

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 2.12.2014

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MR.JUSTICE R.KARUPPIAH

T.C.(A).No.1279 of 2007

Chakiat Agencies Pvt. Ltd.
40, Rajaji Salai
2nd Floor, Chennai – 600 001.

.. Appellant

Vs.

The Assistant Commissioner of Income Tax
Company Circle III(1)
Chennai.

.. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai, dated 15.9.2006 made in I.T.A.No.957/Mds/2006 for the assessment year 2001-2002.

For Appellant	:	Mr.C.V.Rajan
For Respondent	:	Mr.T.Ravi Kumar Senior Standing Counsel

J U D G M E N T

(Delivered by *R.SUDHAKAR, J.*)

This appeal is filed by the assessee challenging the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai, dated 15.9.2006 made in I.T.A.No.957/Mds/2006 for the assessment year 2001-2002, and the same has been admitted on the following questions of law:

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- (i) Whether the Tribunal was right in holding that the consideration received by the appellant for transfer of goodwill was taxable as 'profits and gains of business' under Section 28(ii)(c) of the Income Tax Act and not under the head 'capital gains'?
- (ii) Whether the Tribunal was right in holding that the consideration received by the appellant was only towards the transfer of agency business and not for 'goodwill' ignoring the fact that there was no agency agreement subsisting at the time of receipt towards goodwill?

2.1. The facts in a nutshell are as under: The appellant, which is a private limited company incorporated in the year 1984, is engaged in the business of shipping and clearing agency. It was sub-agent of M/s.Sea Land (I) Ltd., who acted as an agent of M/s.Sea Land Inc., USA. The appellant was a partnership firm at the inception and was carrying on the business of clearing, forwarding and shipping agency. It had entered into a service agreement with Sea Land Service Inc. in November, 1978, which was renewed in 1981.

2.2. The appellant company took over the assets and liabilities of the partnership firm – Chakiat Agencies and also acquired the goodwill of the firm for a consideration of Rs.20,00,000/-. Thereafter, the appellant continued the business arrangement with Sea Land (I) Ltd., agent of Sea Land Inc., USA, and renewed it also.

2.3. It appears that A.P.Moller, Denmark took over the business of Sea Land Inc., USA, on 11.12.1999. Consequently, with effect from 13.12.1999, Sea Land Inc., USA terminated the Agency Agreement dated 14.10.1992 entered into with Sea Land (I) Ltd. By notice dated 15.11.1999, Sea Land (I) Ltd. terminated the Sub-Agency Agreement dated 8.11.1992 entered into between Sea Land (I) Ltd. and Chakiat Agencies Private Limited with effect from 15.2.2000.

2.4. Thereafter, A.P.Moller of Copenhagen, Denmark appointed MAERSK as their agents in India for all cargoes carried by container ships under the trade name "*Maersk Sealand*" with effect from 11.12.1999. MAERSK was desirous of purchasing the shipping sub-agency business of the appellant with goodwill, which the appellant was willing to sell and, therefore, they entered into an agreement for sale of shipping sub-agency business in relation to Sealand with goodwill. The relevant portion of the said agreement dated 1.6.2000 reads as under:

"SALE OF SHIPPING SUB-AGENCY BUSINESS IN RELATION
TO SEALAND WITH GOODWILL

CHAKIAT hereby transfers to MAERSK the shipping sub-agency business related to Sealand and covered by the Sub-Agency Agreement dated 8th November 1992 along with goodwill in relation thereto. It is made clear that no assets of any description than those specified herein belonging to CHAKIAT are the subject matter of sale."

Consequent to this agreement, a sum of US\$ 650,000/- (equivalent to Rs.2,98,33,700/-) was received as consideration by the appellant from Maersk India Ltd., which became the agent of A.P.Moller.

2.5. In the return filed, the appellant offered the consideration received by it on transfer of goodwill as capital gains and claimed exemption under Section 54EC of the Act on the premise that investments were made in prescribed bonds. Accepting the claim of the assessee, the Assessing Officer completed the assessment under Section 143(3) of the Act on 25.3.2004 on total income of Rs.24,53,911/- as per normal computation and book profit under Section 115JB of the Act of Rs.2,89,38,484/-.

2.6. However, the Commissioner of Income Tax was of the view that the order passed by the jurisdictional Officer was erroneous insofar as it is prejudicial to the interest of the revenue and thereby, invoked Section 263 of the Act and revised the assessment order. The Commissioner of Income Tax held that the consideration received by the assessee was basically in the nature of compensation received in connection with termination of agency under Section 28(ii)(c) of the Act and, therefore, directed the Assessing Officer to modify the assessment by applying the provisions of Section 28(ii)(c) of the Act.

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2.7. Calling in question the said order passed by the Commissioner of Income Tax, the assessee preferred an appeal before the Tribunal. The Tribunal dismissed the appeal filed by the assessee, by confirming the order passed by the Commissioner of Income Tax.

2.8. Aggrieved by the said order passed by the Tribunal, the present appeal is filed on the questions of law, referred supra.

3. We have heard Mr.C.V.Rajan, learned counsel for the appellant and Mr.T.Ravi Kumar, learned Senior Standing Counsel appearing for the Revenue and perused the order passed by the Tribunal and the authorities below.

4. As the questions of law raised are intertwined and are relating to the interpretation of Sections 28(ii)(c) and 45 of the Act, they are dealt with together.

5. It is the plea of the appellant that the consideration received by them for transfer of goodwill is a profit or gain out of transfer of capital asset under the head '*profits and gains of business or profession*' as defined in Section 45 of the Act and, therefore, it is not chargeable to income-tax under Section 28(ii)(c) of the Act.

6. Before adverting to the merits of the said plea, it is apposite to refer

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to Sections 28(ii)(c) and 45 of the Act, which read as under:

"Section 28. Profits and gains of business or profession.--
The following income shall be chargeable to income-tax under the head '*Profits and gains of business or profession*',--

(i) ****

(ii) any compensation or other payment due to or received by,--

(a) ****

(b) ****

(c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto.

Section 45. Capital gains.- (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

(1A) Notwithstanding anything contained in sub-section (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to, or destruction of, any capital asset, as a result of--

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- (i) flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature; or
- (ii) riot or civil disturbance; or
- (iii) accidental fire or explosion; or
- (iv) action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),

then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

Explanation.--For the purposes of this sub-section, the expression "insurer" shall have the meaning assigned to it in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938).

(2) Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of

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such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

(2A) Where any person has had at any time during the previous year any beneficial interest in any securities, then, any profits or gains arising from transfer made by the depository or participant of such beneficial interest in respect of securities shall be chargeable to income-tax as the income of the beneficial owner of the previous year in which such transfer took place and shall not be regarded as income of the depository who is deemed to be the registered owner of securities by virtue of sub-section (1) of section 10 of the Depositories Act, 1996, and for the purposes of--

(i) section 48 ; and

(ii) the proviso to clause (42A) of section 2,

the cost of acquisition and the period of holding of any securities shall be determined on the basis of the first-in-first-out method.

Explanation.--For the purposes of this sub-section, the expressions "beneficial owner", "depository" and "security" shall have the meanings respectively assigned to them in clauses (a), (e) and (l) of sub-section (1) of section 2 of the Depositories Act, 1996.

(3) The profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals (not being a company or a co-operative society) in which he is or becomes a partner or member, by way of capital contribution or otherwise, shall

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be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purposes of section 48, the amount recorded in the books of account of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

(4) The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and, for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

(5) Notwithstanding anything contained in sub-section (1), where the capital gain arises from the transfer of a capital asset, being a transfer by way of compulsory acquisition under any law, or a transfer the consideration for which was determined or approved by the Central Government or the Reserve Bank of India, and the compensation or the consideration for such transfer is enhanced or further enhanced by any court, tribunal or other authority, the capital gain shall be dealt with in the following manner, namely:--

(10)

(a) the capital gain computed with reference to the compensation awarded in the first instance or, as the case may be, the consideration determined or approved in the first instance by the Central Government or the Reserve Bank of India shall be chargeable as income under the head "Capital gains" of the previous year in which such compensation or part thereof, or such consideration or part thereof, was first received ; and

(b) the amount by which the compensation or consideration is enhanced or further enhanced by the court, tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which such amount is received by the assessee.

(c) where in the assessment for any year, the capital gain arising from the transfer of a capital asset is computed by taking the compensation or consideration referred to in clause (a) or, as the case may be, enhanced compensation or consideration referred to in clause (b), and subsequently such compensation or consideration is reduced by any court, Tribunal or other authority, such assessed capital gain of that year shall be recomputed by taking the compensation or consideration as so reduced by such court, Tribunal or other authority to be the full value of the consideration.

Explanation.--For the purposes of this sub-section,--

(i) in relation to the amount referred to in clause (b), the cost of acquisition and the cost of improvement shall be taken to be nil ;

(ii) the provisions of this sub-section shall apply also in a case where the transfer took place prior to the 1st day of April, 1988 ;

(iii) where by reason of the death of the person who made the transfer, or for any other reason, the enhanced compensation or consideration is received by any other person, the amount referred to in clause (b) shall be deemed to be the income, chargeable to tax under the head "Capital gains" of such other person.

(6) Notwithstanding anything contained in sub-section (1), the difference between the repurchase price of the units referred to in sub-section (2) of section 80CCB and the capital value of such units shall be deemed to be the capital gains arising to the assessee in the previous year in which such repurchase takes place or the plant referred to in that section is terminated and shall be taxed accordingly.

Explanation.--For the purposes of this sub-section, "capital value of such units" means any amount invested by the assessee in the units referred to in sub-section (2) of section 80CCB"

7. In the light of the above provisions, we consider the nature of agreement entered into by the appellant with MAERSK on 1.6.2000. Originally, by Sub-Agency Agreement dated 8.11.1992, Sea Land (I) Ltd. appointed CHAKIAT as their sub-agents in South India for all cargoes carried by Sea Land Service Inc., USA. On 11.12.1999, A.P.Moller of Copenhagen, Denmark took over the business of Sea Land Service Inc., USA. Consequent to that, Sea Land Service Inc., USA terminated the Agency Agreement with Sea Land (I) Ltd., with effect from 13.12.1999 and Sea Land (I) Ltd., by notice dated 15.11.1999, terminated the Sub-Agency Agreement entered with CHAKIAT with effect from 15.2.2000. Therefore, the appellant ceases to be an agent of Sea Land (I) Ltd. In the light of these facts, Clause (1) of the agreement dated 1.6.2000, referred supra, provided that the appellant will transfer to MAERSK the shipping sub-agency business related to Sea Land and covered by the Sub-Agency Agreement dated 8.11.1992 along with goodwill in relation thereto.

8. No doubt, Section 45 of the Act stipulates that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head "*capital gains*" and shall be deemed to be the income of the previous year in which the transfer took place. However, Section 28(ii)(c) of the Act, which is extracted above, provides an answer to the issue involved in this case.

9. In the case on hand, the appellant is a recipient of certain amount

for holding an agency in India for the activities relating to the business of Sea Land (I) Ltd. and it is only in connection with the termination of the agency, the appellant received certain payment under Clause (1) of the agreement dated 1.6.2000 by transferring such rights covered by the sub-agency to MAERSK and that is referable to the initial Sub-Agency Agreement dated 8.11.1992. Therefore, in our considered opinion, Section 28(ii)(2) of the Act would come into play and the income received by the appellant has to be certainly treated as profits and gains of business. It can partake the character of transfer of capital asset, as what is transferred is the sub-agency and goodwill attached.

10. If it is a case of transfer simpliciter of the asset, without reference to the sub-agency or the terms contained in the agreement dated 8.11.1992, then the appellant would be entitled to harp on Section 45 of the Act. But, when Clause (1) of the agreement dated 1.6.2000 is interpreted as such, it will clearly fall within the ambit and scope of Section 28(ii)(c) of the Act, which in no uncertain terms states that any payment received by any person holding an agency in India for any part of the activities relating to the business of any other person in connection with the termination of the agency shall be chargeable to income-tax under the head "*profits and gains of business*". This appears to be the intention of Clause (1) of the agreement dated 1.6.2000. Therefore, Section 28(ii)(c) of the Act gets squarely attracted.

11. In such view of the matter, the finding of the Commissioner of Income Tax, as upheld by the Tribunal, holding that the order passed by the Assessing Officer is erroneous is justified. In our considered opinion, the Assessing Officer has not applied the correct provision of law and the Commissioner of Income Tax was justified in invoking Section 263 of the Act to revise the erroneous order. Insofar as prejudice to the interest of the revenue is concerned, it is apparent on the face of the record that but for the application of Section 28(ii)(c) of the Act, the assessee would be entitled to the benefit of claiming the receipt of the amount as capital gains under Section 45 of the Act and the consequent exemption that they have sought for. Therefore, the claim of the assessee would certainly be prejudicial to the interest of the revenue. We hold accordingly.

For the foregoing reasons, we dismiss the appeal answering the questions of law against the assessee and in favour of the revenue. No costs.

(R.S.J.) (R.K.J.)
2.12.2014

Index : Yes
Internet : Yes

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To:

1. The Assistant Registrar,
Income Tax Appellate Tribunal
Chennai Bench "A", Chennai.
2. The Secretary, Central Board
of Direct Taxes, New Delhi.

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3. The Commissioner of Income Tax
Chennai – 1.
4. The Assistant Commissioner of Income Tax
Company Circle – I(3)(i/c), Chennai.

(16)

R.SUDHAKAR,J.
and
R.KARUPPIAH,J.

(sasi)

T.C.(A).No.1279 of 2007

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