

ORDER SHEET
ITA 32/2008

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction(income tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, CENTRAL - I

Versus

M/S. SHAW WALLACE DISTILLERIES LTD.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 6th June, 2016.

Ms. A.G. Ghutghutia, Adv., with Mr. Aniket Mitra, Adv. Appears.

Ms. A. Banerjee, Adv., appears with Mr. P. Sinha, Adv., Mr. A. Mitra, Adv.

The Court : The appeal is directed against a judgment and order dated May 31, 2007, passed by the learned Income Tax (Appellate Tribunal, "D" Bench, Kolkata, in ITA No.1116/Kol/2006, pertaining to the assessment year 2002-03, by which an appeal preferred by the revenue was dismissed. The aggrieved revenue has come up in appeal.

The facts and circumstances of the case, briefly stated, are as follows.

Shaw Wallace Distilleries Ltd. filed their return of income on October 31, 2002 declaring total income at Rs.7,17,54,000/-. Notice under section 142(1) was duly served. The General Manager(Finance) and other officers of the assessee duly appeared. The case was discussed and thereafter the

assessment was completed under section 143(3) on March 31, 2005. The assessing officer made additions and also initiated proceedings under section 271. In an appeal preferred by the assessee, though the order of assessment was challenged on various grounds, the attack was restricted to the point as to whether the assessment order was a nullity. The contention of the assessee was that the assessment order passed on March 31, 2005 was a nullity because the assessee had merged with Maharashtra Distilleries Ltd. pursuant to an order passed by the High Court at Mumbai on March 2, 2003. The question was whether the assessment order passed on March 31, 2005 was a nullity. This question has been answered against the revenue both by the CIT (Appeal) and the learned Tribunal. The revenue has come up in appeal.

We already have indicated that we are, in this case, concerned with the assessment year 2002-03. In the remand report obtained by the CIT(Appeal), the assessing officer had to state, inter alia, as follows:

"It is argued that the proposal about the merger of the company with Maharashtra Distilleries Ltd. lying before the High Court of Mumbai was never brought to the knowledge of the department. The Assessing Officer came to learn that the assessee does not exist for the purpose of assessment only when the copy of the written submission along with the paper book in support of the grounds of appeal against the assessment order was sent to the Assessing Officer on 6.12.05. it was further submitted that the facts of the present case are different from the facts in the case of Marshall Sons & Co. Ltd. (223 ITR 809). In the present case, the assessee company puts a proposal of merger with Maharashtra Distilleries Ltd. before the High Court of Mumbai and at the same time files return of income as an independent entity instead of a combined return of income of the amalgamated company and amalgamating company. It was further argued that the merger of the company was approved by the Hon'ble Court

only on 26.3.03. Even after the order the company filed the return of income for assessment year 2003-04 separately with the Assessing Officer. For assessment year 2002-03, the return of income had been filed. The fact of the amalgamation was not referred to in the course of assessment proceedings. The assessment was allowed to be completed in the normal course. In this context, it was submitted, the omission to inform the department about the scheme of amalgamation proposed at the time of filing the return is an important matter for consideration. By filing the return of income and by going along with the assessment proceedings as an unamalgamated entity to the extent of filing the appeal against the assessment order also, the appellant asserted its claim to be an assessable entity."

The aforesaid portion has been quoted by us from the order of the CIT(Appeal).

Amalgamation has been defined under section 2(1B) of the Income Tax Act, which reads as follows:

"(1B) "amalgamation" in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that-

- (i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;
- (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;"

On a plain reading of the definition of the expression of "amalgamation", appearing in the Income Tax Act quoted above, the impression which one receives is that all the liabilities of the amalgamating company immediately before the amalgamation become the liability of the amalgamated company. We are, in this case, concerned, with the assessment year 2002-03, i.e. to say pertaining to the financial year which ended on March 31, 2002, whereas the amalgamation took place with effect from November 2002. There is, as such, no dispute on fact that it is a liability of the amalgamating company which accrued prior to the amalgamation. The assessee maintained a studied silence and did not bring to the notice of the revenue, in particular the assessing officer, about the amalgamation sanctioned by the High Court at Mumbai on March 26, 2003. The assessee not only did not bring this fact to the notice of the assessing officer, the assessee also filed a return for the assessment year 2003-04. Therefore, the assessee itself did not act upon the amalgamation. Be that as it may, by reason of the amalgamation, the order passed on 31st March, 2005, pertaining to the assessment year 2002-2003 could not have become a nullity. The liability arising out of the assessment order became the liability of the amalgamated company

The CIT(A) has misapplied the law laid down by the Madras High Court in the case of CIT Vs. T.V.Sundaram Iyengar & Sons Pvt. Ltd. reported in (1999) 238 ITR 328 and the learned Tribunal did not apply its mind. In the aforesaid case what had happened was that proceedings u/s 104 of the Income Tax Act was started on 31st January, 1975 pertaining to the Assessment Year 1970-71 and the notice was sent to the amalgamated company which resisted the same on the ground that the amalgamating company was no longer in existence. The contention was upheld up to the tribunal. In an appeal preferred by the revenue the Madras High Court held as follows:-

"The failure on the part of the amalgamating company to distribute the statutory percentage of the accumulated profits is the foundation for the order passed by the Income-tax Officer under section 104. Such failure on the part of the amalgamating company is an omission which had within itself the potential for an order under section 104 being made against it, at any time within a period of four years. By proposing a scheme of amalgamation and amalgamating itself with the amalgamated company, the obligation to comply with an order under section 104 when made did not get wiped out. That obligation became the obligation of the amalgamated company. The dissolution of the amalgamating company thereafter was not an event of any relevance and had no effect on the obligation which had been taken over by the amalgamated company in terms of the order of amalgamation.

One of the consequences of amalgamation was that the amalgamating company became incapable of having the benefit of section 105. Had it continued to exist it would have had the option of distributing the undistributed profits, thereby avoiding the liability to tax under section 104. That circumstance, however, cannot be used as a shield by the amalgamated company to avoid payment of the tax. The Revenue is in no way

responsible for the amalgamating company's act of being a party to the scheme of amalgamation and thereby rendering itself incapable of taking the benefit of section 105.

The provisions of the Companies Act should be read harmoniously with those of the Income-tax Act. After the transfer of all assets and liabilities, debts and obligations of the amalgamating company to the amalgamated company in terms of the sanction accorded by the company court under section 394 of the Companies Act, the striking out of the name of the amalgamating company from the register does not wipe out the obligation to comply with an order made by the Income-tax Officer under section 104, and the order is capable of being enforced against the amalgamated company.

Our answer to the question that has been referred to us, therefore, is that the Tribunal was not right in holding that the proceedings against the amalgamated company could not be initiated on account of the failure of the amalgamating company to distribute the statutory percentage of the accumulated profits, our answer is in favour of the Revenue and against the assessee."

For the aforesaid reasons, the question formulated above is answered in the negative and in favour of the revenue.

The appeal is, thus, allowed.

Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)

tk/sb.