and a new sub-Section (8) was inserted. Both the amendments to sub-Section (7) and sub-section (8) were subsequently ordered to take effect from 1st April, 2005 and accordingly, made applicable in relation to the assessment year 2005-2006 and subsequent years.

16. Furthermore, the Central Board of Direct Taxes has clarified with regard to the date on which such amendments would take effect and in explicit terms, it has been stated that the amendment by way of insertion of sub-Section (8) in Section 94 will take effect from 1st April, 2005 and apply in relation to the assessment year 2005-2006 and subsequent years. If this is the factual position, we have to consider as to whether the arguments of the Revenue that it should be retrospective is acceptable or not.

17. The Hon'ble Supreme Court in *Zile Singh vs. State of Haryana*, (2004) 8 SCC 1, explained that a cardinal principle of construction of statutes is that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. The rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. It was held that, unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only. Further, it was pointed out that the presumption against retrospective operation is not applicable to declaratory statutes. Further, it was held that, if it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation and in the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed the intention giving the statute retrospectivity. The following four factors were suggested to be relevant, viz.,

- (i) general scope and purview of the statute;
- (ii) the remedy sought to be applied;
- (iii) the former state of the law; and

(iv) what it was the legislature contemplated. The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right.

The above referred decision was referred to by the Hon'ble Supreme Court in the case of *CIT vs. Gold Coin Health Food (P) Ltd.*, (2008) 9 SCC 622.

18. As pointed out earlier, the Notes on Clauses clearly state that the amendments are to take prospective effect i.e., with effect from 1st April, 2005. Therefore, considering the general scope and purview of the Income Tax Act, the remedy sought to be applied and the former state of the law and what the legislature contemplated, we are of the clear view that sub-

Section (8) of Section 94 was intended to be prospective.

19. The Revenue would contend that the argument of the assessee may apply to sub-Section (7) of Section 94 when it was first introduced with effect from 1st April, 2002, but sub-Section (8) was inserted to block the Revenue leakage and the language of sub-Section (8) clearly shows it is clarificatory in nature, clarifying what was already in existence in sub-Section (7) and omitted to be specifically stated. We are not impressed with the submission made by the Revenue for more than one reason.

19.1. Firstly, the legislature intended in no uncertain terms that the insertion of sub-Section 8 was to be prospective. Furthermore, sub-Section (8) was inserted in the statute for the first time and it is not a substitution of an existing sub-section or a provision.

19.2. Secondly, sub-Section (8) is a new sub-section and it is not an explanation to sub-Section (7) of Section 94. Therefore, by applying the principle of statutory interpretation, sub-Section (8) of Section 94 is neither curative nor declaratory of the previous law, which has to be held to be prospective in operation.

20. Further, the Hon'ble Supreme Court in CIT vs. Walfort Share and Stock Brokers P. Ltd. reported in (2010) 326 ITR 0001 (SC), held that sub-Section (7) was to be prospective with effect from 1st April, 2002 and not earlier. The operative portions of the judgement read as follows:-

"20. The real objection of the Department appears to be that the assessee is getting tax-free dividend; that at the same time it is claiming loss on the sale of the units; that the assessee had purposely and in a planned manner entered into a pre-meditated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, the loss on sale was not genuine. We find no merit in the above argument of the Department. At the outset, we may state that we have two sets of cases before us. The lead matter covers assessment years before insertion of Section 94(7) vide Finance Act, 2001 w.e.f. 1.4.2002. With regard to such cases we may state that on the facts it is established that there was a "sale". The sale-price was received by the

assessee. That, the assessee did receive dividend. The fact that the dividend received was tax-free is the position recognized under Section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction. With regard to the ruling in McDowell & Co. Ltd. v. Commercial Tax Officer [(1985) 154 ITR 148(SC)], it may be stated that in the later decision of this Court in Union of India v. Azadi Bachao Andolan [(2003) 263 ITR 706(SC)] it has been held that a citizen is free to carry on its business within the four corners of the law. That, mere tax planning, without any motive to evade taxes through colourable devices is not frowned upon even by the judgment of this Court in McDowell & Co. Ltd.'s case (supra). Hence, in the cases arising before 1.4.2002, losses pertaining to exempted income cannot be disallowed. However, after 1.4.2002, such losses to the extent of dividend received by the assessee could be ignored by the AO in view of Section 94(7). The object of Section 94(7) is to curb the short term losses. Applying Section 94(7) in a case for the assessment year(s) falling after 1.4.2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of the dividend received would still be allowed from which it follows that the Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. After 1.4.2002, losses over and above the dividend received will not be ignored under Section 94(7). If the argument of the Department is to be accepted, it would mean that before 1.4.2002 the entire loss would be disallowed as not genuine but, after 1.4.2002, a part of it would be allowable under Section 94(7) which cannot be the object of Section 94(7) which is inserted to curb tax avoidance by certain types of transactions in securities. There is one more way of answering this point. Sections 14A and 94(7) were simultaneously inserted by the same Finance Act, 2001. As stated above, Section 14A was inserted w.e.f. 1.4.1962 whereas Section 94(7) was inserted w.e.f. 1.4.2002. The reason is obvious. Parliament

realized that several public sector undertakings and public sector enterprises had invested huge amounts over last couple of years in the impugned dividend stripping transactions so also declaration of dividends by mutual fund are being vetted and regulated by SEBI for last couple of years. If Section 94(7) would have been brought into effect from 1.4.1962, as in the case of Section 14A, it would have resulted in reversal of large number of transactions. This could be one reason why the Parliament intended to give effect to Section 94(7) only w.e.f. 1.4.2002. It is important to clarify that this last reasoning has nothing to do with the interpretations given by us to Sections 14A and 94(7). However, it is the duty of the court to examine the circumstances and reasons why Section 14A inserted by Finance Act 2001 stood inserted w.e.f. 1.4.1962 while Section 94(7) inserted by the same Finance Act as brought into force w.e.f. 1.4.2002.

21. The next question which we need to decide is about reconciliation of Sections 14A and 94(7). In our view, the two operate in different fields. As stated above, Section 14A deals with disallowance of expenditure incurred in earning tax-free income against the profits of the accounting year under Sections 30 to 37 of the Act. On the other hand, Section 94(7) refers to disallowance of the loss on the acquisition of an asset which situation is not there in cases falling under Section 14A. Under Section 94(7) the dividend goes to reduce the loss. It applies to cases where the loss is more than the dividend. Section 14A applies to cases where the assessee incurs expenditure to earn tax free income but where there is no acquisition of an asset. In cases falling under Section 94(7), there is acquisition of an asset and existence of the loss which arises at a point of time subsequent to the purchase of units and receipt of exempt income. It occurs only when the sale takes place. Section 14A comes in when there is claim for deduction of an expenditure whereas Section 94(7) comes in when there is claim for allowance for the business loss. We may reiterate that one must keep in mind the conceptual difference between loss, expenditure, cost of acquisition, etc. while interpreting the scheme of the Act.

22. Before concluding, one aspect concerning Para 12 of Accounting Standard AS-13 relied upon by the Revenue needs to be highlighted. Para 12 indicates that interest/ dividends received on investments are generally regarded as return on investment and not return of investment. It is only in certain circumstances where the purchase price includes the right to receive crystallized and accrued dividends/ interest, that have already accrued and become due for payment before the date of purchase of the units, that the same has got to be reduced from the purchase cost of the investment. A mere receipt of dividend subsequent to purchase of units, on the basis of a person holding units at the time of declaration of dividend on the record date, cannot go to offset the cost of acquisition of the units. Therefore, AS-13 has no application to the facts of the present cases where units are bought at the ruling NAV with a right to receive dividend as and when declared in future and did not carry any vested right to claim dividends which had already accrued prior to the purchase.

23. For the above reasons, we find no infirmity in the impugned judgment of the High Court and, accordingly, these Civil Appeals filed by the Department are dismissed with no order as to costs."

21. Further, as pointed out by the Hon'ble Supreme Court of India in the case of Gold Coin Health Food (P) Ltd. (supra), that the law is well settled that the applicable provision would be the law as it existed on the date of filing of the return and when any loss is returned in any return, it need not necessarily be the loss, as the previous year is concerned. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years.

22. Thus, in the light of the above discussion, we are of the clear view that the Tribunal committed error in reversing the order passed by the CIT(A).

23. In the result, the appeal filed by the assessee is allowed, the order passed the Tribunal is set aside, consequently, the order passed by the Commissioner of Income Tax (Appeals)-IX, Chennai, dated 06.12.2007, is restored and the

substantial questions of law framed for consideration are answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

nsd/abr

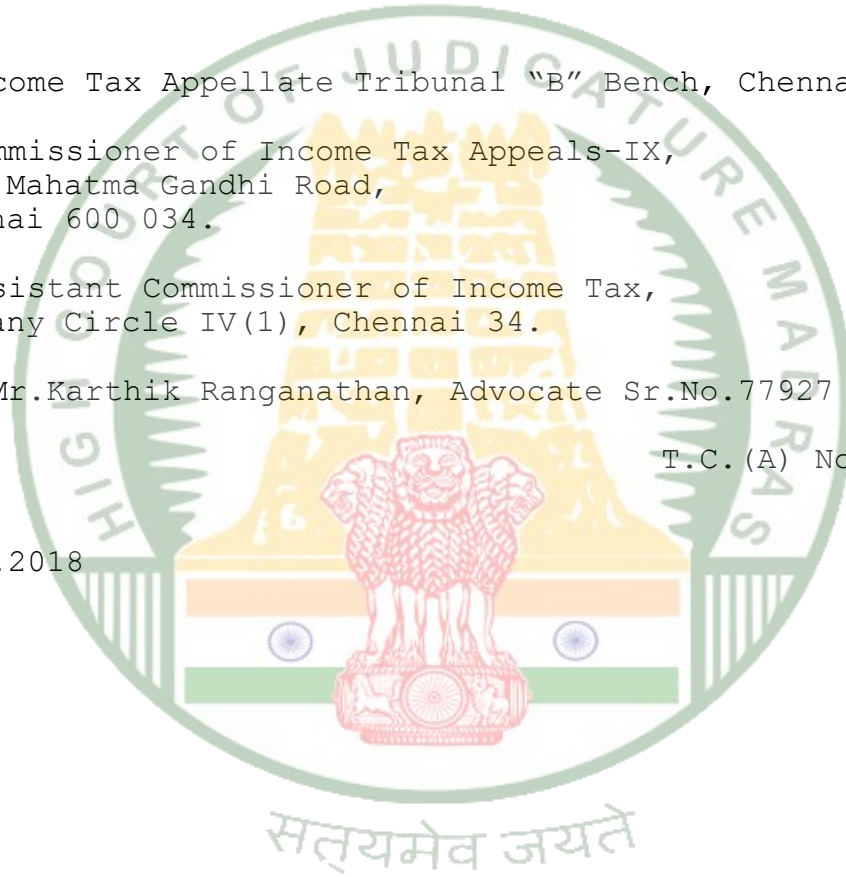
To

1. The Income Tax Appellate Tribunal "B" Bench, Chennai.
2. The Commissioner of Income Tax Appeals-IX,
121, Mahatma Gandhi Road,
Chennai 600 034.
3. The Assistant Commissioner of Income Tax,
Company Circle IV(1), Chennai 34.

+1 cc to Mr.Karthik Ranganathan, Advocate Sr.No.77927

T.C.(A) No.17 of 2009

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