Sequeira

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1436 OF 2013

The Commissioner of Income Tax-8, Mumbai .. Appellant
Vs
M/s Bisleri Sales Ltd.
(Formerly known as Golden Agro
Products Ltd.), Mumbai. .. Respondent

Mr.Arvind Pinto, for the Appellant.
Mr.Soli Dastur, Senior counsel a/w Mr.Nishant Thakkar a/w Mr.Jas Sanghavi a/w Ms Megha Bansal i/b PDS Legal, for Respondent.

CORAM: M.S.Sanklecha,
& N.M.Jamdar, JJ.
Tuesday 30 June, 2015.

P.C.:

This Appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (Act) challenges the order dated 30 November 2012 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order disposes of cross appeals as well as cross objections relating to the Assessment Year 1999-2000.

2 Although numerous questions have been formulated Mr.Pinto, learned counsel for the Revenue at the time of admission urges that two issues arise in this Appeal as under:-

> *"1 Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that non-compete consideration received by the assessee is not liable*

to tax as capital gains even after the amendment to Section 55(2)(a) of the Act w.e.f. 1.4.1998 which introduced the words 'or a right to manufacture, produce or process any article or thing'?

2 Whether on the facts and circumstances of the case and in law, the Tribunal was correct in holding that the non-compete consideration taken as Reserves to the Balance sheet cannot be added to the Book Profit under Section 115JA of the Act even in terms of clause (b) of the Explanation thereto?.

3 Question No.1-

(a) An agreement dated 27 November 1998 was entered by the Respondent / Assessee into with M/s Hindustan Coco Cola Bottling North-West Pvt. Ltd which prohibited the Respondent / Assessee from utilising its business knowhow i.e. carrying on its business at a consideration of Rs.5 crores i.e. non-compete consideration. The Assessing officer was of the view that the non-compete fee received by the Respondent / Assessee is taxable under the head Capital gains w.e.f. 1 April 1998 in view of amendment to Section 55(2)(a) of the Act which included within its ambit right to manufacture, produce or process any article.

(b) On Appeal, the Commissioner of Income Tax (Appeals) allowed the appeal of the Respondent / Assessee. It held that even the amendment to Section 55(2)(a) of the Act on 1.4.1998 will not take within its scope a negative / restrictive covenant. This negative / restrictive covenant was taxable after the introduction of Section 28(va) in the Act w.e.f. 1.4.2003.

(c) Being aggrieved the Revenue carried the issue in appeal to the Tribunal. By the impugned order the Tribunal held that the entire issue of restraint of right to carry on business would be taxable only with effect from Assessment Year 2003-2004 consequent to the introduction of Section 28(va) into the Act. The impugned order relies upon the decision of the **Supreme Court in Guffic Chem Pvt.Ltd. v/s CIT**, [1] wherein it has been observed as -

> *"The position in law is clear and well settled. There is a dichotomy between receipt of compensation by an Assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt.*
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> *** *** ***
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> *One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [See: Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the Assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from 1.4.2003. Hence, the said Section 28(va) is amendatory and not clarificatory. Lastly, in* ***Commissioner of Income-Tax, Nagpur v. Rai Bahadur Jairam Valji*** *reported in : 35 ITR 148 it was held by this Court that if a*

1- *[2011] 332 ITR 602(SC)*

contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT (A) as well as the Tribunal, came to the conclusion that the agreement entered into by the Assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of ₹50 lakhs by the Assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003."

(d) Moreover Section 55(2)(a) of the Act would have no application in the present circumstances, as it deals with the cost of acquisition in relation to a capital asset which includes a right to manufacture or carrying on business. In the present case, the Agreement prohibits the assessee in as much as it amounts to giving up its right to carry on business i.e. a restrictive covenant. It held that such restrictive covenant stands covered only w.e.f. 1.4.2003 on introduction of Section 28(va) of the Act.

(e) In view of the above, the impugned order having merely followed the decision of the Apex Court in **Guffic Chem Pvt. Ltd.** no substantial question of law arises for our consideration. Accordingly question 1 as proposed is not entertained.

4 Regarding Question No.2-

(a) For the subject Assessment year, the Assessing officer by order dated 21 March 2002 recomputed the book profit under Section 115JA of the Act (MAT provision) by adding the amounts received on account of goodwill and non-compete fees which were directly

taken to the Balance sheet by the Respondent-Assessee. This was inter alia on the basis of clause (b) of the Explanation to Section 115JA of the Act. The Assessing officer had also held that the above amounts had to be routed through the Profit and Loss account for the purpose of computing profits under the Companies Act, 1956.

(b) Being aggrieved, the Respondent-Assessee filed an appeal to Commissioner of Income Tax (Appeals) (the Commissioner). By order dated 16 September 2002, the Commissioner allowed the appeal by relying upon the decision of the Supreme Court in the case of **Apollo Tyres Ltd. V/s CIT**,[2] wherein it is held in the context of MAT provisions that the Assessing officer has to accept the authenticity of the accounts maintained in accordance with the provisions of Companies Act, 1956, which are duly audited and passed in the general body meeting of shareholders. It was held that the Assessing Officer has no power to disturb the profits in the Profit and Loss account as except to the extent provided in the explanation to Section 115JA.

(c) On further appeal by the Revenue the Tribunal by the impugned order dismissed the Revenue's appeal. The impugned order places reliance upon the decision of the Apex Court in *Apollo Tyres Ltd.,* wherein it was held that it is not open to the Assessing officer to question the correctness of the Profit and Loss account when the same have been prepared in accordance with the

2 - [2002] 255 ITR 273 (SC)

provisions of the Companies Act, duly scrutinised by the Auditors, approved by the general body of shareholders and filed with the Registrar of Companies. The Apex Court held that the Assessing officer has limited power to make additions and reductions as provided in the Explanation to Section 115JA of the Act. The impugned order further held that the provision for Reserve made by the Respondent-Assessee cannot be added to arrive at book profits in terms of clause (b) of the Explanation to Section 115JA of the Act. This is so as the Explanation presupposes that the amounts received should have been debited to the Profit and Loss account before the same can be added in terms of the Explanation. Accordingly the impugned order dismissed the Revenue's appeal.

(d) The grievance of the Revenue before us is that even though the Assessing officer is bound by the audited accounts, made in accordance with the provisions of the Companies Act, and cannot be disturb the profits so arrived, yet in terms of explanation to Section 115JA, the Assessing officer in the present facts ought to have applied clause (b) of the Explanation to Section 115JA of the Act. Therefore it is submitted that the amount carried to Reserves had to be added in terms of the Explanation to Section 115JA of the Act.

(e) We find that for the Explanation to Section 115JA of the Act to be invoked it is necessary that the amount which has been carried to the reserves should have necessarily been first debited to the Profit and Loss account resulting in a reduction in the profit

declared by the Respondent / Assessee Company. This issue stands settled in view of the Apex Court decision **National Hydroelectric Power Corpn. Ltd. Vs Commissioner of Income Tax -** [3] wherein it has been held that to invoke clause (b) of the Explanation below Section 115JB (identical to Section115JA) of the Act, two conditions must be satisfied cumulatively viz. there must be a debit of the amount to the Profit and loss account and the amount so debited must be carried to Reserves. Admitted position in this case is that there is no debit to the Profit and loss account of the amount of Reserves. The impugned order has in view of the self evident position taken a view that in the absence of the amount being debited to Profit and Loss account and taken directly to the reserve account in the balance sheet, the book profits as declared under the Profit and Loss account cannot be tampered with. In view of the fact that the impugned order has followed the decisions of the Apex Court in *Apollo Tyres* and is in accordance with the decision in *National Hydroelectric,* the Explanation to Section 115JA of the Act would not be triggered. Thus question- 2 raises no substantial question of law for consideration.

Accordingly Appeal dismissed. No order as to costs.

(N.M.Jamdar, J.) *(M.S.Sanklecha, J.)*

3- (2010) 320 ITR 0374