

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1393 OF 2017

Pr. Commissioner of Income Tax - 14

Aayakar Bhavan, M.K. Road,
Mumbai - 400 020.

.. Appellant

Versus

Wockhardt Hospitals Limited

Wockhardt Towers, Bandra Kurla Complex,
Bandra (E), Mumbai - 400 051.
PAN : AAACW3342G

.. Respondent

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- Mr. Suresh Kumar a/w Ms. Priyanka Tiwary for the Appellant
 - Mr. Niraj Sheth a/w Mr. Atul K. Jasani for the Respondent
-

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : MARCH 16, 2020.

ORDER [PER UJJAL BHUYAN, JJ] :

1. Heard Mr. Suresh Kumar, learned standing counsel, revenue for the appellant and Mr. Niraj Sheth along with Mr. Atul K. Jasani, learned counsel for the respondent - assessee.

2. This appeal under Section 260A of the Income Tax Act, 1961 ("**the Act**" for short) is preferred by the revenue assailing the legality and correctness of the order dated

6.1.2017 passed by the Income Tax Appellate Tribunal, Mumbai "G" Bench, Mumbai ("**Tribunal**" for short) in Income Tax Appeal No. 7021/Mum/2013 for the assessment year 2010-11.

3. The appeal has been preferred on the following questions projecting the same as substantial questions of law:-

- "a) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in confirming CIT(A)'s order deleting the disallowance of Rs.18,43,30,378/- incurred by the assessee in relation to slump sale without appreciating that Section 50B of the Act is a complete code in itself and expenses related to slump sale cannot be allowed?
- b) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in confirming CIT(A)'s order deleting the enhancement of slump sale consideration from Rs.143,21,082 to Rs.186,58,21,669/-?
- c) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in confirming CIT(A)'s order deleting the addition of Rs 2,79,53,000 from lump sum consideration without appreciating the fact that the said consideration routed through escrow account being part of the agreement between Wockhardt Hospitals Limited and Fortis Hospitals Limited and claim would be tantamount to double deduction which is incurred during the transaction ?

- d) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in treating an amount of Rs.317,21,09,994 on slump sale as long term capital gain instead of short-term capital gain as the property was held less than a year overlooking the first proviso to section 50B(1) of the Act?
- e) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in deleting the addition made by the Assessing Officer of Rs 48,71,169 u/s 14A r/w Rule 8D of Income Tax Rules, 1962 on account of expenditure incurred for earning exempt income?"

4. The first question i.e Question (a) deals with the order of the Tribunal confirming the order of the Commissioner of Income Tax (Appeals) - 21, Mumbai [briefly, **'the CIT(A)'** or **'the First Appellate Authority'** hereinafter] deleting the disallowance of Rs. 18,43,30,378.00 made by the Assessing Officer under Section 50B of the Act.

4.1. In the assessment proceedings leading to the assessment order dated 28.3.2013 passed under Section 143(3) of the Act for the assessment year 2010-11, Assessing Officer disallowed claim of expenditure of Rs. 18,43,30,378.00 claimed by the assessee. It may be

mentioned that assessee is engaged in the business of running various hospitals in India. During the assessment year under consideration, assessee had sold 12 hospitals under slump sale vide business transfer agreement dated 24.8.2009 to Fortis Hospitals Ltd. Assessing Officer disallowed the claim of expenditure stating that Section 50B of the Act itself was a separate code and no further deduction was required for the purpose of the said expenditure.

4.2. When the matter came up in appeal before the First Appellate Authority i.e CIT(A), it vide the appellate order dated 25.9.2013 allowed the said claim of the assessee and deleted the disallowance made.

4.3. On appeal before the Tribunal, it was found by the Tribunal that this issue was earlier dealt by it in the case of **DCIT Vs. Summit Securities Ltd¹**. Following the said order, Tribunal decided this question against the revenue and in favour of the assessee vide order dated 6.1.2017.

1 ITA 4977/Mum/2009 dated 7.3.2012

4.4. To appreciate the rival contentions on this issue, it is apposite to deal with the certain relevant provisions of law.

4.5. 'Slump sale' is defined under Section 2(42C) of the Act to mean the transfer of one or more undertakings as a result of the sale for a slump sum consideration without values being assigned to the individual assets and liabilities in such sales. As per Explanation 1, the term 'undertaking' used in the aforesaid provision would have the same meaning assigned to it in Explanation 1 to clause (19AA) of Section 2. As per this clause, "undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

4.6. Section 48 is included in Chapter IV - E which deals with computation of income from capital gains. Section 48 deals with mode of computation. It says that the income chargeable under the head "capital gains" shall be

computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the amounts mentioned therein i.e expenditure incurred wholly and exclusively in connection with such transfer; and the cost of acquisition of the asset and the cost of any improvement thereto.

4.7. Section 49 deals with cost with reference to certain modes of acquisition. As per Section 49(1), where the capital asset became the property of the assessee in any of the manner provided therein, such as, on distribution of assets following partition of a Hindu undivided family or under a gift or will; or by succession, inheritance or devolution etc., the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

4.8. This brings us to Section 50B of the Act which provides for special provision for computation of capital gains

in case of slump sale. This provision being relevant, the same is extracted herein under in its entirety;

"Special provision for computation of capital gains in case of slump sale.

50B. (1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place :

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this

section.

Explanation 1.—For the purposes of this section, "net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account :

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation 2.—For computing the net worth, the aggregate value of total assets shall be,—

(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (i) of sub-clause (c) of clause (6) of section 43;

(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, nil; and

(c) in the case of other assets, the book value of such assets.

4.9. Referring to Section 50B of the Act, CIT(A) observed that Section 50B only provides for computation of net worth which is deemed to be cost of improvement and cost of acquisition. As cost of improvement and cost of acquisition which is provided under Section 50B as net worth cannot be equated with capital gains. For computation of

capital gains, recourse has to be made to Section 48 as per which capital gains would be computed by taking into account the full value of consideration reduced by the cost of improvement and cost of acquisition and also expenditure incurred for transfer. Therefore, it was held that for computation of capital gains, Section 48 has to be adopted and computed. All the components of Section 48 have to be considered. Referring to the decision of the Tribunal in the case of Summit Securities Ltd., it was held that Section 50B only determines cost of acquisition and cost of improvement of the undertaking; evidently capital gain has to be computed under Section 48. Section 50B is a code for itself only for determination of cost of acquisition and cost of improvement of the undertaking but not for the computation of capital gains in case of slump sale. Therefore, disallowance made by the Assessing Officer was interfered with and the claim of expenditure incurred for the purpose of transfer amounting to Rs. 18,43,30,378.00 was allowed.

4.10. Tribunal relied upon its own decision in the case of Summit Securities Ltd and upheld the findings of the CIT(A).

Relevant portion of the order passed by the Tribunal in the case of Summit Securities Ltd. is extracted herein below:-

"(e) Sub-section (2) of section 50B makes it abundantly clear that the undertaking or division as a whole is considered as one capital asset and the net worth of this capital asset is considered as cost of acquisition and cost of improvement for the purposes of sections 48 and 49. Therefore, it becomes patent that section 50B is a code in itself only for the determination of cost of acquisition and cost of improvement of the undertaking but not for the computation of capital gains in case of slump sale. The object of section 50B is to simply determine and supply the figure of cost of acquisition and cost of improvement of the undertaking or division, being its net worth along with the decision as to whether the undertaking is a long term or short term capital asset is decided and forwarded to section 48, the computation provision in the later section is activated for determining the income chargeable under the head "capital gains" in accordance with the mode of such computation as prescribed therein. The modus operandi to compute capital gain from the transfer of undertaking thus provides for reducing the cost of acquisition and cost of improvement of the capital asset from the full value of consideration received or accruing as a result of the transfer of capital asset. Coming back to the nature of capital asset being undertaking, which comprises of "all assets minus all liabilities" of the undertaking, the amount of capital gain means reducing the net worth, being cost of acquisition and cost of improvement of "all assets minus all liabilities" of the undertaking from the full value of consideration of "all assets minus all liabilities" of the undertaking.

(f) In computing the net worth of the undertaking or the division, as the case may be, the benefit of indexation as provided in the second proviso to section 48 has been withheld. The possible reason

may be quid pro quo. By extending the benefit of lower rate of taxation on long term capital gain as provided under section 112 to the undertaking as a whole notwithstanding the fact that there may be several assets held by the assessee for a period of not more than 36 months, the Legislature thought it to curtail the benefit of indexation to the cost of acquisition and cost of improvement.”

4.11. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. Tribunal was fully justified in confirming the view taken by the First Appellate Authority. In the circumstances, we see no good reason to entertain this question for consideration.

5. Question No. (b) deals with the decision of the Tribunal in confirming the order of the First Appellate Authority deleting the enhancement of slum sale consideration from Rs. 143.21 crores to Rs. 186.58 crores.

5.1. An agreement was entered into between the assessee and Fortis Hospitals Ltd dated 24.8.2009. Clause (3) of the agreement made it clear that Rs. 186.58 crores was the negotiated value to which further adjustment was required to be done in case liability of the undertaking

exceeded Rs. 599.62 crores. This clause further provided for opening of an escrow account for 2 years for an amount of Rs. 15 crores and if any further claim arose, that was to be deducted from the said amount.

5.2. Assessing Officer did not allow the deduction which occurred during the course of transaction stating that it amounted to double deduction of liabilities which was incurred during the transaction and hence, the assessee was not eligible for such deduction.

5.3. CIT(A) in first appeal held that during the slump sale transaction excess liability of Rs. 43,36,86,617.00 arose. This amount was not paid by Fortis Hospitals Ltd but was adjusted from Rs. 186.58 crores. After adjustment, the lumpsum consideration received by the assessee was Rs. 143.21 crores. Therefore, addition made by the Assessing Officer was deleted.

5.4. In further appeal, Tribunal referred to the agreement entered into between the parties and held that

during the process of transaction, liability of Rs. 43.36 crores arose which was required to be deducted from Rs. 186.58 crores where after the lump sum consideration became Rs. 143.21 crores, rightly determined by the First Appellate Authority. Therefore, this ground of appeal by the revenue was answered against the revenue.

5.5. Since clause (3) of the agreement is relevant, the same is extracted herein under:-

"3.1 In consideration for the transfer of the Business Division by the Seller to the Purchaser, in accordance with the terms and conditions of this Agreement, the Purchaser shall pay:

(A) in case the amount paid by the Purchaser to the lenders pursuant to Clause 6.2(o) below is equal to or exceeds Rs. 599,61,78,301 (Rupees Five Hundred Ninety nine crore sixty one lakhs seventy eight thousand three hundred and one only);

(a) a lumpsum consideration of Rs. 186,58,21,669 (Rupees One Hundred Eight six crore fifty eight lakhs twenty one thousand six hundred and ninety nine only) minus (b) the difference between the amounts payable by the Purchaser to the lenders pursuant to Clause 6.2(o) below and Rs. 599,61,78,301 (Rupees Five Hundred Ninety Nine Crore Sixty One Lakhs Seventy Eight thousand Three hundred and one only);

OR

(B) In case Rs 599,61,78,301 (Rupees Five Hundred Ninety Nine

Crore Sixty One Lakhs Seventy Eight thousand Three hundred and one only) exceeds the amounts payable by the Purchaser to the lenders pursuant to clause 6.2(o) below:

(a) a lumpsum consideration of Rs 186,58,21,699 (Rupees One Hundred Eighty six crore fifty eight lakhs twenty one thousand six hundred and ninety nine only) plus (b) the difference between Rs 599,61,78,301 (Rupees Five Hundred Ninety Nine Crore Sixty One Lakhs Seventy Eight thousand Three hundred and one only) and the amounts payable by the Purchaser to the lenders pursuant to Clause 6.2 (o) below; clause 6.2(0) below;

(the amount arrived in (A) or (B), as the case may be, is hereinafter referred to as the "Consideration") to the seller.

The consideration shall be paid on the closing date in the following manner:

(a) Rs 15,00,00,000 (Rupees Fifteen Crores Only) ('Escrow amount') shall be deposited with an escrow agent mutually appointed by the parties under the Escrow Agreement ('Escrow Agent'); and

(b) the difference between the Consideration and the Escrow amount shall be paid by way of wire transfer to the bank account of the Seller to be notified in writing by the Seller to the Purchaser at least five (5) business days prior to the Closing Date."

5.6. On a reading of the above clause of the agreement, it is evident that though lumpsum consideration was fixed at Rs. 186.58 crores, provision was made for deducting / adjusting any liability exceeding Rs. 599.62 crores. It was noticed by the First Appellate Authority that in

the process of transaction, total liability exceeded Rs. 599.62 crores and the excess liability was quantified at Rs. 43.36 crores which amount was not paid by Fortis Hospitals Ltd to the assessee but was adjusted against Rs. 186.58 crores. The First Appellate Authority held that the amount of Rs. 43.36 crores had to be accounted on the liability side and had to be deducted from the lumpsum consideration. Therefore, when this amount was deducted from Rs. 186.58 crores, the figure arrived at was Rs. 143.21 crores. Therefore, it was held that Assessing Officer was not justified in enhancing the lumpsum consideration from Rs. 143.21 crores to Rs. 186.58 crores.

5.7. Tribunal noticed that the assessee and Fortis Hospitals Ltd had entered into a business agreement and as per the agreement, excess liability arising during the transition period had to be adjusted from the lumpsum amount of Rs. 186.58 crores. It was further noted by the Tribunal that during the process of transaction, excess liability of Rs. 43.36 crores arose which had to be deducted from the lumpsum amount of Rs. 186.58 crores to arrive at

the lumpsum consideration received by the assessee which was Rs. 143.21 crores. Accordingly, the order of the First Appellate Authority was affirmed.

5.8. On due consideration, we do not find any error or infirmity in the order passed by the Tribunal. Besides, this is a finding of fact, rather a concurrent finding of fact and revenue is unable to point out any perversity in the conclusion reached. In the circumstances, no question of law, much less any substantial question of law, arises from such finding of the Tribunal.

6. The third question deals with deletion by the First Appellate Authority of the addition of Rs. 2.79 crores from lumpsum consideration made by the Assessing Officer, which decision of the First Appellate Authority was affirmed by the Tribunal.

6.1. As noticed above, in clause (3) of the agreement entered into between the assessee and Fortis Hospitals Ltd, assessee and Fortis Hospitals Limited were required to open

an escrow account of Rs. 15 crores from lumpsum consideration of Rs. 186.58 crores for a period of 2 years, and in the event of any further claim, such amount had to be deducted from the above lumpsum consideration.

6.2. During the assessment proceedings, Assessing Officer observed that assessee had claimed Rs. 2.79 crores as deduction in the computation of income. According to the Assessing Officer, the said amount was lying in the escrow account and by making the said claim, assessee was resorting to claim of double deduction. Accordingly, such claim of the assessee was declined by the Assessing Officer.

6.3. First Appellate Authority, on consideration of clause (3) of the agreement, took the view that there was no double deduction by the assessee for the said amount and accordingly, deleted the disallowance holding that assessee was eligible for the said deduction.

6.4. On further appeal, Tribunal affirmed the view taken by the First Appellate Authority.

6.5. First Appellate Authority on reading of clause (3) of the agreement observed that there was a provision for escrow account for two years by both the parties to the agreement for Rs. 15 crores from the amount of lumpsum consideration of Rs. 186.58 crores. It was observed that if there were any further claims, that would be adjusted from Rs. 15 crores. It was further observed that when the claim of Rs. 2.79 crores was received, that amount was paid through the escrow account. The escrow account was for a period of two years. On thorough examination, CIT(A) held that there was no double deduction from the aforesaid amount by the assessee. Assessing Officer had made an error by adding the said amount in the assets and liabilities side by including it in lumpsum consideration which was against the principles of accounting.

6.6. When the matter came up before the Tribunal, it was noticed that following the agreement, an escrow account was opened and Rs. 15/- crores was kept in the said account for settling future liabilities and that assessee was to receive

the said amount from the escrow account after a period of two years. It was noticed that liability amounting to Rs. 2.79 crore arose and was settled during the year following which the assessee filed a revised return raising a claim of deduction for the said amount. Tribunal held that there was no doubt about incurring of the expenditure. Necessary evidence in this regard were produced and were found to be genuine. Therefore, there was no need to interfere with the order of the First Appellate Authority.

6.7. In the light of the discussions made above, we are of the view that no question of law arises out of such order passed by the Tribunal which is basically a finding of fact. Consequently, we decline to admit the appeal on Question (c) as framed.

7. The fourth question deals with treating the capital gain on slump sale as long term capital gain instead of short term capital gain initially held by the Assessing Officer.

7.1. Assessee had 12 hospitals and 2 nursing schools which it had sold under slump sale basis to Fortis Hospitals Ltd. Out of these hospitals, 4 were owned for more than three years and the rest were below three years.

7.2. Assessing Officer took the view that percentage of hospitals on long term basis was less than the number of hospitals under short term. Therefore, Assessing Officer assessed the income of the assessee from the slump sale of hospitals as short term capital gain.

7.3. In appeal before the First Appellate Authority, CIT(A) referred to sub-section (1) of Section 50B and the proviso thereto and took the view that for the assets to be assessed under short term capital gain, all the assets should be existing below 36 months; if even one asset exists for more than 36 months, then it had to be treated as long term in nature. Referring to the decision of the Tribunal in Summit Securities Ltd., CIT(A) held that if at least one asset was more than three years, then it was long term in nature. It was found that four of the assets were more than three years

old. Therefore, capital gain accruing out of slump sale had to be assessed as long term capital gain. Since reliance was placed on Summit Securities Ltd., relevant portion thereof is extracted herein under:-

"(b) Where an, industrial undertaking is transferred under slump sale which was owned and held by the assessee for not more than 36 months immediately preceding the date of its transfer, the profit or gains arising from such transfer is deemed to be capital gain arising from the transfer of short term capital assets. The relevant criteria for considering whether the undertaking is a short-term or long term is the period of owning and holding the undertaking as a whole and not individual assets of such undertaking. Suppose the undertaking was set up four years ago and some of the assets were purchased and held for a period of not more than 36 months, it is the entire undertaking which will be treated as long-term capital asset for the purposes of computing capital gain on its transfer. The period of holding of separate assets of the undertaking were purchased a day before its transfer, they will also form part of the undertaking as a long-term capital asset. So long as the undertaking is owned and held by the assessee for a period of more than 36 months, the capital gain arising from its slump sale is considered as long term capital gain notwithstanding the period for which its individual assets were owned and held."

7.4. In further appeal before the Tribunal, the above decision in Summit Securities Ltd. was again adverted to where after Tribunal held that there was no need to interfere with the order of the First Appellate Authority as four hospitals of the assessee were owned by it for a period of

more than 36 months. Therefore, the capital gain accruing out of the slump sale was nothing but long term capital gain.

7.5. We do not find any reason to disturb such finding of the Tribunal. Rather we concur with the view taken by the Tribunal which affirmed the decision of CIT(A). The question framed by the revenue, therefore, does not arise for consideration.

8. The last question framed is regarding deletion by the lower appellate authorities of the addition made by the Assessing Officer of an amount of Rs. 48,71,169.00 under Section 14A read with Rule 8D of the Income Tax Rules, 1962 (briefly "**the Rules**" hereinafter).

8.1. Assessee had invested in the form of shares in Kanishka Housing Development Co Pvt Ltd, which was a subsidiary company of the assessee. The Assessing Officer held that no exempt income was earned by the assessee though the investment made by it was capable of earning exempt income in future. Invoking the provisions of Rule

8D(2) of the Rules, the Assessing Officer disallowed Rs. 48.71 lakhs under Section 14A read with 8D of the Rules.

8.2. In the appellate proceedings before the First Appellate Authority, CIT(A) held that Kanishka Housing Development Co Pvt Ltd was holding land on which assessee had erected hospital. For the purpose of business expediency, assessee had invested in the shares of Kanishka Housing Development Co Pvt Ltd so that the land could be utilized for the purpose of hospital. As the investment was for the purpose of business expediency, no addition was required to be made under Section 14A of the Act. Accordingly, the First Appellate Authority deleted the addition made by the Assessing Officer.

8.3. When the matter came up before the Tribunal, Tribunal confirmed the view taken by the First Appellate Authority.

8.4. Section 14A deals with expenditure incurred in relation to income not includible in total income. As per sub-

section (1), for the purpose of computing the total income, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act.

8.5. Rule 8D lays down the method for determining the amount of expenditure in relation to income not includible in total income.

8.6. Tribunal held that assessee had not earned any exempt income during the assessment year under consideration, nor it had claimed any expenditure against any tax free income. Thus, the twin pre-conditions for invoking the provisions of Section 14A read with Rule 8D of the Rules i.e earning of exempt income and claiming expenditure to earn the same were absent. Therefore, the order passed by the First Appellate Authority was affirmed.

8.7. We are in agreement with the view taken by the Tribunal. As rightly held by the Tribunal, assessee had neither earned any exempt income nor claimed any

expenditure for earning such exempt income. That being the position, Assessing Officer was not justified in making the disallowance by invoking the aforesaid two provisions. The same was rightly deleted by the First Appellate Authority which order has been affirmed by the Tribunal. Therefore, this question proposed by the revenue also fails.

9. Consequently, we do not find any merit in the appeal which is accordingly, dismissed. However, there shall be no order as to cost.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]

Ravindra
M.
Amberkar

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signed by
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Amberkar
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