IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Tax Case Appeal No.1132 of 2010

Commissioner of Income Tax-I,
Chennai. ...Appellant

Vs

M/s.Barry-Wehmiller International
Resources (P) Ltd.,
MPL Silicon Towers, 10th Floor,
No.23-1/83, Velachery-
Tambaram Main Road, Pallikaranai
Chennai – 600 100. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 04.06.2010 made in ITA.No.554/mds/2009 on the file of the Income Tax Appellate Tribunal, 'B' Bench, Chennai for the assessment year 2001-02. Preferred against the order passed by the commissioner of Income Tax, Chennai dated 30.03.2009 made in C.No.218/CIT-I/70/263/2008-2009 against the order passed by the Income Tax Officer, Company WardI(1), Chennai, dated 17.03.2003 for the Assessment year 2001-2002.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : Mr.R.Vijayaraghavan

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

This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (“the Act” for brevity), is directed against the order dated 04.06.2010 in ITA No.554/mds/2009 on the file of the Income Tax Appellate Tribunal Chennai 'B' Bench for the assessment year 2001-02.

2.The appeal was admitted on 21.12.2010 to decide the following substantial questions of law:

“1.Whether on the facts and in the circumstances of the case, the Income Tax

Appellate Tribunal was right in quashing the order of the Commissioner of Income Tax u/s.263 on the ground that the noting in the order sheet made by the Assessing Officer dropping the proceedings initiated u/s.147 did not amount an "order" which could be subjected to revision u/s.263 of the Act?

2.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the transfer of shares was only to comply with the legal requirements, the beneficial ownership was not transferred and therefore there was no error in the order of the Assessing Officer, without considering the detailed reasons given by the Commissioner of Income Tax in the order u/s.263?"

3.The respondent/assessee had filed the appeal before the Tribunal challenging the order passed by the Commissioner of Income Tax [CIT], Chennai-1 dated 30.03.2009 under Section 263 of the Income Tax Act, 1961. The assessee for the year 2001-02 was completed under section 143(3) of the Act on 17.03.2003 on total income of Rs.74,370/-. The assessment was reopened under Section 147 of the Act on 08.08.2005 and after receiving the response from the assessee, the Assessing Officer dropped the proceedings on 29.12.2006. The CIT after examining the records relating to the assessment proceedings was of the opinion dropping the proceedings under section 147 of the Act was erroneous and prejudicial to the interest of revenue and notice under section 263 of the Act was issued proposing to revise the dropping of the reopening proceedings which in the opinion of the CIT was an order. In the show cause notice, it was stated that the Assessing Officer dropped the proceedings under section 147 of the Act holding that there was no change in the beneficial shareholding of the Company in terms of section 10A (9) of the Act. The CIT opined that the Assessing Officer failed to appreciate that the beneficial shareholding of the Company has changed with the acquisition of shares of Marquip International Inc. in USA [hereinafter referred to as "US Company"] which owned 100% shares of Marquip Asia Pacific, Mauritius [hereinafter referred to as "Mauritius Company"] which was the holding company of the assessee. The CIT further opined that the Assessing Officer failed to consider the amendment sought by the assessee with Foreign Investment Promotion Board consequent to this change which was given effect on 19.01.2002.

4.The assessee objected to the notice issued under section 263 of the Act stating that there is no written order passed by the Assessing Officer dropping the proceedings under section 143 of the Act and therefore, the same cannot be subject matter of an action under Section 263 of the Act. Supplementing such stand, the assessee submitted that they have not received an proceedings from the Assessing Officer on the proceedings initiated under section 148 of the Act. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of B.J.Shelat vs. State of Gujarat [AIR 1978 SC 1109]. The CIT held that the Assessing Officer has passed an order on 29.12.2006 dropping the proceedings and this can be subject matter of consideration under section 263 of the Act as the said power can be invoked not only in case of an assessment order but to any order passed in the course of any proceedings under the Act by the Assessing Officer. Further, the CIT held that the assessee was well aware of the decision which was in their favour and therefore, it is incorrect on their part to state that there was no communication from the Assessing Officer to the said effect. Further, the assessee contended that the decision of the Assessing Officer cannot be held to be erroneous as he had dropped the proceedings after considering the entire submissions of the assessee and the documents placed before him.

5.Further, by referring to Explanation 1 to Section 10A of the Act, it was submitted that there should not be either change of ownership or change in beneficial interest as Explanation 1 clarifies that for the purpose of determining whether there is change in ownership or beneficial interest, the test to be applied is whether there is transfer of beneficial interest beyond 49%. Further the assessee contended that the assessee's shares were held by the Mauritius Company and the Mauritius Company in turn was owned by the US Company and the US Company was taken over and consequent to this, the assessee applied to the Company Law Board for change of its name and the Assessing Officer enquired about the share holding pattern of the US Company which has been taken over by another US Company and after full verification and after having been satisfied that there is no change in the beneficial shareholding of the Company dropped the proceedings.

6.The CIT did not agree with the said submission by taking note of the Company register, change in beneficial interest held that the same has been recorded and consequently, the Assessing Officer without considering the material fact of the beneficial interest and without verifying the Company's registers has passed the order dropping the proceedings and the same is erroneous and prejudicial to the interest of revenue and accordingly set aside the assessment order to issue a fresh order after considering all relevant material and determine afresh whether or not there is change in beneficial interest in terms of Section 10A(9) of the Act and decide the assessee's liability for deduction under Section 10A of the Act accordingly. Aggrieved by such order, the assessee preferred appeal before the Tribunal. The Tribunal allowed the appeal by the impugned order which has been challenged in this appeal before us by the revenue raising the aforementioned substantial questions of law.

7.We have elaborately heard Mr.T.Ravikumar, learned senior standing counsel appearing for the appellant and Mr.R.Vijayaraghavan, learned counsel appearing for the respondent.

8.Three major issues arise for consideration. Firstly, whether the CIT could exercise jurisdiction under section 263 of the Act against a decision of the Assessing Officer dropping the reopening proceedings after issuing notice under Section 148 of the Act and after receiving the reply/objections of the assessee. The second aspect is whether or not there was change in beneficial interest in terms of Section 10A(9) of the Act. Thirdly, whether the twin ingredients which are required to be satisfied cumulatively for the exercise of power under Section 263 of the Act stood satisfied.

9.Mr.T.Ravikumar, learned senior standing counsel appearing for the appellant placed reliance on the following decisions:

1) Commissioner of Income Tax vs. Indo Marine Agencies Kerala (P) Ltd., [(2005) 279 ITR 372]
2) New Jagat Textile Mills (P) Ltd. vs. Commissioner of Income Tax [(2006) 282 ITR 399 (Guj.)]
3) Commissioner of Income Tax vs. Carborandum Universal Ltd. [(1999) 240 ITR 0099]
4) Commissioner of Income Tax vs. V.V.A.Shanmugam [(1999) 236 ITR 0878]
5) Sewduttroy Rambullav & Son vs. Commissioner of Income Tax [(1993) 204 ITR 0580]
6) H.H.Rajdadi Smt.Badan Kanwar Medical Trust vs. Commissioner of Wealth Tax [(1995) 214 ITR 130]

10.The aforementioned decisions have been pressed into service by Mr.T.Ravikumar, learned senior standing counsel to buttress his submission that the proceedings of the Assessing Officer dropping the reopening proceedings is an order and the correctness of which can be considered by the Commissioner in exercise of his powers under Section 263 of the Act.

11.In the case of Indo Marine Agencies of Kerala (P) Limited, the Assessing Officer had closed the assessment as 'NA' in view of the fact that the assessee did not have any taxable income for the assessment year under consideration. This fact was taken note of and it was held that the endorsement 'NA' made by the Assessing Officer on the ground that the assessee did not have a taxable income from the assessment year under consideration onwards was held to be an order under Section 144 of the Act and merely because it is not communicated, it would not make such an assessment recorded in the order sheet illegal and therefore, there would not be no bar to initiate proceedings under section 147 of the Act.



12.The facts of the present case are slightly different because the case before us is not an exercise of power under Section 263 of the Act to consider the correctness of the decision taken by the Assessing Officer on an original assessment whether the assessment was erroneous and prejudicial to the interest of revenue. Therefore, the decision in Indo Marine Agencies of Kerala (P) Limited would be distinguishable on facts. Equally so are the other decisions as well.

13.However, the underlying legal principle laid down in all the decisions is that section 263 of the Act empowers the Commissioner to take up consideration any order passed in any proceedings under the Act and it is not possible to read the provision as being limited to exercising revisional powers qua the order of assessment only.

14.Similarly in the case of V.V.A.Shanmugam also, the issue was whether the CIT has got no jurisdiction under section 263 of the Act to interfere with the order passed by the Income Tax Officer [ITO] as per the direction given by the IAC under Section 144A of the Act.

15.The earliest of the decision which has been referred in all the above decisions is that of the Hon'ble Supreme Court in the case of CIT vs. Bidhu Bhusan Sarkar [(1967) 63 ITR 278 (SC)], wherein it was held that pursuant to the filing of a return the ITO enters in the order sheet the remarks “No proceedings” or “filed”, it has to be construed as an order disposing of the proceedings of assessment. As pointed out earlier, in the case on hand, it is not a case of an assessment. Assessment had been completed and thereafter, the Assessing Officer was of the opinion that assessment requires to be reopened, he has recorded reasons and pursuant to which, notice under section 148 of the Act was issued and after receiving the reply from the assessee, the Assessing Officer was satisfied that there was no case for reopening and the proceedings were dropped. Therefore, the decision cited by the revenue would not render assistance to their case.

16.The revenue had relied upon the decision in the case of Carborandum Universal Ltd. On a quick reading of the decision, one may get an impression that the decision can be applied to the facts of the present case, but on a careful reading of the questions framed for consideration, more particularly, question No.3 which has been answered in paragraph No.4 of the judgment in the following terms would clearly show that the decision would support the case of the assessee:

> "4.So far as the third question is concerned, the Tribunal, in our view, has rightly held that the order dropping the proceeding is not an order of reassessment and, therefore, notwithstanding the fact of dropping of those proceedings, the CIT has jurisdiction to revise the original assessment order made under s.263(2)(a) of the Act. Our answer to this question is against the assessee and in faovur of the Revenue. As the Tribunal has not examined the merits of the case, we direct the Tribunal to do so now."

17.Therefore, we are of the view that the CIT had no jurisdiction to invoke his power under section 263 of the Act to examine the correctness of the decision taken by the Assessing Officer dropping the reopening proceedings after issuance of notice under section 148 of the Act and after considering the objections filed by the assessee. In fact to the said extent, the Tribunal was right in its opinion. However, we do not agree with the finding of the Tribunal in paragraph No.6 of the impugned order, wherein the Tribunal has made an observation that issuance of notice under section 148 of the Act was an administrative decision and dropping of the proceedings after verifying the details was also an administrative decision. This observation is incorrect because the decision to be taken before issuance of notice for reopening should be based upon the cogent reasons and the Assessing Officer who issues notice should record his satisfaction and this cannot be termed as purely an administrative decision but there is a quasi-judicial application of mind required before issuance of notice under Section 148 of the Act. Likewise after receiving the objections from the assessee if the Assessing Officer seeks to sustain his prima facie view and reject the objections submitted by the assessee, then also he is required to apply his mind and pass an order, the correctness of which can be questioned in a proceedings under Article 226 of the Constitution of India. Therefore, to that extent, we do not agree with the finds of the Tribunal.

18.The second issue is whether the Tribunal was right in holding that the transfer of shares was only to comply with the legal requirements, the beneficial ownership was not transferred and therefore, there was no error in the order of the Assessing Officer. In this regard, the documents submitted before the Assessing Officer was placed before us, from which, we find that the US Company had addressed the Registrar of Companies in Chennai conveying their no objection for change of name. The register of members and share ledger accounts would show that the shares which were transferred to MIPL was without beneficial interest with effect from 11.03.2002. Further, the assessee in their letter dated 24.03.2006 had stated with regard to the shareholding pattern as follows:

> "Shareholding
>
> 100% of the equity capital of Marquip Worldwide Systems was held by Marquip Asia-Pacific Limited, a company incorporated in Mauritius. There is no change in the shareholding pattern or the beneficial ownership of the share holding in the Indian Company. Even after the name change, the shareholding pattern in the Indian Company continued to be same.
>
> It is evident from the statutory shareholders register that all the shares of the Indian Company are held by Marquip Asia-Pacific Limited, Mauritius and we add that during 2000-01, no share transfers occurred. It may please be noted here tat only 2 shares were transferred to Barry-Wehmilller Companies Inc., USA only in the year March 2002 and that too without beneficial interest in the said shares. Marquip Asia-Pacific continued to hold the beneficial interest in the shares.
>
> We also attach a copy of the abstract of the shareholder register duly attested by the Company Secretary. This has been further confirmed by the copy of the certified letter received from Marquip Asia-Pacific Limited, Mauritius which is enclosed herewith.
>
> Right from 1997, Marquip Aisa-Pacific Limited was owned by Marquip International Inc., USA. 100% of the shares of Marquip Asia-Pacific Limited were owned by Marquip International Inc., USA. There is no change in the shareholding pattern or the ownership or the beneficial interest in the shares.
>
> This has been supported by the certified copy of the duly notarized letter received from Marquip Asia-Pacific Limited, which is attached herewith.
>
> This clearly proves that there is no change in ownership or beneficial interest in the Indian Company even after the name change."

19.Further, Marquip Asia-Pacific Limited, Mauritius by their letter dated 16.03.2006 informed the petitioner by confirming that shareholding of Barry-Wehmiller International Resources Private Limited is as follows:

"(1) 31,156 equity shares of Rs.100 each held by Marquip Asia-Pacific Limited, Mauritius (MAPL),

(2) 2 equity shares of lRs.100 each heald by Barry-Wehmiller Companies Inc., USA as nominee shareholder on behalf of MAPL, Mauritius."

20.Further, it was stated that since Barry-Wehmiller Company incorporated in USA does not have any beneficial interest in the shares held on behalf of the MAPL, 100% of the shares in Barry-Wehmiller International Resources Private Limited are therefore owned by MAPL, Mauritius. This submission was duly support by necessary records. Further, the assessee had submitted an explanatory note clearly explaining the organization structure and established before the Assessing Officer that during 2000-01, Barry-Wehmiller Company Inc. acquired 100% shares in Marquip International Inc. and this does not change the shareholding pattern of the assessee Company and the parent Company continued to be the Mauritius Company with 100% equity.

21.These facts were taken note of and the Assessing Officer had dropped the reopening proceedings. Thus, it is on an opinion formed by the Assessing Officer and after being satisfied that there is no case made out for reopening and after recording that the ownership or beneficial interest of the Company has not changed and continued to be with Mauritius Company and therefore, Section 10A(9) of the Act is not attracted and accordingly, proceedings under Section 147 of the Act was dropped. Therefore, unless and until the twin tests which are required to be satisfied that the assessment should be not only erroneous but prejudicial to interest, the power under section 263 of the Act should not have been invoked apart from the fact that this was not a case where such a power was exercised to revise the original assessment. Therefore, the Tribunal was right in coming to the conclusion that the shares were transferred only to comply with the legal requirements and the beneficial ownership was never transferred. Hence, we find that the order passed by the Tribunal does not call for any interference.

22.In the result, the tax case appeal is dismissed and the Substantial Questions of law are answered against the revenue and in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
   'B' Bench, Chennai.

2. The Commissioner of Income Tax-I,
   Chennai.

3. The Income Tax Officer,
   Company Ward-I(1),
   Chennai.

+1cc to Mr.T.Ravikumar, SSC, Advocate, S.R.No.37910
+1cc to Mr.Subbaraya Aiyar, Padmanabhan, Advocate, S.R.No.37920

TCA.No.1132 of 2010

PM(CO)
RGA(23/08/2021)