

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

ITAT/216/2017
IA No.GA/2/2017 (Old No.GA/1849/2017)
PRINCIPAL COMMISSIONER OF INCOME TAX-3, KOLKATA
VS.
M/S. BRITANNIA INDUSTRIES LIMITED

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 25th August, 2022

Appearance :

Mr. Prithu Dudhuria, Adv.

....for appellant

Mr. R.K. Murarka, Sr. Adv.

Ms. Sutapa Roychowdhury, Adv.

Ms. Aratrika Roy, Adv.

...for respondent

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated October 28, 2016, passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata, in I.T.A No.775/Kol/2015 for the assessment year 2009-2010.

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

"Whether on the facts and circumstances of the case and in law, the learned Income Tax Appellate Tribunal "A" Bench erred in quashing the order of the Principal Commissioner of Income Tax -3, Kolkata passed

under section 263 of the Income Tax Act, 1961 on the ground that the revisionary power were invoked by the Principal Commissioner of Income Tax-3, Kolkata merely on the ground of difference of opinion with the assessing officer in determining the nature of income of the settlement amount received by the assessee company from M/s. Danone Group, Singapore ?”

We have heard Mr. Prithu Dudhoria, learned standing Counsel appearing for the appellant/revenue and Mr. R.K. Murarka, learned senior Counsel appearing for the respondent/assessee.

The short issue involved in this case is whether the Commissioner could have invoked his power under Section 263 of the Act on the ground that the Assessing Officer did not conduct proper enquiry. We need not labour much to decide this issue as the learned Tribunal has elaborately discussed the factual position and brought out as to how the Assessing Officer had conducted an enquiry into the aspect as to how the amount received by the assessee from foreign entity towards settlement of a civil dispute pertaining to a trademark has to be treated. For better understanding we extract the relevant portion of the order passed by the Tribunal which has been done after taking note of clauses 4 and 11 of the settlement agreement between the assessee and the foreign entity dated 14th April, 2009.

“10. A reading of the above agreement and the terms set out in schedule 2 indicates that at any point of time the Group Danone neither conceded the claims made by the assessee nor admitted to have infringed the trade mark rights of the assessee. At the same time, the assessee did not surrender or part with any part of their rights in respect of the trade mark either in brand name or

in logo in favour of either Danone or its affiliates. On the other hand, the settlement was reached neither of the parties relinquishing their claims put forth before the adjudicatory forums. In other words, neither Danone admitted to have committed any breach of trade mark of the assessee nor the assessee agreed to forego any of its rights in respect of the brand name and logo of 'TIGER'.

11. Taking strength from this factual position, Learned AR submitted it cannot be stated that either of the parties has given any concession to the other in consideration of which such payment was made by Danone to the assessee and only as a consideration for the assessee to give up their right to sue the Danone paid this amount. He further submitted that when the matter was argued before the Assessing Officer basing on facts and law, the Assessing Officer considered all these factors and has reached a view that the income in dispute is chargeable under the head "Capital Gains". Placing reliance on a decision of a Coordinate bench of Hyderabad Tribunal in *Orient Blackswan (P) Ltd. Vs. ACIT (2016) 71 Taxmann.com 319* wherein under similar circumstances the question arose as to whether the compensation received under compromise in respect of putting an end to litigation and neither of the party precluded from using the trade mark then such a compensation cannot be treated as business income, he submitted that the view taken by the CIT also is equally lopsided.

12. Now coming to the proceedings before the Assessing Officer, we find from the Paper book that Page No. 46 thereof is the letter dated 05.12.2012 where under the AO sought some information from the assessee and such information includes the following question also :

"What is the nature of capital receipt towards the settlement of litigation of Rs. 22.79 cr. During the financial year ? Also furnish the details, names and addresses of the parties with whom such transactions were made."

13. To this query the assessee submitted an elaborate reply which is incorporated in page nos. 50 to 62 of the paper book. In this reply, the assessee set forth the background of the matter vide Page nos. 50 to 53, reasons for their objection to treat it as business income in page nos. 56 to 58 and the reasons not to consider the same as capital gain in page no. 59 to 62. AO in his order vide page nos. 7 to 10 elaborately discussed the contentions raised by the assessee and while brushing aside their submissions in respect of the capital receipt and business income AO preferred to take the view that such an amount is to be taxed under the head capital gain. It could be seen from the submissions of the assessee before the AO, the assessee placed reliance on so many decisions in respect of their contentions to object the treatment of the amount either as business income or as capital gain. Having considered all these facts and also the law laid down in such decisions, the AO consciously reached a conclusion that the income is to be treated as capital gain but not as either capital receipt or business income. This is one of the probable views that could have validity be

taken. By no stretch of imagination could it be said that the AO mechanically passed this order taking the view that the income has to be charged as capital gain. The AO made enquiries, called for details of such income and having considered the submissions of the assessee in respect of all the three probable views i.e. capital receipt, business income and capital gain, the AO for the reasons recorded in his order at page nos. 7 to 10, came to the conclusion that the income in dispute has to be charged as capital gain but not as capital receipt or business income. In this factual context, we are called upon to examine the question whether the CIT is justified in terming the order of AO as erroneous and without proper enquiry or on wrong assumption of the facts.”

From the above, we see that it is not a case where the Assessing Officer failed to conduct an enquiry rather it is the case where the Assessing Officer has conducted an elaborate enquiry and adopted one of the three views which was the plausible view. The question would be as to whether in such circumstances the power under section 263 could be invoked. This issue is no longer *res integra* and well settled in several decisions and one of the earliest decision on the said point is in the case of *Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax*, (2000) 243 ITR 83 (SC). In the said decision the Hon’ble Supreme Court held as follows :-

“The phrase “prejudicial to the interests of the Revenue” has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue ; or where two views are possible and the Income-tax Officer has taken one view which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.”

Further, the Hon'ble Supreme Court in the case of Pr. CIT vs. Canara Bank Securities Ltd., S.L.P.(C) No. 25651 of 2019, by order dated 14th October, 2019 dismissed the department's appeal affirming the view taken by the Bombay High Court in ITA No.1761 of 2016, dated February 11, 2019, wherein the High Court held that the question whether the income should be taxed as business income or has arisen from other source was a debatable issue and the Assessing Officer had taken the plausible view that it was a business income after due enquiries and therefore not open for the Commissioner to take such an order in revision.

In the light of the above, we are of the considered view that the learned Tribunal had rightly granted reliefs in favour of the assessee.

For the above reasons, the appeal is dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)