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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 849/2019

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL-1

.....Appellant

Through: Mr. Aseem Chawla, SSC with
Ms. Naincy Jain, JSC, Ms.
Pratishtha Chaudhary & Ms.
Nivedita Advs.

versus

AAMBY VALLEY LTD.

.....Respondent

Through: Mr. Percy Pardiwala, Sr. Adv.
with Mr. Hiten Thakkar, Mr.
Satyen Seth, Mr. Arta Trana
Panda & Mr. Sanjeev Kumar
Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

19.07.2024

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1. Having heard Mr. Chawla, learned counsel appearing for the appellant and Mr. Pardiwala, learned senior counsel appearing for the respondent, we take note of the following questions which are proposed: -

“1. Whether on the facts and circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal ('ITAT') has erred in holding that the transaction of Composite Scheme of Arrangement and Amalgamation ('Scheme') took place in the previous year relevant to Assessment Year 2011-12 and not in the relevant previous year under consideration ended March 31, 2012, corresponding Assessment Year 2012-13.

2. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that since the Scheme has been approved by the Hon'ble High Court could not have been regarded as a colourable device to avoid payment of the taxes and that the validity and genuineness thereof cannot be questioned.



3. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that the transactions pursuant to the Scheme cannot be regarded as having being carried during the course of business and, therefore, provisions of Section 28(iv) of the Income Tax Act, 1961 ("the Act") are not applicable resulting in deletion of addition amounting to Rs. 46,999.38 crores

4. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition amounting to Rs.26,197.67 crores made under Section 56(2)(viii) of the Act.

5. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that amendments made to provisions of Section 47(vii) vide Finance Act 2012 being clarificatory in nature and, therefore, have a retrospective application.

6. Whether in the given facts and circumstances of the case and in law, the Hon'ble ITAT is right in holding that receipt of shares is in consequence of Scheme and hence, falls within the exception provided under Section 47(vii) of the Act.

7. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has disregarded the fact that the amount of Rs.46,999.38 crores by which the General Reserves increased were not routed through the Profit & Loss Account and thereby has erred in deleting the addition made under Section 115JB of the Act.

8. Whether on the facts and circumstances of the case and in law the Hon'ble ITAT has erred in deleting the addition amounting to Rs.507,75,75,010 arising on account of foreign exchange transaction difference accrued to the assessee per the financial statement for the relevant previous year in respect of foreign currency monetary transactions.

9. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that the loan advanced by the assessee was a long-term asset thereby constituting capital asset and not circulating capital and the relatable foreign exchange gain would be a capital account accretion.

10. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting addition made under Section 14A of the Act amounting to Rs.240.13 crores.



11. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the interest paid amounting to Rs.114.77 Crores under Section 36(1)(iii) of the Act, as an allowable deduction in the hands of the Assessee.

12. Whether the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the Transfer Pricing adjustment amounting to Rs.43,17,02,728 on account of interest charged on loan granted by the Assessee to its Associated Enterprise namely Aamby Valley (Mauritius) Limited.

13. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition amounting to Rs.39,58,925/- made under Section 40A(3) of the Act in respect of payment made to M/s Aishwarya Enterprises.

14. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the disallowance of the consulting charges amounting to Rs.12,66,63,005/- paid by to M/s Siva Ventures Limited.

15. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition of interest amounting to Rs.6.24 crores made in respect of amounts advanced to M/s Charita City Homes Jaunpur Private Limited.

16. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition made amounting to Rs.4,14,944/- on account of notional interest in respect of long outstanding balance of imprest.

17. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition amounting to Rs.90,13,188/- constituting interest expense pertaining to an overdraft facility which in turn were provided to group concern as interest free advance.

18. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting addition amounting to Rs.6,48,65,327/- made in respect of development charges paid to M/s Aishwarya Enterprises.

19. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the disallowance amounting to Rs. 5,86,819/- of interest paid in respect of delay in payment of Indirect Taxes (Service Tax & VAT), on the premise that the same not being penal in nature.”



2. Insofar as questions 7 to 9 are concerned, Mr. Chawla, learned counsel, fairly states that the same stands answered by the **Income Tax Appellate Tribunal**¹ bearing in mind the judgment passed by the Supreme Court in **Apollo Tyres Limited Vs. Commissioner of Income Tax**² wherein it was concluded that the AO did not have the jurisdiction to go beyond the net profit shown in the Profit and Loss Account except to the extent provided under the Explanation to Section 115JA of the **Income Tax Act, 1961**³.

3. As far as the issue of foreign exchange rate fluctuation is concerned, the ITAT has relied on **Sutlej Cotton Mills Ltd. Vs. CIT**⁴ observing that:

“8. We have considered the rival submissions. The Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd., (supra) has held that any foreign exchange gain or loss on capital asset will be adjusted with the value of such asset. It was further held that *“The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss. if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature.”*

4. In response to questions 10 and 11 relating to deletion of additions under Section 14A and Section 36(1)(iii) of the Act, the ITAT correctly observes that the **Show Cause Notice**⁵ itself records that the assessee had not earned any exempt income during the assessment year and even investments were made in its subsidiary for commercial expediency for which no borrowings were specifically

¹ ITAT

² (2002) 9 SCC 1

³ Act

⁴ (1978) 4 SCC 358

⁵ SCN



undertaken. Therefore, the question of disallowing any expenditure would not arise. The ITAT further held that the interest paid under Section 36(1)(iii) of the Act was an allowable deduction as the borrowed funds were duly utilised by the assessee for its own business.

5. Question 12 has also been correctly answered by the ITAT and we find that the respondents correctly held with respect to the deletion of the Transfer Pricing Adjustment on account of interest earned by the assessee in connection with loans granted to its **Associated Enterprise**⁶.

6. The ITAT has also made appropriate observations with regard to questions 13 to 18 pertaining to cash payments under Section 40A(3) of the Act read with Rule 6DD(k) of the **Income Tax Rules, 1962**⁷ alongwith development charges, consultancy charges payments made by the assessee and interest paid on amount advanced to various third party companies.

7. While deleting the disallowance on interest paid in respect of delay in payment of Indirect Taxes (Service Tax and VAT), question 19 stands answered by the ITAT as under:

"90. After considering the rival submissions, we are of the view that the interest paid in respect of delay in payment of indirect taxes i.e., Service Tax and VAT is not penal in nature. The decision relied upon by Learned Counsel for the Assessee squarely apply to the facts and circumstances of the case. We, accordingly, set aside the orders of the authorities below and delete the entire addition."

8. In view of the aforesaid, we find no justification to interfere with the view taken by the ITAT insofar as questions 7 to 19 in the

⁶ AE

⁷ Rules



appeal are concerned.

9. This leaves us to consider proposed questions 1 to 6. Mr. Pardiwala, learned senior counsel contends that the entire premise of the appeal, and insofar as proposed questions 1 to 6 are concerned, is based on an attempt to revise the Appointed and Effective Date which were made part of the Scheme. It becomes pertinent to note that the appeal proceeds on the foundation that the transactions should be viewed as pertaining to **Assessment Year**⁸ 2012-13 which is clearly misconceived. This, since when one keeps in mind the Appointed Date as being the close of business on 31 March 2011, the relevant AY would be 2011-12. Once we come to hold that the transactions clearly do not form part of AY 2012-13, the questions which are sought to be canvassed clearly disintegrate.

10. Undisputedly, in terms of the Scheme of Arrangement which came to be approved by the concerned High Court on 20 January 2012, the Appointed Date was defined in the following terms: -

“**Appointed Date**” means the closing hours of business on 31st day of March, 2011 or such other date as may be fixed by the High Court of Judicature at Bombay”

11. Of equal significance is Clause 9.2 of the Scheme which reads thus: -

“**9.2** With effect from the Appointed Dale and upon the Scheme becoming effective, any statutory licenses, permissions. approvals or consents forming the basis of or required to carry on the operations of the Demerged Company, In relation to the Demerged Undertakings as detailed in **Annexure A to Annexure E** shall stand vested in or transferred to respective Business SPVs without any further act or deed including any processes, applications, notifications, approvals or consents or permissions for the same of any government or statutory authority or local body and shall be appropriately mutated by the statutory authorities concerned in favour of respective Business SPVs upon the vesting and transfer of

⁸ AY



the Demerged Undertakings pursuant to this Scheme. In so far as they relate to the Demerged Undertakings, the benefit of all statutory and regulatory permissions, licenses, environmental approvals and consents, sales tax registrations or other licenses and consent shall vest in and become available to respective Business SPVs pursuant to this Scheme. In so far as the various incentives, subsidies, special status and other benefits or privileges enjoyed, granted by any Government body, local authority or by any other person are concerned, the same shall vest with and be available to respective Business SPVs. on the same terms and conditions. In particular and without prejudice to the generality of the foregoing, benefit of all balances relating to CENVAT or Service Tax or VAT being balances pertaining to the Demerged Undertakings, shall stand transferred to and vested in respective Business SPVs as if the transaction giving rise to the said balance or credit was a transaction carried out by respective Business SPVs. The assets and properties pertaining to the Demerged Undertakings shall not be required to be and shall not be physically transferred from any premises or location relating to the Demerged Undertakings and consequently or otherwise, there shall be no withdrawal of or obligation to pay or refund any CENVAT, VAT, Service Tax or other tax or duty pursuant to vesting of Demerged Undertakings in respective Business SPVs in accordance with the Scheme.”

12. Insofar as questions pertaining Section 28(iv) of the Act are concerned, it was rightly observed by the ITAT that the net increase in the General Reserves of the respondent-assessee can neither be perceived as a benefit or perquisite nor can it be perceived to have arisen out of carrying on of any business or profession by the respondent-assessee.

13. So far as the addition regarding Section 56(2)(viia) of the Act is concerned, the Tribunal rightly observes:

“110. The question, therefore, before us is, *Whether the provisions of section 47(vii) as amended by Finance Act 2012 is retrospective in nature?* It is a fact that existing provision of section 47(vii) was not possible to comply with when amalgamating company is the 100% subsidiary of the amalgamated company. This is, in fact, was a defect in Section 47(vii) prior to the amendment. The amendment was made to cure this defect. Therefore, the decisions relied upon by the Learned Counsel for the Assessee above squarely apply to this case as the provisions of section 47(vii) prior to the amendment if read



clause-(a) thereof, was unworkable and could not have applied in case, where amalgamating company is the owner of 100% shares of the amalgamating company. The Memorandum explaining the amendment made by Finance Bill 2012 amending the provisions of Section 47(vii) clearly states that “*provisions of Section 47(vii) could not have applied where in case of amalgamation, amalgamated company hold all the shares of amalgamating company*”. This clearly denotes that in such situation existing provisions of Section 47(vii) was unworkable and unintended consequences has arisen and the amendment has been made obviously to provide the remedy to remove the defect, We are, therefore, of the view that the above provisions are retrospective in nature and it is clarificatory in nature only. We do not agree with submission of the Ld. D.R. that it is not a case of amalgamation of AVVPL into the assessee-company. No doubt in view of the para-II of the Composite Scheme of Arrangement and Amalgamation, various undertakings will first vest in various SVPs, but, subsequently due to the applicability of Para-III of the Scheme, the holding Company of all the SVPs i.e., AVVPL got amalgamated into the assessee-company and all the assets and liabilities of the amalgamating company, immediately before the amalgamation becomes the property and liability of the assessee-company by virtue of the amalgamation and due to the simultaneously retrospective amendment to Section 47(vii) and in Section 2(1B) which defines the amalgamation. The condition of amalgamation is, therefore, stands complied with in this case since the merging of AVVPL into the assessee-company, in our view, complied with all the three conditions as stipulated, in the definition of the amalgamation, it cannot be said that it is not a case of amalgamation. No bonus shares have been issued out of general reserve. We, therefore, hold that provisions of Section 56(2)(viia) cannot be applied in respect of this transaction as it is a case where the transfer in the case of assessee falls under section 47 (vii) of the Income-Tax Act. We, accordingly, delete the addition under Section 56(2)(viia) also.”

14. Viewed in that backdrop, it is apparent that the appeal fails to raise any substantial questions of law. It shall consequently stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

JULY 19, 2024/RW