

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 4TH DAY OF JULY, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE C.M. POONACHA

I.T.A NO.662 OF 2016

BETWEEN:

SMT. DURGA KUMARI BOBBA
15/1, 2, 3, KADAMBARI FARM
SONNAPPANAHALLI, JALA HOBLI
BENGALURU - 562 157.
PAN: AADPB5139N

....APPELLANT

(BY SHRI. A SHANKAR, SENIOR ADVOCATE FOR
MR. BHAIKAV KUTTAIAH, ADVOCATE)

AND:

THE DEPUTY COMMISSIONER
OF INCOME TAX, CIRCLE-11(2)
BMTB BUILDING, 80 FEET ROAD
KORAMANGALA, 6TH BLOCK
BENGALURU - 560 095.

...RESPONDENT

(BY SHRI. K.V. ARAVIND, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE
INCOME TAX ACT, 1961, ARISING OUT OF ORDER
DATED:26/08/2016 PASSED IN ITA NO.172/BANG/2013, FOR
THE ASSESSMENT YEAR 2009-2010, PRAYING TO
FORMULATE THE SUBSTANTIAL QUESTION OF LAW AS
STATED AND ANSWER THE SAME IN FAVOUR OF THE
APPELLANT AND ETC.

THIS ITA COMING ON FOR *HEARING*, THIS DAY,
P.S.DINESH KUMAR J., DELIVERED THE FOLLOWING:

JUDGMENT

Though this appeal is admitted to consider four questions raised by the appellant, Shri A.Shankar, learned Senior Advocate for the appellant submits that the following two questions arise for consideration in this appeal.

"1. Whether Tribunal erred in law in not holding that for the purpose of Section 48 of the Act the price bargained for by the parties is the full value of consideration, and consequently non reduction of Rs.90,74,103/- in arriving at full value of consideration is perverse in law on the facts and in circumstances of the case?"

2. Whether the Tribunal ought to have held that an amount of Rs.90,74,103/- is liable to be reduced from the gross consideration received by the appellant on the principle of diversion at source by overriding the title of facts and in circumstances of the case?."

2. The brief facts of the case are, appellant and her husband entered into share purchase agreement dated February 28, 2008 to sell her shares in the following four companies.

- i. M/s Bobba Aviation Ground Services (P) Ltd.
- ii. M/s Bobba Aviation Ground Handling Services (P) Ltd.
- iii. M/s Ground and Air Technical Services (P) Ltd. and
- iv. M/s Mount Kailash Power Projects (P) Ltd.

3. We are concerned with the sale of appellant's shares in the said companies in favour of M/s Soham Renewable Energy India Private Limited.

4. Shri Shankar, submitted that the consideration agreed between the parties for sale of appellant's shares was Rs.2,70,32,278/- minus the tax component of Rs.90,74,103/-. The appellant had agreed to pay the tax component as per Clause 7(1) of the share purchase agreement. She claimed deduction under 'capital gains' on the tax component under Section 48 of the Income Tax Act, 1961 ('the Act' for short). The Assessing Officer did not allow the deduction. The CIT(A) has allowed the appeal in part. On further appeal before the ITAT, the same has been dismissed.

5. Assailing the orders passed by the Revenue, Shri Shankar submitted that the full value realised by the appellant as consideration is the amount excluding tax component. Therefore, the view taken by the Revenue is unsustainable.

6. Shri K.V.Aravind, learned Standing Counsel for the Revenue submitted:

- that the consideration agreed between the parties is amenable to tax;
- that the parties have entered into share purchase agreement for sale of shares at Rs.2.70 Crores. The tax component of Rs.90,74,103/- cannot be construed as an expenditure in connection with such transfer nor as cost of acquisition, the only two contingencies which can be considered while allowing deduction. The tax component does not fall within the definition of Section 48(1) of the Act;
- that the tax paid by the company is not allowed as deduction. By the same analogy, deduction

cannot be allowed in the hands of the appellant;

and

- that if this Court were to consider assessee's appeal, it may be noted that appellant shall be entitled for exemption only to the extent of 50% proportionate to her share holding.

7. In substance, Shri Aravind contended that the full value of shares is Rs.2.70 Crores and tax component does not fall within the definition of expenditure.

8. We have carefully considered rival submissions and perused the records.

9. Undisputed facts of the case are, appellant has agreed to sell her shares at Rs.2.70 Crores. Clause 7.1 of the agreement extracted in the ITAT order reads as follows:

"7.1 The Sellers shall be liable to reimburse the Companies for all taxes that may be levied on the Companies (consisting of both the Aviation Business and the power business) in respect of the period up to the Closing Date and in the event of the Companies receiving any refund of any taxes in respect of the period up to the Closing date, the same shall be forthwith passed on to the

Sellers, failing which, the Sellers' obligation to reimburse the taxes under this agreement shall cease to exist."

10. In substance, what the parties have agreed is, consideration towards sale of shares at Rs.2.70 Crores minus the tax component.

11. Shri Aravind also raised another contention that the tax payable ought to have been distributed among all the sellers because the tax component is that of the company and the amount paid by the appellant is not the full tax component. We see force in his argument.

12. Both the first and second questions are inter-linked as to whether the Revenue has erred in law in not holding that for the purpose of Section 48 of the Act, the price bargained is a full value consideration and non-deduction of Rs.90,74,103/- is perverse.

13. Clause 7 of the agreement deals with the payment of taxes and it has been agreed between the parties that seller shall reimburse the tax that may be levied on the company upto the closing date. As recorded in the Assessment Order, tax has been paid in the following manner:

Sl.No	Date of payment	Name of the Company	Asst. year	Amount in Rs.
1	21.03.09	GATS	2006-07	11,32,094
2	16.12.08	GATS	2006-07	2,790
3	26.03.08	GATS	2005-06	10,00,000
4	31.03.08	GATS	2005-06	5,00,000
5	02.05.08	GATS	2005-06	9,49,185
6	27.09.08	GATS	2008-09	44,90,034
		Total		90,74,103

14. Thus, in effect, the net amount that the appellant has realised is Rs.1,79,58,175/- (Rs.2,70,32,278/- minus Rs.90,74,103/-) by selling her shares.

15. Shri Shankar has placed reliance on the decision of the Hon'ble Supreme Court in *Commissioner of Income Tax Vs. Gillanders Arbuthnot & Co*¹. In the said case, the Apex Court has referred to the decision in *Commissioner of Income Tax Vs. George Henderson & Co. Ltd.*² wherein it is held as follows:

"xxx... It is evident that the legislature itself has made a distinction between the two expressions 'full value of the consideration' and 'fair market value of the capital asset transferred' and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2),

¹ (1973)87 ITR 407 (SC)

² (1967) 66 ITR 622 (SC)

the market value of the asset transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are: (1) that the transferor was directly or indirectly connected with the transferee, and (2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer "

16. Section 48 of the Income Tax Act provides for mode of computation in terms of which the income chargeable under the head 'Capital Gains' shall be computed by deducting full value of the consideration received. The expenditure incurred and cost of acquisition are deductible. The Revenue's case is, payment of tax does not fall in these two categories. But in the facts of this case, the total amount realised or in other words, which the appellant got in her hand, is Rs.1.80 Crores. The deduction is claimed based on the agreement between the parties. A careful perusal of

the agreement shows that intention of the parties is clear to the effect that the value of the shares shall be the amount agreed between the parties excluding the tax component. However, the contention urged by Shri Aravind that tax component should be distributed among both sellers merits consideration. Therefore, appellant shall be entitled for deduction of only 50% of the tax component proportionate to her share holding.

17. In view of the above, this appeal is ***allowed in part***. The questions are answered partly in favour of the assessee and against the Revenue, holding that assessee shall be entitled for deduction of only 50% of the tax component.

No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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