

OD-5

ITA/147/2009

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

COMMISSIONER OF INCOME TAX (C) -
II

-Versus-

M. K. FOUNDATION

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 9th February, 2023

Appearance :

*Ms. Smita Das De, Adv.
...for the appellant.*

*Mr. J. P. Khaitan, Sr. Adv.
Ms. Swapna Das, Adv.
...for the 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 30th September, 2008 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the Tribunal) in IT(SS)A No.68/Kol/2006 for the block period from 01.04.1990 to 24.08.2000.

The appeal was admitted on the following substantial questions of law:

- (a) *Whether in the facts and circumstances of the case the Tribunal was justified in law to cancel*

the order of CIT by holding that the order of the assessment was not erroneous and prejudicial to the interest of the revenue despite the fact that the assessing officer failed to include the reserves and surplus of M/s. M.K. Shah Exports Ltd. with that of M/s. Safari Capitals Pvt. Ltd. for quantification of deemed dividend income ?

- (b) *Whether in the facts and circumstances of the case the Tribunal was justified in law in not appreciating the order of amalgamation dated 5.7.2001 with retrospective effect from 18.5.1998 which has a direct bearing on the calculation of the accumulated profits for the purpose of computation of deemed dividend income which is required to take into account the reserves and surplus for both the companies namely, M/s. Sarafi Capitals Pvt. Ltd. and M/s. M. K. Shah Exports Ltd.*
- (c) *Whether in the facts and circumstances of the case the Tribunal was justified in law to rely upon the case of Mukundraaj K. Shah vs. CIT reported in CIT 277 ITR 128 (Cal) in spite of the fact that the deemed dividend was never declared by the assessee unlike in the instant case of the assessee ?*

We have heard Ms. Smita Das De, learned standing counsel appearing for the appellant/revenue and Mr. J. P. Khaitan, learner senior counsel assisted by Ms. Swapna Das, learned Advocate for the respondent/assessee.

The Commissioner of Income Tax, Central-II, Kolkata (CIT) initiated proceedings under Section 263 of the Act stating that in the course of examination of assessment records the assessee it was noticed that there was an amalgamation between Safari Capitals Pvt. Ltd. and M.K. Shah Exports Ltd. with retrospective effect from 18.05.1998 as per the order passed by this Court dated 05.07.2001. It was stated that while calculating the deemed dividend income, the assessee had not taken into consideration the reserves and surpluses of M. K. Shah Exports Ltd. as on the dates of loan i.e. 23.02.1999 and 04.03.1999 for quantification of deemed dividend income even though this Court had ordered amalgamation to take effect from 18.05.1998. It was stated that the assessing officer failed to include the reserve and surplus of M. K. Shah Exports Ltd. with that of Safari Capitals Pvt. Ltd. for the aforesaid quantification of deemed dividend income and owing to short computation of income under Section 2(22)(e), the block assessment order has been rendered erroneous and has resulted in under charge of tax thereby causing prejudice to the interest of revenue. With these facts a show cause notice was issued under Section 263 of the Act. The assessee in their reply/written submission stated that neither on 23.02.1999 nor on 04.03.1999 when the two demands in question were made by Safari Capitals Pvt. Ltd. to the assessee, there was no

proposal or scheme of merger in contemplation of the Board of Directors of either of the said two companies. Further, it was stated that since the question of deemed dividend is to be considered as on the date on which the loan or advance were made by Safari Capitals Pvt. Ltd. to the assessee, the figures of accumulated profits appearing in the books of Safari Capitals Pvt. Ltd. alone as on 23.02.1999 and 04.03.1999 are relevant. The assessee relied upon several decisions. However, the CIT was not convinced with the explanation and held that the quantification of deemed dividend income in the case of assessee, the decision of this Court dated 05.07.2001 ordering amalgamation with retrospective effect from 18.05.1998 cannot be ignored. Further on account of retrospective operation of the order of amalgamation, the calculation of accumulated profits for the purpose of computation of deemed dividend income has to be taken into account the reserves and surplus of both the companies namely, Safari Capitals Pvt. Ltd. and M.K. Shah Exports Ltd. Thus, the CIT came to the conclusion that the block assessment was erroneous and prejudicial to the interest of revenue.

The assessee being aggrieved by such order, preferred appeal before the learned Tribunal questioning the jurisdiction of CIT to invoke its power under Section 263 of the Act. The learned Tribunal has elaborately referred to the submissions

made by the assessee before it as well as the stand taken by the revenue. It was contended by the assessee that the assessing officer was fully aware of the issue raised by the CIT in the proceedings under Section 263 of the Act. The assessing officer has taken a conscious decision after going through all the details and particulars filed before him in the original block assessment proceedings. He was also aware of the relevant provisions as well as the case law. Therefore, it was submitted that only because the CIT does not agree with the opinion of the assessing officer, it would not give the CIT jurisdiction under Section 263 of the Act to revise the assessment. Further, it was contended that the assessing office in the original block assessment has taken a plausible view and the facts which are relevant were set out. Apart from that, the assessee placed reliance on the decision of the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. vs. CIT* reported in 243 ITR 83(SC) to support their contention that the CIT erred in assuming jurisdiction under Section 263 of the Act. Furthermore, it was submitted that the aspect regarding the deemed dividend could not have been part of the block assessment as it does not emanate from any search or seizure operation or survey operation and on the date when CIT assumed jurisdiction under Section 263 of the Act, the decision of this Court in the case of *M.K. Shah vs. CIT* reported in 277 ITR

128(Cal) was available, and, therefore, the CIT could not have ignored the said decision and assume jurisdiction under Section 263 of the Act. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in *CIT vs. Max India Ltd.* reported in 213 CTR 266 (SC) and *CIT vs. G.M. Mittal Stainless Steel Pvt. Ltd.* reported in 263 ITR 255 (SC).

After considering the submissions made on either side and paragraph 10 of the impugned order, the learned Tribunal has noted that the undisputed and admitted facts. Thereafter it proceeded to consider as to how a deeming provision should be construed and by relying upon the decision of the Hon'ble Supreme Court in *CIT vs. C.P. Sarathy Mudaliar* reported in (1972) 83 ITR 170 (SC) it held that deeming provision must receive strict interpretation. After such an observation the learned Tribunal has noted the facts that the assessing officer while completing the original block assessment, was fully aware of the matter in dispute. The assessee had clarified before the assessing officer regarding the quantification of deemed dividend under Section 2(22)(e) and also set out the reasons for the same. Furthermore, the Tribunal noted that the assessing officer vide letter dated 19.03.2004 raised specific queries on this aspect in course of block assessment proceedings. The assessee had submitted an elaborate reply dated 25.03.2004 which was also noted by the Tribunal. Thus,

the Tribunal found that after considering the detailed submissions of the assessee, the assessing officer has completed the block assessment accepting the contention of the assessee. Further, the Tribunal called for the assessment records and found that a note 'not for assessee' prepared by the assessing officer regarding various issues involved in the block assessment proceedings. The said note 'not for assessee' has been extracted in full wherein there is also a specific observation stating that the matter was discussed with the Additional CIT, Range-III(C), Kolkata along with the submission of the assessee dated 25.03.2004 and in view of the specific methodology of calculating deemed dividend at the time of advancing the loan by the company to the assessee, reference was made to the decision of the Hon'ble Supreme Court in *Navnit Lal C. Javeri vs. K. K. Sen* reported in (1965) 56 ITR 198 (SC) wherein it was held that the subsequent event of amalgamation, though with retrospective effect, is not significant. Therefore, the assessing officer concluded that the assessee's stand of reckoning the reserve and surplus of Rs.22,13,220/- for the purpose of deemed dividend under Section 2(22)(e) of the Act is acceptable and no adverse inference was drawn. This factual aspect was taken into consideration by the Tribunal and it was held, in our view rightly, that the assessing officer was very well aware of the issue and has taken a

consistent decision after examining the issue on hand and also after taking note of various decisions of the Hon'ble Supreme Court.

With regard to the decision in the case of *M. K. Shah vs. CIT* reported in 277 ITR 128(Cal), the Tribunal observed that on the date when the CIT assumed jurisdiction under Section 263 of the Act, the decision of this Court was in force and would bind the Department and subsequent reversal of the decision of the Hon'ble Supreme Court can have no impact in this regard. The learned Tribunal rightly referred to the decision of the Hon'ble Supreme Court in *CIT v. G.M. Mittal Stainless Steel Pvt. Ltd.* reported in 263 ITR 255 (SC).

Thus, the factual position which emerges from the above is that the assessing officer has taken a plausible view and there are several decisions of the Hon'ble Supreme Court wherein it has been held that if two views are plausible and the assessing officer takes one of the two views and assigns reasons, such order cannot be construed to be erroneous nor prejudicial to the interest of the revenue. Further, on perusal of the order passed under Section 263 of the Act we find that the twin-test which are required to be simultaneously fulfilled for assuming jurisdiction under Section 263 of the Act are conspicuously absent.

Thus, we are of the considered view that the learned Tribunal rightly allowed the assessee's appeal and the order does not call for any interference.

In the result, the appeal filed by the revenue (ITA/147/2009) is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)