IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 01.06.2020

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

TCA.No.767/2018

Principal Commissioner of Income Tax-1
63, Race Course Road, Coimbatore. ..Appellant/Appellant

Versus

Shir P.Subramanian ..Respondent/Respondent

Prayer:- Tax Case Appeal filed under Section 260A of the Income Tax Act 1961, against the order of the Income Tax Appellate Tribunal, Madras, ''D'' Bench, dated 28.02.2018 in ITA.No.1670/Chny/2017 against the order of the Commissioner of Income Tax (Appeals)1, Coimbatore dated 31.03.2017 made in Appeal No. 26/2016-2017 again the Deputy Commissioner of Income Tax, Corporate Circle 2, Coimbatore dated 30.03.2016 made in PAN No. AMBPS893/K Assessment year 2013-2014.

For Appellant : MR.T.R.Senthil Kumar
For Respondent : Mr.A.S.Sriraman

JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.,]

(1)The appellant is the Revenue and aggrieved by the order of the Commissioner of Income Tax [Appeals]-I, dated 31.03.2017 relating to the Assessment Year 2013-14, filed an appeal before the Income Tax Appellate Tribunal, ''D'' Bench, Madras in ITA No.1670/Chny/2017 and the said appeal also came to dismissed vide impugned order dated 28.02.2018 and challenging the legality of the said order, came forward to file the present Tax Case Appeal.

(2)The appellant/Revenue has raised the following questions of law in this appeal:-

1.Whether the Appellate Tribunal is right in holding that the sale of equity shares through Share Purchase Agreement having non-compete clause does not fall within the ambit of Section 28[va] of Income Tax Act despite the express ''explanation'' added by the legislature in the said section vide the Finance Act, 2012?

2. Whether the Appellate Tribunal is right in holding that amount given for take over of business including Non-Compete covenant contained in the Sale Purchase Agreement was only share purchase agreement and not business take over, where the valuation is pursuant to Regulations 3[1] and 4 of the Securities and Exchange Board of India [Substantial Acquisition of Shares and Take overs] Regulations 2011, which deal with valuation of shares resulting in transfer of business?
3. Whether the Appellate Tribunal is correct in holding that the amount received by the Public and the Managing Director is to be equally treated by ignoring the fact that the Managing Director is controlling the business and has given up the business continuity and portion of his share has been retained by the purchaser for future contingencies of the business whereas the public has no hold in the business?

(3) The facts leading to filing of this appeal, have been narrated in detail and in extenso in the order of the Commissioner of Income Tax [Appeals]-I dated 31.03.2017 in Appeal No.26/16-17 and therefore, it is unnecessary to re-state the facts once again.

(4) The Deputy Commissioner of Income Tax, in the Assessment Order dated 30.03.2016 found that the provision of Section 28 [va] of the Income Tax Act, 1961, will be applicable to the assessee and the excess amount of Rs.20.90 per share, received by him, over and above the market price of Rs.60.10 as on 13.07.2012, is to be treated as business income of the respondent/assessee and accordingly, done the computation. The respondent/assessee, aggrieved by the said order of Assessment, wherein the income from the transfer of business, partly as capital gain and partly as income, has filed the appeal before CIT [Appeals].

(5) The Commissioner of Income Tax [Appeals], in paragraphs No.10 to 13, had formulated the necessary issues and in paragraph No.11, had recorded the finding that the assessee had only sold shares which wre held as investments ever since the inception

of the company and therefore, the income arising from the same should be treated as capital gains and further recorded the factual aspect that the Assessing Officer has also accepted that Rs.60/- per share is to be treated as capital gains and the balance of Rs.21/- per share as business income and a clarificatory Circular of the Central Board of Direct Taxes bearing No.6/2016 dated 29.02.2016 would also come to the aid of the respondent/assessee and therefore, found that the amount received by the assessee towards sale of 2,82,50,291 shares which was held as investment to M/s.Tube Investments of India vide Agreement dated 13.07.2012 will have to be treated as Capital Gains and not as business income and as a result of the said finding, it also answered the question ''whether there is a non-compete fee embedded in the transfer?'' and found that the promoter as well as the public shareholders have paid the same price, i.e, Rs.81/- per share and the amount paid to public shareholders cannot be, in any case, treated as having non compete fee embedded in them and also taken note of paragraph No.7.5 of the Agreement and accordingly, allowed the appeal.

(6) In the appeal filed by the Revenue, the Income Tax Appellate Tribunal [ITAT], ''D'' Bench, Chennai, had found in paragraph No.7 that the market rate in the Stock Exchange on the date of sale was Rs.71/- per share and therefore, the excess price of Rs.10/- per share received by the respondent/assessee was treated as non-compete fee by the Assessing Officer and the Agreement also stipulates that no non-compete fee would be paid by the purchaser and on account of the fact that the assessee selling a large amount of 2,82,50,291 equity shares to M/s.Tube Investments of India to get control over the company and that apart, same amount has been paid to third party general public also.

(7) It is also brought to the knowledge of this Court by the learned counsel for the respondent/assessee that the rate of Rs.81/- per share was offered to all shareholders vide Regulations 3[1] and 4 of the Securities and Exchange Board of India [Substantial Acquisition of Shares and Take overs] Regulations, 2011.

(8) In the considered opinion of the Court, CIT [Appeals] as well as ITAT, ''D'' Bench, Chennai, had exhaustively dealt with those issues and arrived at a categorical finding deciding those issues/questions in favour of the respondent/assessee.

(9) The substantial questions of law raised in this appeal have already been answered by CIT [Appeals] and ITAT, ''D'' Bench, Chennai in negative and therefore, there are no substantial questions of law arise for consideration in this appeal.

(10) In the result, the Tax Case Appeal stands dismissed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. Principal Commissioner of Income Tax-1
63,Race Course Road, Coimbatore.

2.The Commissioner of Income Tax (Appeals)1
Coimbatore

3.The Deputy Commissioner of Income Tax
Corporate Circle-2, Coimbatore

TCA.No.767/2018

VGII(CO)
SP(04/08/2020)