

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 9 of 2002

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

DY. C.I.T. (ASSTT.)....Appellant(s)

Versus

CHEMSTAR ORGANICS (INDIA) PVT. LTD.....Opponent(s)

Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1

MRS SWATI SOPARKAR, ADVOCATE for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and

HONOURABLE MR.JUSTICE K.J.THAKER

Date : 11/12/2014

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of this appeal, the appellant-revenue has challenged the judgment and order dated 30.04.2001 passed by the Income Tax Appellate Tribunal, Ahmedabad [**for short "the Tribunal"**] in ITA No.3332/Ahd/1995, whereby the appeal filed by the revenue was partly allowed by the Tribunal.

2. The facts of this case are that the assessee had filed its return for the assessment Year 1990-91 on 3.12.1990 and declared a loss of Rs.5,16,758/-. A revised return was also filed by the assessee on 31.0-3.19902 at a total income of Rs.46,25,360/-. Thereafter, the return was processed and the Assessing Officer passed his order on 30.03.1993. Against the order of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The CIT (A) vide order dated 26.07.1993 partly allowed the appeal of the assessee. Being aggrieved by the order of the CIT(A), the revenue filed an appeal before the Tribunal. The Tribunal vide impugned order dated 30.04.2001 partly allowed the said appeal. Hence, this appeal is filed at the instance of the revenue.

3. While admitting this appeal on

18.03.2002, the Court had formulated the following substantial questions of law:-

(1) *Whether, the Appellate Tribunal is right in law and on facts in confirming the order of the CIT(A) who directed to allow relief of set off of business losses considering the date of allotment as the actual date of scheme of amalgamation ignoring the fact that provisions of Section 79 were clearly attracted as the effective date of amalgamation is the date from which the scheme becomes effective i.e. 1.4.1989*

(2) *Whether, the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income Tax(A) who directed to compute the deduction u/s.80HHC considering the current year's profit without reducing therefrom the unabsorbed depreciation and unabsorbed investment allowance ?*

4. Learned counsel for the appellant-assessee has submitted that the Tribunal has committed an error in confirming the order of the CIT(A). He further submitted that the Tribunal has ignored the fact that provisions of Section

79 of the Income Tax Act were clearly attracted in this case.

4.1. It is his next contention that though the shares were allotted on 20th March, 1992 as per the decision of the Bombay High Court in the case of Brooke Bond India Ltd. Vs. Dinkar Landge 56 Com Cases 1, the assessment year 1991-92 was the relevant year for assessment.

4.2. It is the next contention of learned advocate for the appellant that the Tribunal has committed error in confirming the finding of the CIT(A) that there was no provision either in the Company's Act or in the Income Tax Act which provides that shares allotted to the shareholders of amalgamating company should relate back to the date from which the amalgamation scheme was made effective by the order of the High Court. Therefore, he urged that this Court may allow this appeal and quash and set aside the order of the Tribunal as well as the CIT(A).

5. On the other hand, learned advocate for the respondent-assessee has supported the order of the Tribunal and submitted that the CIT(A) as well as the Tribunal after appreciating the material on record have passed the orders, therefore, there is no germane reason to interfere with the impugned order of the Tribunal.

5.1. Learned advocate for the respondent has drawn our attention to Section 79 of the Income

Tax Act and submitted that in view of the aforesaid section and in view of the observations made by the CIT(A) in its order, no interference is required to be called for by this Court in the impugned order of the Tribunal. He, therefore, urged that this Court may answer the question No.1 in favour of the assessee.

5.2. So far as the question No.2 is concerned, learned advocate for the respondent has submitted that the same is already concluded by the Apex Court in favour of the revenue and against the assessee in the case of **Commissioner of Income Tax v. Shirke Construction Equipment Ltd.** reported in **[2007] 291 ITR 380 (SC)**.

6. We have heard learned advocates for the parties and perused the material on record. Before dealing with the contentions, it would be relevant to reproduce Section 79 of the Income Tax Act, which reads as under:-

"Section 79 Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year in the case of a company carrying not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless -

(a) On the last day of the previous year the shares of the company carrying not less than fifty one per cent of the voting power were beneficially held by persons who beneficially held share of the company carrying not less than fifty-one percent of the voting power on the last day of the year or years in which the loss was incurred.

Provided that nothing contained in this section shall apply to a case where a change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift.

Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty one per cent shareholders of the amalgamating or demerged foreign company shareholders of the amalgamating or demerged foreign company continue to be shareholders of the amalgamated or the resulting foreign company.

7. The CIT(A) while deciding the appeal has observed in paragraph Nos. 5.2 to 5.5 has observed as under:-

3.3. The appellant company has given elaborate arguments on the issue. The appellant has tried to substantiate its claim that there is no change in shareholding by submitting the list of shareholders for various years and also the list of shareholders after the effect of amalgamation was given. The appellant also submitted the copies of the return of allotment filed with the office of the registrar of Companies to substantiate its claim as to the actual date of allotment. However, it is felt that the actual date of allotment is never disputed and therefore, I do not find it necessary to go through these documents. I find that there is no dispute about the actual date of allotment. The question is about the effective date of allotment. The appellant has also relied on the decision of Ahmedabad Tribunal in the case of Farmon Pharmecautical Guj. Pvt. Ltd. 31 ITJ 488 for arguing that the case is not covered by the mischief of section 79 of the Income Tax Act, 1961. At this point it is necessary for me to mention that I do not find the relevance of this decision in this case at all. The law has long been changed after this decision has been rendered. In this case, the main issue to be decided was whether in that instant case the change in shareholding was done with a view to avoid tax (originally subsection (b) of section 79. With the withdrawal of clause (b) with effect from 1.4.89 the ratio of this decision is not useful to any of the cases for all A.Y. Subsequent to A.Y. 89-90. The case of the assessee in that case was that the assessee fell within the exception carved out by

provisions of clause (b) of section 79. However, I do not seek to apply the ratio strictly as the assessee in the above referred case had not argued the issue which is sought to be contested by the appellant in this case. The appellant has also relied on the decision of the Bombay High Court in the case of Brooke Bond India Ltd. Vs. Dinkar Landge 56 Com Cases 1. In this it has been held that a period does not case get the rights of a member during the pendency of the petition of amalgamation, even though the proposed scheme of amalgamation is within the retrospective effect. The appellant relied on the above decision and mentioned that the shareholders of the appellant company till such time the scheme is approved by the Bombay High Court.

3.4. In the light of the above arguments put forth and against the addition it is necessary to examine certain aspects of the scheme of amalgamation vis-a-vis section 79 very closely. The relevant portion of Section 79 is reproduced hereunder:-

"On the last day of the previous year the shares of the Company carrying not less than fifty one percent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty one percent of the voting power on the last day of the year or years in voting power of the last day of the year or years in which the loss was incurred."

The effect of this is that majority of

the beneficial holding (and not necessarily actual holding) of the shares should remain with the same set of shareholders. The A.O. has put stress on the beneficial shareholding as against the actual shareholding. It is, therefore, necessary to examine the cases where the beneficial holding would be different from the actual holding. To give such illustration would be that the shares have been transferred in favour of some persons but the said transfer is not registered in the register of transfer. Where the shares are held by some persons as the benamidar or another persons or another persons' nominee. Where the shares are held by some persons (like trust) for the benefit of some other persons. These are beneficial holding being different from the actual holding. For establishing that there is a difference between the actual owner and the beneficial owner it is necessary that at least one of them is there on record. It cannot be said that the shares are also not existing and the shareholder is also not existing on the record but merely the beneficial holding is existing. It is a case of ownership of a non-existing asset. By retrospective effect given to the order of the High Court the only fiction which is created is a right to get the shares allotted and not the right of being a member from the back. It is not the case where the shares were existing. Where there shares itself were not existing on the last day of the previous year the question of beneficial interest in the shares do not arise. What the shareholders of Bakul Chemicals Pvt. Ltd. held was the beneficial interest in the assets of the appellant company and not in the shares of the appellant

company. For holding beneficial interest into any asset it is necessary that the asset must be in existence, if the asset is not existing the question of holding beneficial interest in the said asset do not arise.

3.5. On perusal of the Scheme of Amalgamation as approved by the Bombay High Court some interesting reasons come to the light. In paras 2,3,4,6 and 7 the reference is made to the appointed date, which is 1st April, 1989. It has been mentioned in these paras that on the approval of the said scheme the assets, rights, obligations, profits and losses of the amalgamating company will belong to or vest in the appellant company with effect from the appointed date. However, reading para 9 (relied upon also by the A.O.) the reference is made to the Scheme becoming effective and not with effect from the date, in which, the procedural formalities as prescribed under the Companies Act, 1956 is completed. These formalities are mentioned in para 15 of the Scheme of Amalgamation which includes the approval of the High Court. Sub Section (3) of Section 391 of the Companies Act, 1956 prescribed as under:-

391(3) an order made by the Court under sub section (2) shall have no effect until a certified copy of the order has been filed with the Registrar end of the previous year and, therefore, the scheme also could not have been effective before the end of the previous year. The shares, in terms of the scheme of amalgamation also could not have been allotted or come into existence before the scheme becomes effective.

The appointed date (or effective date of the scheme of amalgamation) has to be construed only reference to the profits and losses of the amalgamation company and not beyond. If the contention of the A.O. is accepted about the beneficial ownership of the shares, it may lead to some absurdity in operation. The meetings of the shareholders of the amalgamated company (in this case the appellant company) held during the pendency of disposal of the petition would become illegal and invalid immediately on rendering of the judgment of the High Court. I feel that there is not clearly the intention of the Scheme of amalgamation, which is sought to be interpreted."

8. In view of aforesaid discussions and in view of the provisions Section 79 of the Income Tax Act, we are of the considered opinion that the Tribunal was right in confirming the order of the CIT(A). Therefore, the question No.1 posed in this appeal is required to be answered in favour of the assessee and against the revenue.

9. So far as question No.2 is concerned, the Apex Court in the case of **Commissioner of Income Tax vs. Shirke Construction Equipment Ltd. (supra)**, held that Section 80AB of the Income-tax Act, 1961, specified that profits are those as determined for the purpose of the Act, will apply for determining profits from export

business for the purpose of the deduction under Section 80HHC. In determining business profits for the deduction under Section 80HHC the unabsorbed business losses of earlier years under section 72 should be set off.

10. Therefore, in view of the principle laid down by the Apex Court in the above decision, we are of the considered opinion that the questions No.2 is required to be answered in favour of the revenue and against the assessee.

11. For the foregoing reasons, the question No.1 raised in this appeal is answered in affirmative i.e. in favour of the assessee and against the revenue. Accordingly, we hold that the Tribunal was right in confirming the order of the CIT(A), whereby the CIT(A) directed to allow relief of set off of business losses considering the date of allotment as the actual date of scheme of amalgamation. The question No.2 is answered in negative i.e. in favour of the revenue and against the assessee. Therefore, we hold that the Tribunal was not right in law and on facts in confirming the order of the Commissioner of Income Tax(A), whereby the Tribunal directed to compute the deduction u/s.80HHC considering the current year's profit without reducing therefrom the unabsorbed

depreciation and unabsorbed investment allowance. The appeal stands partly allowed. The judgment and order of the Tribunal is modified accordingly.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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