IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.07.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.1010 of 2008

M/s.L.G.Balakrishnan & Bros Ltd.
6/16/13, Krishnarayapuram Road,
Ganapathy
Coimbatore ...Appellant

-vs-

The Deputy Commissioner of Income Tax,
Special Range-II
Coimbatore ...Respondent

Tax Case Appeal under Section 260-A of the Income Tax Act, 1961, is directed against the order passed by the Income Tax Appellate Tribunal, Madras "D" Bench, Chennai in I.T.A No.1736/Mds/94, dated 31.08.2007 for the assessment years 1991-92.

For appellant : Mr.M.P.Senthil Kumar

For Respondent : Mr.T.R.Senthil Kumar
Senior Standing Counsel

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JUDGEMENT

[Judgement of the Court was made by T.S.Sivagnanam, J.]

This Tax Case Appeal by the assessee, filed under Section 260-A of the Income Tax Act, 1961, ('the Act' for brevity) is directed against the order passed by the Income Tax Appellate Tribunal, Madras "D" Bench, Chennai in I.T.A No.1736/Mds/94, dated 31.08.2007 for the assessment years 1991-92.

2.The above Tax Case Appeal has been filed raising the following substantial questions of law:-

> *"1. Whether the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the deduction granted u/s 32AB had to be withdrawn since the appellant was amalgamated with its parent company M/s.L. G.Balakrishnan & Bros.Ltd.?*
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> *2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the amalgamation of company would amount to "otherwise transferred" the assets of the company for the purpose of section 32AB(7) of Income Tax Act, 1961?*

3.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that machinery maintenance charges paid to M/s.L.G.Balakrishnan & Bros.Ltd. was not an allowable expenditure?

4. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not holding that the disallowance/addition in the hands of appellant in respect of the claim of expenditure by payment of the same to the parent company M/s.L.G.Balakrishnan & Bros.Ltd., was not warranted since it would amount to double taxation?"

3. We have heard Mr.M.P.Senthil Kumar, learned counsel for the appellant/assessee and Mr.T.R.Senthil Kumar, learned Senior Standing Counsel for the respondent/revenue.

4. Substantial question of law nos.1 and 2 are connected and therefore dealt with together. The Assessing Officer while completing the assessment vide order dated 23.03.1994 under Section 143(3) of the Act, withdrew the deduction under Section 32AB of the Act, the reason being that, the assets of the assessee company were

transferred to its parent company L.G.Balakrishnan & Bros. Ltd.(LGB) by amalgamation with effect from 01.01.1991. However, the assessee company had claimed deduction under Section 32AB from the assessment year 1987-88 to 1990-91 for the total amount and in terms of Section 32AB(7), the deduction allowed under Section 32 AB has to be withdrawn and treated as income of the previous year.

5. The assessee preferred appeal before the Commissioner of Income Tax (Appeals)-Coimbatore [CIT(A)], who accepted the case of the assessee and held that in the assessee's case amalgamation cannot be considered as a case of sale by one company of its assets to the other or a case where 'assets have been otherwise transferred'.

6. The Revenue preferred appeal before the Tribunal which reversed the findings of CIT(A) and restored the findings of the Assessing Officer. Thus, what is required to be seen is the effect of amalgamation. This issue has come up for consideration in various decisions, though not a case arising under Section 32AB of the Act but nevertheless, the legal principle laid down in those decisions, as regards, the effect of amalgamation can be applied.

7. In ***Meenu Equitpments Vs.*** **CIT** reported in **[(2004) 266 ITR 0033 (Madras)]**, it was held that there was no contradiction of Section (155)(4)A and/or Section 32A(5) on constitution of a new firm comprising of all the partners of the original firm and widow of deceased partner, as there was no transfer on dissolution of old firm; there was no reason for invoking Section 155 also for the reason that the amount which had been credited to the reserve had been utilised by the old firm for purchase of new machinery within the period allowed by law. In the said decision the court referred to the law laid down by the Supreme Court in the case of ***Malabar Fisheries Co. Vs. CIT*** reported in **[(1979) 120 ITR 49 (SC)]**, wherein the Court held that development rebate is not liable to be withdrawn in the event of dissolution of firm and distribution of assets among the partner, as no transfer of assets is involved.

8. In ***Shaw Wallace & Co.Ltd. Vs. Commissioner of Income Tax*** reported in **[(1979) 119 ITR 0399(Cal],** the Court examined the effect of amalgamation and it was held that the entire capital and assets of the transferor-companies having vested in the assessee, as a result of the said amalgamations, the assessee became the sole owner of the capital of the transferor-companies. There was,

therefore, no extinguishment of the right of the assessee in participating in the capital on the liquidation of the transferor-companies. The share held by the assessee in the transferor-companies represented the capital invested by the assessee in the said companies and by the said amalgamation the assessee became the sole owner of the entire capital of the transferor companies. By virtue of the said amalgamations the assessee as the transferee-company became the sole repository of all the rights which flowed from or were embedded in the shares held by the assessee in the transferor-companies. For all the above reasons it was held that, there was not extinguishment of any right of the assessee as holder of the shares in the transferor-companies.

9. In ***Commissioner of Income Tax Vs. Renuga Textile Mills Ltd.*** reported in **[(2015) 366 ITR 649 (Madras)**, it was held that on merger, the amalgamating companies looses its entity, however, by such merger there is no formation of new business to disqualify the claim of assessee for deduction under Section 10B. To be noted that the Division Bench considered the decision of Apex Court in ***Saraswati Industrial Syndicate Limited V. CIT*** reported in **[(1990) 186 ITR 278]** which is being relied on before this Court by

the Revenue.

10. Mr. T.R.Senthil Kumar, learned Senior Standing Counsel for the Revenue placed reliance on the decision of the ***CIT(A) Delhi (iv) Vs. DCM Ltd.*** reported in **[(2015) 55 Taxmann.com 470 (Delhi)]**. We find the said decision cannot be applied to the factual position in the case on hand as in the said case under scheme of arrangement, 9 out of 13 industrial units held by the assessee company were transferred to 3 newly formed companies and the scheme would be covered under the expression 'otherwise transferred' in sub-Section 5 of Section 30A for which purpose the matter was remanded back to the Assessing Officer for fresh consideration. Therefore, we find factually the said decision is distinguishable.

11. In ***Commissioner of Income Tax Vs. MCTM Corporation Pvt.Ltd.*** reported in **[(1996) 221 ITR 0524 (Mad)],** it was held that there being no transfer in the case of amalgamation of companies within the meaning of Section 2(47) capital gain can neither be levied in respect of shares nor debentures allotted in amalgamated company to shareholder of amalgamating company.

12. The effect of above decisions, in our view was rightly understood by the CIT(A) while allowing the appeal filed by the assessee and rightly held that the assets in respect of which relief was allowed under Section 32AB of the Act are still held by the amalgamating company even after amalgamation and gets fused by one company.

13. Apart from the above, we find from the order passed by the Company Court in C.P.No.21 and 22 dated 19.04.1991, specific clause has been inserted in the order covering the allowance reserve which reads as follows:

> *(f) It is specifically agreed that the Development Rebate Reserve, Investment allowance Reserve, General Reserve, Capital Reserve and Investment deposit account of CIL, immediately prior to the appointed date will, as a result or the amalgamation, retain their identity and will become part of the Development Rebate Reserve, Investment allowance Reserve, General Reserve, Capital Reserve and Investment Deposit account of LGB respectively on and from the appointed date.*

14. In the light of the above, the Tribunal fell in error in reversing the decision of the CIT(A). Accordingly, substantial question of law nos.1 and 2 are answered in favour of the assessee. Consequently, the findings of the Tribunal on the said issue is set aside.

15. Substantial question of law no.3 is with regard to machinery maintenance charges which was paid by LGB. The Assessing Officer disallowed the same for want of proof. The assessee preferred appeal before the CIT(A), who accepted the plea raised by the assessee and deleted the disallowance. In paragraph no.9 of the order passed by the CIT(A), we find that the CIT(A) has recorded that the Deputy Commissioner of Income Tax (Assessing Officer) does not dispute the factum of repair having been carried out by LGB. A perusal of paragraph no.(iv) of the assessement order dated 23.03.1994 shows that the Assessing Officer at no point of time accepted the stand taken by the assessee, in fact, the Assessing Officer comes to the conclusion that the assessee has not been able to place any material to substantiate the stand and in the absence of any evidence the amount was disallowed and added back. Therefore, the findings of the CIT(A) is contrary to record.

16. The CIT(A) further states that there can be no benefit of any kind whatsoever in the assessee's accounting the expenditure for repairs at an inflated figure and paying the tax at a reduced quantum. In our view, this can be a test to be applied to decide, as to whether, the machinery maintenance charges is allowed as expenditure.

17. Thus, the CIT(A) applied a wrong test and came to the a conclusion. The Tribunal, therefore, rightly reversed the order passed by the CIT(A) and we find no good grounds to interfere with the order of the Tribunal. Accordingly, substantial question of law no.3 is answered against the assessee.

18. Substantial question of law no.4, which according to the assesee would cover other issues, also pertains to the disallowance/addition for payments made to LGB, which the assessee claimed as expenditure. This issue is discussed by the Assessing officer in pages 6 to 10 of the assessment order. The Assessing Officer after examining the entire facts, including the reply given by the assessee dated 12.12.1991, held that the claim made by the assessee was arbitrary and there is no scientific basis for such a claim and consequently worked out the expenses based on the system followed

by the assessee for the assessment year 1989-90.

19. The CIT(A) could not controvert the finding recorded by the Assessing Officer which was done by him after taking note of the factual position but proceeded on the basis that what was done by the Assessing Officer is not realistic. In our view, that could not be the manner in which the CIT(A) could have reversed the finding of the Assessing Officer, rendered after examining the entire facts.

20. The Tribunal, on appeal, for its part re-examined the factual issue and set aside the findings of the CIT(A) and restored the order of the Assessing Officer. As rightly pointed out by the learned Senior Standing Counsel for the Revenue, this issue revolves entirely on facts and there is no substantial question of law arising for consideration. Accordingly, substantial question of law no.4 is rejected.

21. In the result, the appeal filed by the assessee is partly allowed. Substantial question of law nos.1 and 2 are answered in favour of the assesseee and substantial question of law no.3 is answered against the assessee and so far as substantial question of

law no. 4 is concerned, we hold that no substantial question of law arises for consideration and the same is rejected. No costs.

(T.S.S., J.) **(V.B.S., J.)**
10.07.2019

ska/mp
Index: Yes/No

To

The Deputy Commissioner of Income Tax,
Special Range-II
Coimbatore

T.S.Sivagnanam, J.
and
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