

Form No. (J2)

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

Present :

The Hon'ble JUSTICE T. S. SIVAGNANAM

And

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

ITAT/39/2020
IA NO.GA/2/2020 (Old No.GA/1153/2020)

PRINCIPAL COMMISSIONER OF INCOME TAX-3, KOLKATA
VS
M/S. EIH LTD.

Appearance:
Mr. S.N. Dutta,
Mr. Soumen Bhattacharjee, Advs.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.,
Mr. Soham Sen, Adv.,
for the respondent.

Heard on : 17.01.2022

Judgment on : 17.01.2022

T.S. SIVAGNANAM J. : This appeal of the revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the composite order dated 5th April, 2017 passed

by the Income Tax Appellate Tribunal, A-Bench, Kolkata (the 'Tribunal') in ITA No.1557/Kol/2011 and ITA No.1431/Kol/2011 for the assessment year 2007-08.

The revenue has raised the following substantial questions of law for consideration:

- (i) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deciding the appeal in favour of the assessee that surplus amount of Rs.31,33,05,072/- is covered an exchange under section 2(47) of the Income Tax Act as against long term capital gains under section 50B and section 2(42C) of the Income Tax Act?*
- (ii) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.2,84,00,909/- being 60% of the aggregate expenditure incurred on running and maintenance of aircrafts without considering that the aircrafts were also used for personal purpose of the directors?*
- (iii) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.2,59,33,450/- under section 40(a)(i) on account of professional and consultancy charges to non*

residence by ignoring the fact that such fees are subject to tax in India under section 9(1) read with section 195 of the act?

(iv) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.84,57,149/- under section 40(a)(i) on account of advertisement publicity and sales promotion to non resident by ignoring the fact that such expenses are subject to tax in India under section 9(1) read with section 195 of the act?

(v) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law deleting the disallowance of Rs.84,57,149/- under section 40(a)(i) on account of advertisement publicity and sales which was reasonable considering the fact that the documents in support of such expenses were not produced by the assessee before the assessing officer?

(vi) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in not deciding the issue relating to leave encashment on merits and mechanically remanded the matter back to the file of the assessing officer for reconsideration to base its decision on the finding of the Supreme Court in the case of Exide

Industries Ltd. Vs. Union Bank of India which has not yet been finally decided by the apex court?

(vii) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of expenditure in respect of earning dividend income & tax free interest on US 64 tax free bonds without appreciating the finding of the assessing officer who disallowed 0.5% of average investment by applying rule 8D of income tax rules and made disallowance of expenses under section 14A?*

(viii) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the addition on account of interest amounting to Rs.3,80,69,705/- being 12% of interest free advances given to subsidiary companies for non business purpose based on the presumption that those advances were made by the assessee out of its own funds and not out of the borrowed funds bearing interest?*

(ix) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under section 40(a)(ia) of Rs. 13,68,50,370/- paid as commission to and sitting fees to directors of the*

company without deducting tax at source under section 194H of the Income Tax Act?

(x) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under section 40(a)(i) of Rs.3,06,20,256/- paid as commission to non-resident by ignoring the fact that such commission are subject to tax in India under section 9(1) read with section 195 of the Income Tax Act?

(xi) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under section 40(a)(i) of Rs.3,06,20,256/- paid as commission to non-resident by considering the facts pertaining to such expenses were not produced by the assessee before the assessing officer?

We have heard Mr. S.N. Dutta, learned standing counsel assisted by Mr. Soumen Bhattacharjee, learned Counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel, assisted by Mr. Soham Sen, learned Counsel appearing for the respondent/assessee.

It is not disputed before us that the substantial questions of law no.(ii), (iii), (iv), (v), (viii), (ix), (x) and (xi) have been answered against the revenue in the revenue's appeal in the assessee's own case for the assessment year 2008-09

in ITAT No.34 of 2020 dated 16th December, 2021. Thus, following the said decision, the said questions of law are answered against the revenue.

So far as the substantial question of law no.(vi) is concerned, we find that the Tribunal has remanded the matter for a fresh decision after taking note of the decision of the Hon'ble Supreme Court. Thus, we find that there is no question of law arising for consideration on the said issue and hence, the said question of law no.(vi) is rejected. So far as the substantial question of law no.(vii) is concerned, we have carefully perused the findings recorded by the Tribunal in paragraph 7.2.1 and 7.2.2 of its order. We find that after analysing the factual position, relief has been granted to the assessee. Thus, we find that no question of law much less the substantial question of law as suggested would arise for consideration in so far as the question of law no.(vi) is concerned and the same stands rejected. This leaves us only with substantial question of law no.(i). The discussion on this issue in the order passed by the Tribunal commences from paragraph 2.2 of the impugned order. The Tribunal after considering the factual position noted that the factual situation which is not in dispute is that the transfer of capital assets is within the meaning of Section 2(47) in the form of transfer of two undertakings, the consideration is a lumpsum payment, the consideration is not attributable to any identifiable

assets of the undertaking transferred by assigning individual values and the consideration is settled to the assessee by issuance of preference shares and debentures in EIH Associated Limited. After noting these facts, the Tribunal has considered the definition of slump sale as defined under Section 2(42C) of the Act as it stood then. The Tribunal then took note of the decision of the Hon'ble Supreme Court in the case of CIT Vs. R.R. Ramakrishna Pillai, reported in (1967) 66 ITR 725 (SC). Thereafter, it took into consideration the definition of the transfer as defined under Section 2(47) of the Act and noted that in the assessee's case transfer is by way of exchange, that is, by issuance of preference shares and debentures in EIH Associated Limited.

The Tribunal took note of the argument of the assessee with regard to computation of capital gains and found that there cannot be any controversy that each of the specified hotels is an undertaking and, therefore, constituted a long term capital asset. Further, the Tribunal took note that it is not in dispute that the transfer of the business undertaking as a going concern constitutes transfer of capital asset. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Setty, reported in (1981) 128 ITR 294 (SC) and on facts found that the two specified hotels which were transferred as going concerns by way of exchange of shares and debentures, the

cost of acquisition of the undertaking and the date of such acquisition cannot be ascertained and in such a case, such a transfer cannot be brought within the purview of Section 45 of the Act. The Tribunal proceeded to take note of the decision of the High Court of Bombay in the case of CIT Vs. Bharat Bijlee Limited, reported in (2014) 365 ITR 258 (Bom) and granted relief to the assessee by observing that two specified hotels of the assessee were transferred to EIH Associated Limited for consideration of Rs.78,99,26,100/- to be settled by issuance of preference shares and debentures were a transfer of capital by way of exchange and, therefore, the provisions of Section 50B of the Act cannot be made applicable to the facts of the case on hand. We find that the finding recorded by the Tribunal to be perfectly right. In fact, the Tribunal rightly took note of the decision in the case of R.R. Ramakrishna Pillai (supra) where it has been held as follows :

"A transaction by which a person carrying on business transfers the assets of that business to another assessable entity may take different forms and may have different legal effect. The assets of a business may be sold at a fixed price to a company promoted by a person who carried on the business! if the price paid for or attributable to an asset exceeds the written down the value of the asset, proviso 2 to section 10(2)(vii) would ex facie be attracted. Where the person carrying on the business transfers the assets to a company in consideration of allotment of shares, it would be a case of exchange and not of sale, and the true nature of the transaction will not be altered, because for the purpose

of stamp duty or other reasons the value of assets transferred is shown as equivalent to the face value of the shares allotted. A person carrying on business may agree with a company floated by him that the assets belonging to him shall be transferred to the company for a certain money consideration and that in satisfaction of the liability to pay that money consideration, shares of a certain face value shall be allotted to the transferor. In that case there are in truth two transactions - one a transaction of sale and the other a contract under which shares are accepted in satisfaction of the liability to pay the price".

That apart, we took note of the submissions of the learned Senior Counsel for the respondent/assessee that the definition of slump sale as defined under Section 2(42C) was amended with effect from 1st April, 2021. The unamended provision defined slump sale to mean transfer of one or more undertaking as a result of sale. By Finance Act, 2021 the amendment made was by defining slump sale to mean the transfer of one or more undertaking by any means. This significant change by way of amendment would also aid the case of the assessee and would convince us to uphold the finding of the Tribunal.

For the above reasons, the substantial question of law no.(i) is answered against the revenue. In the result, the substantial question of law nos. (ii), (iii), (iv), (v), (viii), (ix), (x) and (xi) are answered against the revenue following the decision in ITAT No.34 of 2020 dated 16th December, 2021 in the

assessee's own case for the assessment year 2008-09. The substantial question of law no.(vi) is concerned, this is not a question of law since the matter has been remanded to the assessing officer to decide the matter afresh. So far as the substantial question of law no.(vii) is concerned, we affirm the finding of the Tribunal on facts and, accordingly, the said question stands decided against the revenue.

For the reasons assigned in the preceding paragraphs, the substantial question of law no.(i) is answered against the revenue.

In the light of the above, the appeal (ITAT 39/2020) fails and is hereby dismissed.

With the dismissal of the appeal, the stay application (GA/2/2020) stand closed.

(T. S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)