

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.06.2019

CORAM

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

Tax Case Appeal No.2439 of 2008

Commissioner of Income Tax,
Chennai.

...Appellant

Vs.

M/s.Parry and Company Limited,
(since merged with M/s.EID Parry
(India) Ltd.) Dare House,
234 NSC Bose Road,
Chennai – 600 001.

...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 "B" Bench, Madras in I.T.A No.2139/Mds/2007 dated 03.06.2008 for the assessment year 2002-03.

For appellant : Mrs.R.Hemalatha,
Senior Standing Counsel

For Respondent : Mr.M.P.Senthil Kumar

JUDGEMENT

This Tax Case Appeal was filed by the assessee under Section 260-A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against the order passed by the Income Tax Appellate Tribunal "B" Bench, Madras in I.T.A No.2139/Mds/2007 dated 03.06.2008 for the assessment year 2002-03.

2. The appeal has been admitted on the following substantial questions of law:

"Whether on the facts and circumstances of the case, the Tribunal was right in holding that the capital loss arising out of sale of shares to sister concern when the transaction for sale to an outside buyer for a much higher price is being processed is genuine and ought to be allowed?"

3. We have heard Mrs.R.Hemalatha, learned Senior Standing Counsel for the Revenue and M.P.Senthil Kumar, learned counsel for the assessee.

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4. The respondent/assessee merged with EID Parry India Ltd., during the relevant previous year. It is stated by the Revenue that after entering into negotiations with M/s.Bush Boake Allen Ltd., for sale of shares of Parry Confectionery Ltd.,(PCL) which is another

Company of the same group and pending Government permission for the same, the assessee sold its share holding in PCL to its sister concern Santhanalakshmi Investments Ltd., (SIL) and claimed long term capital loss to the extent of Rs.5.22 crores. The Assessing Officer disallowed the capital loss, treating the transaction as sham, as the assessee is aware of the impending sale to M/s.Bush Boake Allen Ltd., and the motive and time of the shares are questionable.

5. Aggrieved by such order, the assessee preferred appeal before the CIT(Appeals) V Chennai, the CIT(Appeals) by order dated 29.05.2007 allowed the appeal and set aside the order passed by the Assessing Officer. Challenging the said order, Revenue filed an appeal before the Tribunal, which was rejected by order dated 03.06.2008 which is impugned in this appeal before us.

6. The endeavour of Mrs.R.Hemalatha, learned Senior Standing Counsel is to convince this Court that the transaction adopted by the respondent/assessee is in the nature of circular transaction. After elaborately referring to the factual matrix, the learned counsel referred to the decision of the Hon'ble Apex Court in the case of **Commissioner of Income Tax Vs. Ashini Lease Finance (P) Ltd.,**

reported in (2009) 309 ITR 0320.

7. We have heard Mr.M.P.Senthil Kumar, learned counsel for the assessee on the above submissions.

8. On a careful perusal of the order passed by the CIT(Appeals) dated 29.05.2007, we find that an elaborate consideration has been given by the CIT(Appeals) with regard to the disallowance of the claim of long term capital loss. At this juncture, it would be relevant to take note of the findings recorded by the CIT(Appeals) in paragraph 4.5.3 of its order dated 25.09.2007. After examining the factual aspects, the CIT(Appeals) held that the Assessing Officer's conclusion that the assessee company became aware of the sale of shares of M/s. Bush Boake Allen Ltd., to purchase its shares from the existing shareholders is incorrect. Further, it was pointed out that the resolution to sell the shares of M/s.Bush Boake Allen Ltd., by the assessee was taken by its Board of Directors on 28.05.2002. The corresponding resolution was passed by M/s.Bush Boake Allen Ltd., at its end on 29.05.2002. The share sale/purchase agreement was entered into by the assessee with the aforesaid on 06.06.2002.

9. Thus, the CIT(Appeals) held that the sale of shares of M/s.Parry Confectionery Ltd., was effected much before the sale of M/s.Bush Boake Allen Ltd., shares and faulted the Assessing Officer having spelt out incorrect facts in the Assessment order. Further, it was pointed out that prior to sale of PCL shares, the same were valued at Rs.50/- per share on the basis of the valuation report prepared by M/s. Ernst and Young. The CIT(Appeals) on perusal of the relevant stock market quotations found that the prevailing market price of PCL shares was Rs.44/- high and Rs.42/- low. Thus, it was concluded that the shares of PCL was transacted by the assessee with M/s. SIL at a price significantly higher than the prevailing market price. Thus, CIT(Appeals) held that no ulterior motive can be attributed to the assessee relating to sale of PCL shares, contrary to the finding rendered by the Assessing Officer.

10. Furthermore, on facts, it was found by CIT(Appeals) that the event of sale of M/s.Bush Boake Allen Ltd., shares were on the basis of permission of the Government of India took place much after the sale of PCL shares by the assessee company, and the latter event cannot be held to have been influenced by the former transaction. After referring to the decision of the Hon'ble Supreme Court in the case of

Union of India & another Vs. Azadi Bachao Andolan reported in (2003) 263 ITR 706 (SC) it was held that transaction cannot be regarded or called as a colourable device, so long as the transaction is valid in law. With the above reasons, CIT(Appeals) held that they are unable to sustain the disallowance of long term capital loss.

11. The Revenue filed appeal before the Tribunal. The Tribunal also made a fact finding exercise and held that the suspicion of the Assessing Officer is solely based on the ground that the assessee had knowledge about the purchasing back of its shares by M/s.Bush Boake Allen Ltd., and therefore the assessee sold the share to PCL, to its sister concern and M/s.Bush Boake Allen Ltd., with a view to avoid tax on capital gain arising out of prospective sale of shares of M/s.Bush Boake Allen Ltd. The Tribunal found that the Assessing Officer has committed a factual error and he proceeded purely on estimation without any substantial evidence. To support such conclusion, the Tribunal pointed out that the sale of PCL shares took place on 26.03.2002 and the Government permission was obtained for purchasing of its shares by M/s.Bush Boake Allen Ltd., only on 20.05.2002. Thereafter, the Board resolution of the assessee was passed for selling shares of M/s.Bush Boake Allen Ltd., at a price of

Rs.3.90/- per share on 28.05.2002. Similarly, M/s. Bush Boake Allen Ltd., also passed a resolution as regards purchase of shares from the assessee company at a price of Rs.3.90/- per share on 29.05.2002. The parties entered into an agreement for transfer of shares on 06.06.2002. After noting these facts, the Tribunal observed that the Assessing Officer has imagined beyond stretch that the assessee was having knowledge of sale of shares of M/s.Bush Boake Allen India Ltd., because sale of PCL shares took place even before grant of permission by the Government of India to M/s.Bush Boake Allen Ltd.

12. Further the Tribunal agreed with the contention of the assessee that the assessee was not a party or had influence in the decision taken by the M/s.Bush Boake Allen India Ltd., for the purchase of shares. Furthermore, on facts, the Tribunal found that the transaction is neither fraudulent nor a colourable device. Ultimately, the Tribunal held that when the transaction is within the parameters of law, then the Income Tax Authorities cannot enter into the shoe of the assessee to decide the prudence of commercial expediency of a particular transaction. With the above reasons, the Tribunal dismissed the appeal filed by the Revenue.

13. In our considered view, there is no substantial question of law arising for consideration in this case. We cannot be called upon to re-appreciate the evidence which was made available with the CIT(Appeals) and the Tribunal which in our considered view, has elaborately considered the factual matrix. So far as decision in the case of **Commissioner of Income Tax Vs. Ashini Lease Finance Private Ltd., reported in (2009) 309 ITR 0320**, we find that on facts, the Court found that it is a clear case of circular transaction. The Revenue does not dispute before us that there is a third party involved in the present transaction, it is a Government of India company.

14. Thus, for the above reasons, there is no substantial question of law arising for consideration in this appeal. In the result, the appeal fails and stands dismissed. No costs.

[T.S.S.,J]

[V.B.S.,J]

07.06.2019

Index: Yes/No

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To

Income Tax Appellate Tribunal "B" Bench, Madras

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**T.S.SIVAGNANAM.,J
&
V.BHAVANI SUBBAROYAN.,J**

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