IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.02.2022

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

T.C.A.No.254 of 2010

The Commissioner of Income Tax II,
Coimbatore.
.. Appellant / Appellant

Vs.

M/s.Lakshmi Machine Works Ltd.,
SRKV Post, Perianaickenpalayam,
Coimbatore 641 020.
PAN AAACL5244N
.. Respondent / Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'D' Bench, Chennai dated 08.06.2009 in ITA No.2159/Mds/2008 for the assessment year 2004-05 preferred against the order of the Commissioner of Income Tax (Appeals)-I in ITA.No.88/08-09 dated 11.09.2008 filed against the Assessment order of the Assistant Commissioner of Income Tax, Company Circle – IV(2), Coimbatore dated 08.07.2008 for the Assessment Year 2004-05.

For Appellant : Mr.M.Swaminathan
Senior Standing Counsel
Mrs.K.G.Usharani
Junior Standing Counsel

For Respondent : No appearance

J U D G M E N T

(Judgment of the court was delivered by R.MAHADEVAN, J.)

This tax case appeal has been filed by the appellant / Revenue, challenging the order dated 08.06.2009 passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, in I.T.A.No.2159/Mds/2008, relating to the assessment year 2004-05.

2.By order dated 22.03.2010, this court admitted the aforesaid tax case appeal on the following substantial question of law:

> "Whether the claim of carry forward losses under Section 72A of the Act, ought to have been allowed, where necessary conditions have not been satisfied?"

3.When the matter was taken up for consideration, the learned counsel appearing for the appellant, referring to the judgement dated 13.02.2019 passed by a Division Bench of this court in T.C.A. No. 747 of 2009 in respect of the assessee's own case relating to the assessment year 2004-05, submitted that the identical question of law was raised in that case and the same was decided in favour of the assessee and against the Revenue. The relevant passage of the said judgment is profitably, extracted below:

> "12. The SICA is a special enactment, the purpose of which is rehabilitation and revival of sick industries. The provisions of section 32(2) thereof read as under:
>
> '32. Effect of the Act on other laws.? -
>
> (1).......
> (2)Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72-A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation, by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.'
>
> 13. The provisions of Section 32(2) of the SICA as well as 72A of the Act and the interplay thereof came to be considered by the Supreme Court in the case of Indian Shaving Products Ltd (supra). The Bench was considering an appeal against an order of the Appellate Authority for Industrial and Financial Reconstruction upholding an order of the BIFR refusing to grant the benefit of the provisions of Section 71 (a) of the Income Tax Act to the appellant upon amalgamation and sanction of a scheme by the BIFR.

14. After noting that that BIFR had been enacted in public interest, with a view to secure timely detection of sick and potentially sick companies owning industrial undertakings and to determine preventive, ameliorative, remedial and other measures required to be taken with respect to such companies, the Bench considered the various provisions of the SICA, in specific Section 32(2).

15. Reference is made to the judgement of the Supreme Court in the case of Commissioner of Income Tax and others vs. Mahindra and Mahindra and Others (144 ITR 225) that considered a challenge to Section 72 A. The following paragraph from the judgement in Mahindra's case has been particularly noted and extracted:

> 'Before undertaking a scrutiny of these reasons for ultimately deciding whether the impugned conclusion of the Specified Authority and the Central Government is liable to be interfered with or not it will be useful to indicate briefly the object with which this new provision of s. 72A was introduced in the Act as it will throw light on what was the mischief or situation that was intended to be remedied by its introduction as also the true concept of financial Don- viability. From the budget speech of the Finance Minister, the Notes on Clauses of the Finance Bill (No. 2) of 1977 and the Memorandum explaining to provisions of the said Bill it will appear clear that sickness among industrial undertaking was regarded as a matter of grave national concern inasmuch as closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; it was felt that a more effective method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With such objective in view, in

order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf s. 72A was introduced in the Act where under by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation was in public interest. The expression "financial non-viability" had not been defined in the Act but the Finance Minister's speech, the notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in cl. (a) of sub-s. (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant facts.'

16. The above judgment was rendered prior to coming into force of SICA in terms of which the BIFR was constituted, in an era when sanction was specifically required to be given by the Central Government upon recommendation of the Specific Officer thereunder. Thus, financial viability or otherwise, of the amalgamating company had to be determined first, in order to attract the provisions

of Section 72A. However, after the enactment of the SICA and the Constitution of the BIFR, the question of sickness or robust health of the entity is to be determined by the Board. It is only when the Board was satisfied that it would have, in the first place, entertained applications for revival, sanctioning appropriate schemes for rehabilitation. Thus, a sanction by the BIFR implies that the requirements of Section 72(2) of the Act have been met.

17. This provision, and the interplay thereof with the provisions of the Income tax Act has been considered by the Supreme Court in the case of Indian Shaving Products (supra) where at paragraph 7 the Bench holds as follows:

> '7. Under Section 72 of the Income Tax Act, to give to the amalgamated Company the benefit of the loss or, as the case may be, allowance for depreciation of the amalgamating company for the previous year in which the amalgamation was effected for the purposes of the Income Tax Act, the Central Government must, upon the recommendation of the specified authority, be satisfied that the amalgamating company was not, immediately before the amalgamation, financially viable by reason of its liabilities, losses and other relevant factors, and that the amalgamation was in the public interest, By reason of Section 32(2) of the said Act, where there has been under any scheme thereunder an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act shall apply in relation to such amalgamation, subject to this modification that the power of the Central Government is to be exercised by the BIFR without the necessity of a recommendation by the specified authority mentioned in Section 72A of the Income Tax Act. This is because, for the purposes of according sanction to a scheme of amalgamation of a sick industrial undertaking with any other company under Section 18 of the said Act, the BIFR has to be satisfied that the amalgamating company is not financially viable, which is the effect of Section 3(o) of the said Act, and that the amalgamation is necessary or expedient in the public interest, which is the effect of Sections 17 and 18 of the said Act read

together. Sanction of a scheme of amalgamation under Section 18 of the said Act necessarily implies that the requirements of Section 72A of the Income Tax Act have been met and the BIFR must exercise the power conferred upon it by Section 32(2} of the said Act and make the declaration contemplated by Section 72A of the Income Tax Act, The conditions for sanctioning a scheme under Section 18 of the said Act being the same as those required for a declaration under Section 72A of the Income Tax Act, the BIFR could not have sanctioned the scheme of amalgamation of Sharp Edge with the appellant but declined to make the declaration under Section 72A of the Income Tax Act with regard to that amalgamation'

(underlining for emphasis, ours)

18. Nothing further remains to be said in the light of the categoric conclusion of the Supreme Court emphasised above. The view taken by the Assessing Authority to the effect that the claim of the assessee is liable to be allowed in the light of the provisions of section 32(2) of the SICA and its interpretation by the Supreme Court is thus, the correct one.

19. The jurisdiction exercised by the CIT to correct the alleged error in assessment was in terms of section 263 of the Act. Section 263 empowers the Commissioner of Income tax to revise an order of assessment if the order in question is erroneous and prejudicial to the interests of the revenue, both conditions to be satisfied concurrently. The action of the assessing officer, though prejudicial, can hardly be termed as 'erroneous' in so far as the officer has followed the dictum laid down by the Supreme Court in the case of Indian Shaving products (supra). Thus, in the absence of concurrent satisfaction of the two conditions under section 263 of the Act, the action of the CIT was contrary to statute and liable to be set aside.

20. In the light of the aforesaid discussion, the appeal filed by the Revenue is dismissed. The substantial question of law is answered in favour of the assessee and against the Revenue. No costs.”

4.In addition, the learned counsel for the appellant / Revenue submitted that the Special Leave Petition in S.L.P. (Civil) No.16117 of 2020 filed by the Revenue against the similar judgment dated 28.01.2020 passed in TCA No.1199 of 2010, was also dismissed by the Supreme Court on 22.11.2021.

5.Following the aforesaid decision, the substantial question of law raised in this appeal is answered in favour of the assessee and against the Revenue. Accordingly, the present tax case appeal filed by the Revenue, stands dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vkr

To

1. The Commissioner of Income Tax II,
   Coimbatore.

2. The Income Tax Appellate Tribunal 'D' Bench,
   Chennai.

3. The Assistant Commissioner of Income Tax,
   Company Circle – IV(2),
   Coimbatore.

+1cc to Mr.M.Swaminathan, Advocate, S.R.No.11353

T.C.A.No. 254 of 2010

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