

OD-8

ITAT/70/2015
IA No.GA/2/2015 (Old No.GA/1448/2015)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX,
KOLKATA-3, KOLKATA

-Versus-

M/s. PURBANCHAL POWER COMPANY
LIMITED

Appearance:

Mr. Prithu Dudheria, Adv.
...for the appellant.

Mr. Rishi Raju, Adv.
Mr. Soumyajyoti Nandi, Adv.
Mr. Deepankar Thakur, Adv.
Mr. Ashutosh Singh, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 15th July, 2022.

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 17th July, 2014 passed by the

Income Tax Appellate Tribunal, Kolkata, "B" Bench, Kolkata in ITA No.201/Kol/2010 for the assessment years 2006-07.

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

- i) *Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench, Kolkata erred in law in upholding the order of the CIT (Appeals)-VIII, Kolkata by deleting the addition of Rs.69,64,34,089/- made by the Assessing Officer on the ground that jurisdictional High Court has approved the scheme of Amalgamation without considering the ratio laid down by Hon'ble Apex Court in the case of Marshall & Sons as the Department has initiated separate proceedings considering the violation of section 2(1B) of the Income Tax Act, 1961?*
- ii) *Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench, Kolkata erred in law in holding that the Department cannot examine the taxability of income under section 68 of the Income Tax Act only because the Hon'ble High Court has approved a scheme of amalgamation ?"*

We have heard Mr. Prithu Dudheria, learned standing counsel for the appellant/revenue and Mr. Rishu Raju, learned Counsel assisted by Mr. Soumyajyoti Nandy, Mr. Deepankar Thakur

and Mr. Ashutosh Singh, learned Advocates for the respondent/assessee.

The issue involved in the instant case is whether the scheme of amalgamation which was approved by this Court could be stated to be a scheme which was floated by the assessee with the sole object of avoidance of income tax. The assessing officer held so. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals)-VIII, Kolkata. By order dated 19th November, 2009, the appeal was allowed. The finding rendered by the appellate authority is as follows:

" * * *

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* * *

However, once the Hon'ble jurisdictional High Court approves the scheme of amalgamation, it is a natural corollary to presume that these issues were in the knowledge of the Hon'ble High Court and, also, that such an order has been passed after due deliberations of all concerned issues. The AO has relied on a few case laws in support of his stand. These have been perused. I do not discern any latitude in these decisions which can empower any AO to challenge the jurisdictional High Court's order in this regard. Moreover, once the jurisdictional High Court approves of a scheme of Amalgamation, the suspicion of a colourable device therein is preclude. The AO has mentioned in his order that a 'a huge amount of money has been transferred to the serve by way of some transaction which is nothing but a colourable devise to put the reserve by way of some transaction which is nothing but a colourable devise to put into undisclosed and unaccounted income of the assessee company through the transferor

companies. . .'. The assessment order itself is silent about the process of generation of such 'undisclosed and unaccounted income'. There is no material therein to indicate that the appellant has earned any such income as mentioned by the AO.

Furthermore, as has been repeatedly stressed in various judicial decisions, the tests for an addition under Sec. 68 of the Income Tax Act to be sustained are those of identity of the creditor, its creditworthiness and genuinity of the transactions. If the AO's addition is measured against these, then it is seen that, there is no dispute as to the identity of these amalgamating companies, their creditworthiness is attested by their balance-sheet which, have been accepted by the AO and there is no imputation in the order that these monies have been actually paid to the appellant, in whatever manner. Thus the question of genuinity also becomes redundant. Accordingly, I direct that the addition made under Sec. 68 of the Income Tax Act, 1961 on account of Amalgamation Reserve credit in the books be deleted. These grounds of appeal are allowed".

Aggrieved by such finding, the revenue filed appeal before the tribunal. The tribunal re-examined the factual position and, in particular, noted the order passed by this Court approving the scheme of amalgamation more particularly, in paragraph (iv) of the order which states that since all the shares in the transferor companies are held inter se by the transferor companies, no shares shall be issued by the transferee company to

the shareholders of the transferor companies. After considering the scope of such order, the tribunal discussed the facts and after placing reliance on the decision in the case of *Vodafone Essar Gujarat Ltd. vs. Department of Income Tax*, reported in (2013) 35 taxmann.com 397 (Gujarat) rejected the appeal filed by the revenue.

With regard to whether the scheme of amalgamation is a colourable device, the tribunal elaborately considered the facts and also took note of various decisions and in particular, this Court approved the scheme of amalgamation and held the said issue against the revenue. Aggrieved by the same, the revenue is before us by way of this appeal.

The Hon'ble Gujarat High Court in *Vodafone Essar Gujarat Ltd.* held as follows:

"46.

Keeping the said object in mind if the Scheme has been framed and is approved by the shareholders in their wisdom, in our view, it cannot be said that the Scheme itself is floated with the sole criteria of tax avoidance simply because it may have effect and result into avoidance tax. If the Scheme is evolved by way of an arrangement and with an object of converting the PI assets from non-revenue generating assets; improved network quality and greater coverage etc.

... ..

It may be relevant to note that even the Central Government has not raised any objection to the Scheme and

even the Department has not contended that the aforesaid objectives are imaginary. Therefore, it cannot be said that the Scheme has no purpose or object and that it is a mere device/subterfuge with the sole intention to evade taxes, particularly when even the incidence of tax purportedly sought to be evaded is not established on facts. Further, similar scheme of arrangement proposed by other telecommunication companies to achieve the aforesaid objective have been sanctioned by different High Courts. In our considered view, this Court cannot refuse the sanction on the aforesaid ground by coming to the conclusion that the only object of the Scheme is to avoid taxes.

47. It is, no doubt, true as argued by Mr. Thakor that in case the Scheme is sanctioned, it may result into tax avoidance on the part of the appellant, but it is required to be noted that even if the ultimate effect of the Scheme may result into some tax benefit or even if it is framed with an object of saving tax or it may result into tax avoidance, it cannot be said that the only object of the Scheme is 'tax avoidance'. Considering the various clauses of the Scheme, it is not possible for us to come to a conclusion that the Scheme is floated with the sole object of tax avoidance."

The above decision was affirmed by the Hon'ble Supreme Court as reported in the case of *Department of Income Tax vs. Vodafone Essar Gujarat Ltd.* reported in (2016) 66 taxmann.com 374 (SC). In the light of the factual position arrived at by the

tribunal, we find that no question of law much less substantial question of law arising for consideration.

Accordingly, the appeal (ITAT/70/2015) fails and is dismissed.

Consequently, the connected application for stay (IA No.GA/2/2015) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)