

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.07.2019

CORAM :

**THE HONOURABLE MR.JUSTICE T.S.SIVAGNAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN**

Tax Case Appeal No.1124 of 2009

The Commissioner of Income-Tax -I,
Coimbatore. .. Appellant

Vs.

M/s. Shiva Distilleries Limited,
1212, Trichy Road, Coimbatore -641 018. .. Respondent

Prayer : Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal Chennai 'A' Bench, Chennai, dated 27.02.2009 in I.T.A.No.1172/Mds/2008 for the Assessment Year 2001-02.

For Appellant : Ms.K.G.Usharani
Junior Standing Counsel

For Respondent : Mr.Vikram Vijayaraghavan

* * *

JUDGMENT

[Judgment of the Court was delivered by T.S.Sivagnanam, J.]

This appeal filed by the revenue under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') is directed against the order dated 27.02.2009 passed by the Income Tax Appellate Tribunal Chennai 'A' Bench in I.T.A.No.1172/Mds/2008 for the Assessment Year 2001-02.

2. The appeal was admitted on 10.11.2009 on the following substantial questions of law:

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in quashing the order passed by the Commissioner of Income-tax under Section 263 of the Income-tax Act, even though the order passed by the assessing officer is erroneous and prejudicial to the interest of the revenue and failed to apply his mind to the case in all its perspectives of the case? And

(ii) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was right in law in holding Section 50B was not applicable to the facts of this case, even though

the transfer of the business undertaking as a whole by itself is a property within the meaning of Section 2(47) it may be subject to capital gains by virtue of the provision of Section 50 of the Income Tax Act, 1961?"

3. We have heard Ms.K.G.Usharani, learned counsel Junior Standing Counsel for the appellant/revenue and Mr.Vikram Vijayaraghavan, learned counsel appearing for respondent/assessee.

4. The validity of the proceedings initiated by the Commissioner of Income Tax under Section 263 of the Act is the subject issue in this appeal.

5. The Tribunal accepted the case of the assessee and held that Section 263 of the Act could not have been invoked as it amounts to clear change of opinion. We concur with the findings of the Tribunal.

6. Section 263 of the Act deals with revision of order 'prejudicial to revenue' Sub-Section (1) states that the Principle Commissioner or Commissioner may call for and examine the records of any proceeding under this Act, and if he considers that any order

passed therein by the Assessing Officer is erroneous, in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

7. In ***Malabar Industrial Co. Ltd Vs. CIT*** reported in ***(2000) 159 CTR (1) (SC) = (2000) 243 ITR 83 (SC)***, the Court had pointed out that the phrase "prejudicial to the interest of the revenue" under Section 263 of the Act has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. It was further pointed out that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. An illustration was pointed out stating that when the ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the ITO is unsustainable in law. This

decision was followed in ***Commissioner of Income Tax Vs. Max India Ltd.*** reported in ***(2007) 295 ITR 0282.***

8. In the instant case, the assessment was completed for the year under consideration, 2001-02 by order dated 27.01.2006, after which notice was issued under Section 148 of the Act. The Assessing Officer issued the notice for reopening the assessment on the ground that the holding company ceased to hold whole of the share capital of the subsidiary company, the exemption granted has to be withdrawn as per provision of Section 47A of the Act. It is further stated that the original sale of the textile unit has to be treated as transfer and net worth amounting to Rs.6,15,97,000/- has to be subjected to capital gains treating this transactions as a slump sales as per provisions of Section 50B of the Act.

9. The assessee submitted their reply stating that the assets were transferred at their book value and the liabilities of the Division was also taken at book value i.e., at values as reflected in the books of accounts of the assessee, the transferor. It was further stated that the excess of the assets over liabilities was the net consideration received by the assessee from Shiva Texyarn Limited (STYL), the

transferee company. Further it was stated that the value of individual assets was identified with reference to the book value of such assets, being Written Down Value of the assets, which were subject to depreciation and the remaining assets, which were not subject to depreciation, were transferred at book value being cost to the assessee. The details as to how the value of the assets adopted for the purpose of transfer was also indicated. With regard to the proposal made by the Assessing Officer for reopening the assessment by proposing to invoke Section 50B of the Act, the assessee stated that as per Section 2(42C) of the Act "Slump Sale" has to be defined to mean the transfer of one or more undertaking as a result of the sale for lumpsum sale without values being assigned to the individual assets and liabilities in such sales. It was further stated that in the assessee's case, the transfer price was based on the individual assets and liabilities of the undertaking transferred and the sale would not qualify as "Slump Sale" as per Section 2(42C) of the Act. This explanation offered by the Association was accepted by the Assessing Offer and the assessment was completed.

10. For the very same reasons, the Commissioner has invoked the power under Section 263 of the Act. In the order passed

by the Commissioner of Income-Tax-I, Coimbatore dated 10.03.2008, there is no reference to the reopening made by the Assessing Officer, notice issued by him, reply given by the assessee and how the assessment was completed.

11. Considering this fact, the Tribunal held that the power under Section 263 of the Act could not have been invoked by the Commissioner. The Tribunal rightly took note of the decision in **Max India Ltd.** (*supra*). Thus, revenue has not made any ground to interfere with the order passed by the Tribunal .

12. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue. No costs.

सत्यमेव जयते

WEB COPY (T.S.S., J.) (V.B.S., J.)
03.07.2019

Speaking order: Yes/No
Index: Yes/No
mp/ska

T.S.SIVAGNANAM, J.
and
V.BHAVANI SUBBAROYAN, J.

mp/ska



Tax Case Appeal No.1124 of 2009

WEB COPY

03.07.2019