

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

ITA/67/2012
IN THE MATTER OF :
COMMISSIONER OF INCOME TAX, CENTRAL-I, KOLKATA
VS
VIPER ESTATES & INVESTMENTS (P) LTD.

BEFORE :
THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATED : JANUARY 18, 2022.
[Via Video Conference]

Appearance :
Mr. P.K. Bhowmick, Advocate
...for appellant
Mr. Abhratosh Majumder, Advocate
Mr. Avra Mazumder, Advocate
...for respondent

The Court :- This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 29th December, 2010 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata in ITA No. 890/Kol/2010 for the assessment year 2005-06. The appeal was admitted on 15th June, 2012 to decide the following substantial question of law:-

1. Whereon the facts and in the circumstances of the case the Income Tax Appellate Tribunal erred in law in quashing the order passed under section 263 of the Income Tax Act, 1961 without considering the judgement of the Hon'ble Apex court in the case of Vazir Sultan tobacco Co. Ltd. reported in 132 ITR 559 where the Hon'ble Apex Court had held that amount transferred to General Reserve should be treated as profit chargeable to Income-tax in the assessee's hands ?

We have heard Mr. P.K. Bhowmick, learned Counsel appearing for the appellant/revenue and Mr. Abhratosh Majumder, learned Counsel assisted by Mr. Avra Mazumder, learned Counsel appearing for the respondent.

The substantial question of law, which has been raised and admitted to be decided in this appeal is squarely covered in favour of the assessee in the light of the decision of the Hon'ble Supreme Court in the case of Commissioner v. Mahindra and Mahindra Ltd. [2018] 404 ITR 1 (SC). This decision was referred in the case of Commissioner of Income-Tax (LTU) v. Areva T & D India Ltd.[2021] 434 ITR 604 (Mad). The operative portion of the judgement read as follows:-

“18. Substantial question of law Nos.3 and 4 are connected as the question is as to whether the net book value of the entity taken over by the assessee over and above the consideration paid for acquiring three

companies would not fall within the ambit of the provisions of section 28(iv) of the Act.

19. The Tribunal found that the amalgamation of the three companies with the assessee-company was not the business of the assessee and consequently, it could not be stated that the provisions of section 28(iv) of the Act would apply to the excess of the net book value of the entities over the consideration paid in any way nor was it income liable to tax under the head "Profit and gains of business" in the hands of the assessee-company. On the above terms, relief was granted to the assessee.

20. This issue is no longer res integra and has been decided by the hon'ble Supreme Court in the case of Commissioner v. Mahindra and Mahindra Ltd. reported in [2018] 404 ITR 1 (SC) wherein it was held that for applicability of section 28(iv) of the Act, the income must arise from the business or profession and the benefit, which is received has to be in some other form other than in the shape of money.

21. An identical issue was considered by the hon'ble Division Bench of this court in the case of CIT v. Stads Ltd. reported in [2015] 373 ITR 313 (Mad) wherein it was held that the provisions of section 28(iv) of the Act make it clear that the amount reflected in the balance-sheet of the assessee under the head "Reserves and surplus" could not be treated as a benefit or perquisite arising from business or exercise of profession, that the

difference amount post amalgamation was the amalgamation reserve and it could not be said that it was out of normal transaction of the business and that the present transaction, being capital in nature, which arose on account of amalgamation of four companies, could not be treated as falling under section 28(iv) of the Income-tax Act.

22. Thus, the Tribunal rightly granted relief to the assessee. We also find that the Commissioner of Income-tax (Appeals) appreciated the facts in a proper perspective and granted relief to the assessee and in doing so, followed the decision of the High court of Gujarat in the case of CIT v. Spunpipe and Construction Co. Ltd. reported in [1965] 55 ITR 68 (Guj)."

In the instant case, the Tribunal noted the facts and found that no nexus has been established that the amount which the assessee got as a benefit had anything to do with the business income. Further, the Tribunal noted that the scheme of arrangement in the nature of amalgamation was approved by the jurisdictional High Court on 15th January, 2005, and was effective from 1st April, 2004, which will show that it is a case of scheme of amalgamation. Therefore, the Tribunal rightly observed when it is a case of amalgamation provisions of Section 47(6) of the Act will take care of the situation. Thus the Tribunal concluded that the order of assessment dated 11th December, 2007 cannot be said to be erroneous or prejudicial to the interest of revenue warranting invoking of power under Section 263 of the Act. Thus we find that there is no error in the decision of the Tribunal.

In the result, appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

GH/nm.