

OD-5

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

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITAT/169/2024
IA NO: GA/2/2024
PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA
VS.
CAROLINA FOOD AND INDUSTRIES PRIVATE LIMITED

Appearance :

Mr. Smarajit Roychowdhury, Adv.

Mr. Amit Sharma, Adv.

...for Appellant

Mr. J.P. Khaitan, Sr. Adv.

Mr. Somak Basu, Adv.

Mr. Swagato Kabiraj, Adv.

...for Respondent

HEARD ON : 31.01.2025

DELIVERED ON : 31.01.2025

T.S. Sivagnanam, CJ :

This appeal filed by the revenue under section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 9th September, 2022 passed by the Income Tax Appellate Tribunal, Bench "C", Kolkata (Tribunal) in ITA No.2625/Kol/2018, for the assessment year 2015-16.

2. The revenue has raised the following substantial questions of law for consideration :-

- i) Whether on the facts and circumstances of the case the Learned Tribunal has correctly deleted the disallowance of depreciation of Rs.6,24,73,357/-

on goodwill accounted from the amalgamating company M/s. Ramuk Scan Investment Pvt. Ltd. ?

- ii) Whether the Learned Tribunal has correctly applied the law of the amalgamation when the full disclosure into assets of the amalgamating company was not made before the Hon'ble High Court, the alleged Goodwill of Rs.37,91,42,049/- was not accounted in the swap ratio of shares in the amalgamating scheme which was in violation of accounting standard AS-14 ?
- iii) Whether the Learned Tribunal has correctly applied the law while holding that post-amalgamation after the scheme was approved by the Hon'ble High Court, the revenue has no jurisdiction to examine the financials and tax avoidance under the scheme particularly when the assessee has failed to disclose goodwill in the amalgamation scheme and the revenue has no information to object at the time of amalgamation ?

3. We have heard Mr. Smarajit Roychowdhury, learned standing counsel appearing with Mr. Amit Sharma, learned counsel for the appellant/revenue and Mr. J.P. Khaitan, learned senior counsel for the respondent/assessee.

4. The issue which fell for consideration before the learned Tribunal was whether the Assessing Officer was right in denying the claim of the depreciation on opening written down value of fall of assets and depreciation on goodwill and other depreciable assets amounting to Rs.6,24,73,357/-. Learned Tribunal took note of the factual position discussed about the finding rendered by the Assessing Officer as affirmed by the Commissioner of Income Tax (Appeals) [CIT(A)] and proceeded to decide the matter. It is not in dispute that the assessee entered into a scheme of amalgamation with *M/s. Ramuk Scan Investment (P)*

Limited in terms of Section 391(2) and 394 of the Income Tax Act, 1956, which was approved by the High Court of Calcutta vide order dated 9th December, 2015 with the appointed date as 1.1.2013. The Assessing Officer after examining the scheme of amalgamation and on the basis of the documents furnished by the assessee came to the conclusion that the claim of depreciation is not correct as the swap ratio of shares was not based on the balance sheet as dated 31.12.2014 rather than the balance sheet as at 1.1.2013, resulting in wrong calculation of swap ratio of shares, the assessee not taking the market value of the assets and liabilities while computing the goodwill etc. finally rejected the claim for depreciation of Rs.6,24,73,357/- including other depreciation claims. Thus, the issue which fell for consideration before the learned Tribunal is whether the assessee is entitled to depreciation on goodwill arising from the excess of consideration paid over the net value of the assets under the scheme of amalgamation which was approved by the High Court at Calcutta after calling for objections from all the stakeholders including the Income tax Department. Learned Tribunal noted that the Income tax Department was given an opportunity to state any objections to the scheme of amalgamation but they did not raise any objections. The learned Tribunal took note of the various decisions and held that once the scheme of amalgamation is approved by the High Court after giving notice to the stakeholders including the Income tax Department to state its objections, if any, to the proposed amalgamation scheme and if the revenue has not raised any objection, they would be estopped from challenging the validity of the scheme subsequently. Learned Tribunal took note of a decision of the co-ordinate Bench of the Tribunal in the case of *Electrocast Sales India Ltd. Vs. DCIT, (2018) 64 ITR 14 (Kol.)(Trib.)* and held that the decision of the

CIT(A) upholding the order of the Assessing Officer cannot be sustained. In the decision of the coordinate Bench of the Tribunal in the case of *Electrocast Sales India Ltd.*, several decisions of various High Courts have been referred to of which one decision would be very relevant to the facts and circumstances of this case, namely, the decision of the High Court of Madras in *Pentamedia Graphics Ltd. vs. Income-tax Officer*, (2012) 20 taxmann.com 755 (Madras). In the said decision the Court took into consideration the decision of the Hon'ble Supreme Court in *Marshall Sons & Co. (India) Ltd. vs. ITO*, (1997) 138 CTR (SC) 1, wherein the Hon'ble Supreme Court held that once the scheme had been sanctioned with effect from a particular date, it is binding on everyone including the statutory authorities. Identical issue was decided by this Court in the case of *Commissioner of Income Tax, Kolkata-3, Kolkata vs. M/s. Purbanchal Power Company Limited*, ITAT/70/2015, dated 15th July, 2022, wherein the decision of the High Court of Gujarat in *Vodafone Essar Gujarat Ltd. vs. Department of Income Tax*, (2013) 35 taxmann.com 397 (Gujarat) was taken note of which decision was affirmed by the Hon'ble Supreme Court as reported in *Department of Income Tax vs. Vodafone Essar Gujarat Ltd.*, 2016 (66) taxmann.com 374(SC). Paragraphs 46 and 47 of the decision by the High Court of Gujarat would be relevant.

“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."

5. Thus, the law on the subject is clear and there can be no ambiguity on the said aspect and the revenue in an assessment proceeding cannot seek to reopen the matter. As pointed out earlier, the issue concerning valuation is sought to be reopened by the Assessing Officer. The question is whether this can be done. To

be noted, that the valuation issue was one of the specific issues which was raised by the Regional Director of Company Affairs when the scheme was submitted by the assessee. By communication dated 29th June, 2015, the assessee was called upon to answer several queries and produce certain documents and one of which was the copy of the valuation report of shares along with detailed calculation in support thereof to arrive at the exchange ratio. The assessee was also directed to forward a copy of fairness report of exchange ratio prepared by any merchant banker in the matter. The assessee had submitted the reply to the Regional Director of Company Affairs by reply dated 11th August, 2015 specifically answering the query and also producing the copy of the valuation report furnished by the Chartered Accountants.

6. Upon receipt of the same, the Office of the Regional Director issued notices to all the stakeholders including the Income tax Department. However, the Income tax Department did not respond nor placed any objections or comments upon the scheme of amalgamation as presented by the assessee. This fact is evident on perusal of the affidavit filed by the Regional Director in CP No.447 of 2015 and CA No.373 of 2015, where it has been specifically stated that as per the instruction of the Ministry of Corporate Affairs, New Delhi, a copy of the scheme was forwarded to the Income tax Department on 8th July, 2015 with a request to forward their comments/observations/objections, if any, on the proposed scheme of amalgamation within fifteen days but till the date of filing of the affidavit before the High Court, that is, on 26th August, 2015, no comments/observations/objections were received from the Income tax Department. That apart, we note that the share exchange ratio was very much

part of the scheme as could be seen from paragraph 11.1 of the scheme of amalgamation which was presented for approval.

7. That apart, it is relevant to note that the Tribunal partly took note of the submissions made on behalf of the assessee for the assessment year 2013-14 which was the first year the claim for depreciation of goodwill was allowed by the Department and the matter attained finality. Though for the assessment year 2014-15 the same was allowed initially but subsequently the assessment has been reopened and the matter is stated to be pending. Thus this is already a very relevant factor which weighed in the mind of the Tribunal.

8. Thus, we find that the issue was considered when the scheme was approved and the learned Tribunal was right in holding that the order passed by the CIT affirming the order of the Assessing Officer is erroneous. Thus, we find no grounds to interfere with the order passed by the learned Tribunal.

9. Accordingly, the appeal fails and is dismissed. The substantial questions of law are answered against the revenue.

10. The stay application [IA No.GA/2/2024] stands closed.

(T.S. SIVAGNANAM, C.J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)