

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

IA NO.GA/2/2020
ITAT/51/2020

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA
-Versus-
M/S. MAHALUXMI MARKETING PVT. LTD.

*For the Appellant: Mr. S. N. Dutta, Adv.
Mr. Asok Bhowmick, Adv.*

For the Respondent: Mr. Agnibesh Sengupta, Adv.

Heard on : 07.02.2022

Judgment on : 07.02.2022

T. S. SIVAGANANAM, J. : This appeal of revenue filed under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 12TH December, 2018 passed by the Income Tax Appellate Tribunal, Kolkata "B" Bench (the 'Tribunal' in short) in IT(SS)A No.118/Kol/2017 for the assessment year 2012-13.

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

- "(a) *Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal was right in law in upholding the order of the Commissioner of Income Tax (Appeals) deleting the addition made under Section 69 of the Act on the ground that the assessee company is different juristic entity cannot be taxed by applying Section 68 of the Act for the share capital and premium which these 14 amalgamating companies have shown their respective books from Financial Year 2008-09 onwards ?*
- (b) *Whether the Learned Income Tax Appellate Tribunal erred in law as well as in facts in dismissing the appeal of the revenue by deleting an addition of Rs.1,53,60,07,000/- wrongly assuming that this addition has been made under section 68 while the Assessing Officer made addition on account of unexplained investment in share capital and the applicable section is Section 69 of the Income Tax Act, 1961 and, therefore, the Income Tax Appellate Tribunal erred in law in holding otherwise ?*

We have heard Mr. S. N. Dutta, learned counsel assisted by Mr. Asok Bhowmick, learned advocate for the appellant/revenue and Mr. Agnibesh Sengupta, learned counsel for the respondent/assessee.

The short question which falls for consideration is whether the Commissioner of Income Tax (Appeals)-20, Kolkata (in short CIT(A)) was justified in deleting the addition made by the

Assessing Officer under Section 68 of the Act and as to whether the Tribunal was right in affirming such an order. The legal issue which arises for consideration in the instant case is whether after the process of amalgamation the remission/cessation of trading liability can be taxed in the hands of the assessee company. In this regard it would be beneficial to refer to the decision of the Hon'ble Supreme Court in *Saraswati Industrial Syndicate Ltd. vs. Commissioner of Income Tax* reported in [1990] 186 ITR 278 (SC). In the said decision the Hon'ble Supreme Court has discussed the law on the subject i.e. after an order of amalgamation is approved by the concerned High Court. It would be beneficial to refer to paragraph 5 of the judgment which reads as follows:

"Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly

'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsbury's Laws of England, Fourth Edn., Vol.7, paragraph 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

It would also be of relevance to note an earlier decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Hukumchand Mohanlal* reported in [1971] 82 ITR 624 (SC), more appropriately the decision of the High Court of Delhi in *Commissioner of Income Tax, Delhi-VI vs. Usha Stud Agricultural Farms Ltd.* reported in [2008] 301 ITR 384 (Delhi) can be referred to as the facts in the said case would match with that of the facts in the case on hand. As in the case of the assessee before us in *Usha Stud Agricultural Farms Ltd.* the CIT(A) had recorded a finding of fact that the credit balance appearing in the accounts of the assessee does not pertain to the year under consideration and accordingly held that the assessing officer was not justified in making the addition under Section 68 of the Act.

Mr. S. N. Dutta vehemently contends that the substantial amount of funds are involved in the matter and the Tribunal proceeded to decide the matter only on technicalities.

To test the correctness of the said submission we have not only gone through the order passed by the Tribunal but also the order passed by the CIT(A) dated 15th June, 2017. The CIT(A) as well as the Tribunal not only took note of the legal position but also the factual position. The Tribunal held that the legal effect after amalgamation of the 14 companies with the assessee company is that the amalgamating companies loses its identity and since the assessee company is different juristic entity, cannot be taxed by applying Section 68 of the Act for the share capital and premium which these 14 amalgamating companies have shown in their respective books from financial year 2008-09 onwards. Furthermore, the Tribunal as well as the CIT(A) noted that the assessee company being a different corporate entity cannot be saddled with the share capital introduced by 14 different amalgamating companies in the financial year 2008-09. That apart, the Tribunal also considering the legal position namely, the decision in *Saraswati Industrial Syndicate vs. Commissioner of Income Tax* reported in [1990] 53 taxman 92 (SC), in the case of *Hukumchand Mohanlal (supra)* and *Usha Stud Agricultural Farms Ltd. (supra)* dismissed the appeal filed by the revenue.

We find that there is no error committed by the Tribunal in affirming the decision of the CIT(A). Thus, for the above reasons, the appeal filed by the revenue (ITAT/51/2020) is dismissed. In the result, the substantial questions of law are answered against the revenue.

The connected application for stay being GA/2/2020 stands dismissed.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)