

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

[Before Hon’ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 222/Kol/2015

Assessment Year : 2011-12

Aravali Polymers LLP
[PAN: AASFA 0747 L]
(Appellant)

-vs-

ACIT, Circle-34 Kolkata
(Respondent)

I.T.A No. 267/Kol/2015

Assessment Year : 2011-12

ACIT, Circle-34, Kolkata
(Appellant)

-vs-

Aravali Polymers LLP
[PAN: AASFA 0747 L]
(Respondent)

For the Assessee : Shri R.N. Bajoria, Sr. Counsel
Shri A.K. Gupta, FCA

For the Department : Shri P.K. Srihari, CIT (DR)

Date of Hearing : 13.08.2018

Date of Pronouncement : 29.08.2018

ORDER

Per M.Balaganesh, AM

1. These cross appeals are directed against the order passed by the Learned Commissioner of Income Tax (Appeals) -10, Kolkata [in short the ld CITA] in New Appeal No. 70/CIT(A)-10/Cir-34/2014-15/Kol dated 29.12.2014 against the order passed by the Learned Assistant Commissioner of Income Tax , Circle -34, Kolkata [in

short the Id AO] under section [in short u/s] 254/143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') dated 5.9.2014 for the Assessment Year (in short Asst Year) 2011-12. Both the appeals are taken up together and disposed off by this common order for the sake of convenience.

2. The only effective issue to be decided in the appeal of the revenue is as to whether the Id CITA was justified in striking down the order passed by the Id AO u/s 253/143(3) of the Act dated 5.9.2014 wherein the short term capital gains of Rs 53,56,69,88/- was brought to tax, in the facts and circumstances of the case. The only effective issue to be decided in the appeal of the assessee is as to whether the Id CITA was justified in passing certain comments about the taxability of short term capital gains as above after having struck down the addition made by the Id AO in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee LLP came into existence on 13.8.2010 by conversion of Aravali Polymers Pvt Ltd (APPL) In terms of the provisions of section 58(4) of the LLP Act, 2008, all the tangible, movable or immovable, and intangible properties vested in APPL , all assets, interest, rights, privileges, liabilities and obligations relating to APPL and the whole of the undertaking of APPL stood transferred to and vested in the assessee LLP and APPL was deemed to be dissolved and removed from the records of the Registrar of Companies. All the assets and liabilities of APPL stood transferred and vested in the assessee LLP at its cost or book value in the hands of APPL. The assessee thus became the owner of 3184807 shares of EIH Ltd at its cost in the books of APPL of Rs 2,84,37,180/-. Out of the said 3184807 shares so transferred and vested in the assessee, 3000000 equity shares of EIH Ltd were sold by assessee LLP for Rs 55,20,00,000/- leading to long term capital gains of Rs 53,56,69,888/-. The assessee offered Long Term Capital Gains accordingly in the return filed by it for the Asst Year 2011-12 arising out of sale of said 3000000 equity

shares of EIH Ltd without claiming the benefit of indexation on its cost on conversion from APPL, duly paid the tax leviable u/s 112 of the Act at 10% amounting to Rs 5,51,73,999/-. Such offer of long term capital gains on sale of said 3000000 equity shares of EIH Ltd by the assessee was duly accepted by the Id AO in the order of original assessment and there was no controversy and / or dispute relating thereto. Infact the said fact was even subjected to detailed verification by the Id AO by posing a specific query as to why the subject mentioned capital gains should not be treated as short term capital gains. The assessee gave a detailed reply in response to the said show cause notice during the course of original assessment proceedings.

4. Original Assessment Proceedings u/s 143(3) of the Act

A. The Id AO accepted the claim of long term capital gains returned by the assessee in respect of sale of 3000000 equity shares of EIH Ltd post conversion of private limited company into LLP in the sum of Rs 53,56,69,888/-.

B. The assessee claimed exemption u/s 47(xiiib) in the return filed in respect of conversion of private limited into LLP. The Id AO however observed that the assessee LLP post its conversion, had granted loans to its partners which had resulted in violation of provisions of section 47(xiiib) of the Act. According to Id AO, the provisions of section 47(xiiib) of the Act mandates that post conversion, there should not be any payment to partners for prescribed period of time. Accordingly, the Id AO resorted to reject the claim of exemption u/s 47(xiiib) of the Act and computed the consideration of capital gains for conversion of private limited company into LLP by replacing the book value of assets with market value of assets. This was upheld by the Id CITA. The assessee preferred an appeal before this tribunal and this tribunal had held that the substitution of consideration at market values is not in accordance with law as the conversion from private limited company into LLP had happened at book values only.

Hence there is no question of replacing the consideration figure at market values. The tribunal upheld the action of the Id AO in rejecting the claim of exemption u/s 47(xiiib) of the Act in respect of conversion of private limited company into LLP. However, the tribunal having held that the assessee is not entitled for exemption u/s 47(xiiib) of the Act and accordingly held that the consideration thereon should be adopted only at book values instead of market values, restored the matter back to the file of the Id AO for computation of capital gains by adopting book values for assets.

5. The present proceedings framed by the Id AO u/s 254/143(3) of the Act dated 5.9.2014 were in pursuance of the aforesaid order of this tribunal.

6. Hence it could be seen from the above, that there was absolutely no dispute with regard to the claim of long term capital gains of Rs 53,56,69,888/- on sale of 30 lakh equity shares of EIH ltd post conversion into LLP by the assessee in the original assessment proceedings. In other words, the said issue never travelled to any appellate forums such as CITA or to Tribunal. Hence when the order is passed by the Id AO pursuant to the directions of this tribunal, he could confine himself only with those directions of the tribunal and cannot travel beyond his jurisdiction vested thereon in the second round of proceedings.

7. However, the Id AO while passing the fresh order in the second round of proceedings dated 5.9.2014, proceeded to compute the long term capital gains for conversion of private limited company into LLP as under:-

Sale value of shares or assets of the company taken over	
By the LLP	3,10,92,830
Less: Cost of Acquisition of the assets by the company	3,10,92,830
Long Term Capital Gain	NIL

8. The Id AO further proceeded to shift his stand taken by him in the original assessment proceedings, by proceeding to treat the sale of 30 lakh equity shares of EIH Ltd (post conversion into LLP) as short term capital gains , as according to him, the period of holding of EIH shares by the assessee LLP was less than one year and hence the resultant gains thereon would only have to be taxed as short term capital gains. In other words, since the benefit of exemption u/s 47(xiiib) of the Act had been denied , the period of holding of shares by the previous owner (i.e private limited company) need not be considered as per section 49(1) of the Act. Accordingly, he computed the short term capital gains at Rs 53,56,69,888/- in the second round of proceedings.

9. The Id CITA observed that the order u/s 254/143(3) of the Act dated 5.9.2014 passed by the Id AO is supposed to be for limited purposes of giving effect to the directions of this tribunal in para 12 & 13 of the order thereon dated 27.6.2014. The Id AO has no jurisdiction to travel beyond the express or implied direction of the Tribunal. Accordingly, the Id CITA held that the decision of the Id AO treating the sale of EIH Ltd shares as short term capital gains is to be struck down. The Id CITA having struck down the action of the Id AO supra, proceeded to make the following observations in his order:-

The AO's action was or may be right but he chose a wrong proceeding/ method to rectify or amend one of mistakes or omissions on the part of the income tax authorities concerned to charge to tax some incomes as briefly pointed out in para 2.4. above. The A.O. is however free to take recourse to other proceedings to tax the gain as short term capital gain if he thinks that as legally proper. I take this opportunity to point out that the A.O. is also free to take recourse to the proceedings to levy tax on capital gain in respect of conversion of shares in the erstwhile Aravali Pvt Ltd in the shares of Aravali Polymers LLP in the hands of the shareholders of the said erstwhile company as pointed out in para 2.4. above.

4. Grounds 1,2,3&4 are decided thus in the favour of the appellant. As regards, grounds of appeal no. 5 & 6, I do not agree with the claim of the appellant and therefore, these grounds are not allowed.

10. Aggrieved, both the revenue as well as the assessee are in appeal before us on the following grounds:-

ITA No. 267/Kol/2015 – Revenue Appeal

1. *On the facts & circumstances of the case and in law, the ld. CIT(A) erred in striking down the Order of the AO treating the transfer of EIH shares as short term capital gain.*
2. *On the facts & circumstances of the case and in law, the ld. CIT(A) erred in not appreciating the fact that the Hon'ble ITAT has given specific finding that "the assessee has not complied with the proviso to section 47(xiiib) is not available to the assessee."*
3. *On the facts & circumstances of the case and in law, the ld. CIT(A) erred in striking down the Order inspite of the fact that AO has rightly followed the direction of the Hon'ble ITAT and treatment of transfer of shares is consequential effect of the order.*
4. *The appellant craves the leave to made any addition, alteration, modification of grounds at the appellate stage.*

ITA No. 222/Kol/2015 – Assessee Appeal

1. *For that various uncalled for, illegal, baseless and perverse observations and findings given in para 2.4 of the Order dated 29 December 2014 passed by the (East India Hotel Ltd.) shares and distribution of gains or profits to the Commissioner of Income Tax (Appeals) are in excess of jurisdiction, erroneous and are liable to be cancelled and/or deleted.*
2. *For that various allegations, purported findings and observations in the order of the CIT(A) to the effect that –*
 - (a) *Aravali Polymers Pvt Ltd. was converted into Aravali Polymers LLP with an intention to avoid the tax liability that would have arisen on sale of EIHL shareholders of the erstwhile Aravali Polymers Pvt Ltd. u/s. 2(22) of the Income Tax Act.*
 - (b) *There appears to be an intention to avoid the tax liability that would have arisen under MAT (section 115JB of the I.T. Act*
 - (c) *The shareholders or partners or the erstwhile Aravali Polymers Pvt Ltd. have intention to avoid tax on distributed profits (section 115-0 of I.T. Act).*
 - (d) *The original order u/s 143(3) dated 03.03.2014 seems to have ignored the*

tax implication on conversion of company shares into LLP shares in the hands of the shareholders of the erstwhile Aravali Polymers Pvt Ltd.

(e) Conversions of shares in the erstwhile Aravali Polymers Pvt Ltd. to the shares in the appellant LLP (of the partners of LLP or the shareholders of the erstwhile company) should have been considered in terms of section 45 as the shareholders transferred the shares in the erstwhile company on said conversion.

(f) The said transfer by way of said conversion takes the nature of exchange and while computing capital gain the market value of the share in the erstwhile company or the LLP might have been taken as illegal, perverse, without jurisdiction, contrary to the admitted facts and materials on record and are liable to be deleted.

3. *For That the various observations and findings as above given in the order of CIT(A) are not in respect of the matter appearing and/or arising in the appeal decided by him and were beyond his jurisdiction and further none of the said findings and observations are brought out from the assessment order, earlier CIT(A) order dated 11th April, 2014, ITAT order and the order of the Assessing Officer giving effect to the order of the Tribunal dated 5th September, 2014 and all such allegations, purported findings and perverse observations had been arrived at on surmises and conjectures, extraneous and irrelevant considerations and are erroneous and liable to be deleted.*
4. *For That the CIT(A) exceeded his jurisdiction in guiding the Assessing Officer to take recourse to various proceedings to levy tax somehow on the appellant even when no such tax is legally liable to be paid by the appellant and such guidance and/or observation in para 3 are without jurisdiction, illegal and are liable to be deleted and/or reversed.*
5. *For That the CIT(A) erred in dismissing the grounds No. 5 and 6 raised by the appellant without any discussion whatsoever and without noting any of the arguments of the appellant and/or giving any finding of his own on such argument. The cryptic order dismissing grounds no. 5 and 6 is without application of mind, erroneous and perverse and is liable to be reversed.*
6. *For That further and in any event and without prejudice to ground no. 5 above the CIT(A) should have held that the appellant was entitled to the benefit of Explanation 1(b) to Section 2(42A) read with Section 49(1) of the Act.*

11. We have heard the rival submissions and perused the materials available on record. The facts narrated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that this tribunal in the original round of appellate proceedings vide ITA No. 718/Kol/2014 dated 27.6.2014 had observed as under :-

12. A perusal of the provisions of section 45 of the Income Tax Act shows the levy of capital gains to be on the profits or gains arising from the transfer of capital asset effected in the previous year. Admittedly, the erstwhile Company Aravali Polymers Pvt Ltd converted into a partnership firm Aravali Polymers LLP, a Limited Liability Partnership firm. This took place on 12.08.2010 being the assessment year under appeal. This conversion of the Pvt Limited Company into a Limited Liability Partnership does not have the protection of section 47(xiiib) in the assessee's case. Consequently the Capital gain on the same is liable to be considered. In the computation of capital gains, nowhere in the Act is there provision, more so in section 45, for deeming the sale price in the case of equity shares. The value at which the shares or the assets of the Company Aravali Polymers Pvt Ltd was taken over by the Limited Liability Partnership firm, would be the sale price and the cost of acquisition thereof is to be as per books of the erstwhile Company. In these circumstances, the issue of computation of the capital gains under section 45 is restored to the file of the Assessing Officer, who shall take the sale consideration as on 12.08.2010 at the figure, at which the assets of the erstwhile firm has been acquired or taken over by the appellant Aravali Polymers LLP.

13. In the result, the crux of the finding in this order is – (i) the assessee has not complied with the proviso to section 47(xiiib). Consequently, the benefit of section 47(xiiib) is not available to the assessee.

(ii) As the assessee did not have the benefit of section 47(xiiib), the provision of section 47A94) does not apply.

(iii) The capital gains in respect of the transfer of the assets in the hands of M/s Aravali Polymers Pvt Ltd to the appellant firm Aravali Polymers LLP is to be computed under section 45 of the Income Tax Act for which purpose, the issue is restored to the file of the Assessing Officer.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Pursuant to the aforesaid directions, the ld AO did compute the capital gains on conversion of private limited company into LLP at Rs Nil by fixing the consideration at

book values as directed by the tribunal. Admittedly, this was computed in the hands of Aravali Polymers LLP (i.e the assessee herein) by treating the assessee LLP in the capacity of successor to private limited company. In our considered opinion, the Id AO ought to have stopped the proceedings with this action which would be in strict consonance with the directions of the tribunal supra. We are in complete agreement with the arguments of the Id AR that the issue as to whether the sale of 3000000 lakh equity shares of EIH Ltd post conversion into LLP, would result in long term or short term capital gains, was never in dispute in the first round of proceedings. The assessee LLP had offered the long term capital gains on sale of such shares in the return which has been duly accepted by the Id AO in the original round of proceedings after subjecting the same to detailed enquiry by issuing a specific show cause notice to the assessee as to why the subject mentioned gains should not be treated as short term capital gains. The Id AO on examining the detailed reply given by the assessee both on facts as well as on law, accepted the contentions of the assessee that the resultant gains on sale of 3000000 shares of EIH Ltd would only be long term capital gains. Since this was accepted by the Id AO in the assessment itself, there was no occasion to carry the said issue to the appellate forums such as CITA or the tribunal. Hence the Id AO ought not to have taken a different stand in the proceedings giving effect to the directions of the tribunal by treating the resultant gains on sale of 3000000 equity shares of EIH Ltd as short term capital gains. We find that this action of the Id AO had been rightly struck down by the Id CITA in his order. Accordingly, grounds raised by the revenue are dismissed.

11.1. But we find that the Id CITA having struck down the action of the Id AO in taxing short term capital gains, had proceeded to make some observations, to somehow bring to tax the short term capital gains, which in our considered opinion, cannot be done as per law at all. In our considered opinion, these observations of the Id CITA are totally unwarranted and only reflects the contradictory stand of the Id CITA in as much as, the

Id CITA , on the one hand, clearly gives a finding, that the Id AO cannot travel beyond his jurisdiction and has to strictly abide by the directions of the tribunal, but , on the other hand, the Id CITA decides to travel beyond his jurisdiction to look into issues which were not the subject matter of directions of the tribunal. In view of the same, we hold that the observations of the Id CITA in respect of Ground Nos. 5 & 6 raised before him deserves to be expunged and are hereby directed to be expunged. Accordingly, the grounds raised by the assessee are allowed.

12. In the result, the appeal of the assessee is allowed and appeal of the revenue is dismissed.

Order pronounced in the Court on 29.08.2018

Sd/-
 [A.T. Varkey]
 Judicial Member

Sd/-
 [M.Balaganesh]
 Accountant Member

Dated : 29.08.2018

SB, Sr. PS

Copy of the order forwarded to:

1. Aravali Polymers LLP, 4, Mangoe Lane, 6th Floor, Kolkata-700001.
2. ACIT, Circle-34, Aayakar Purba, 110, Shantipally, Kolkata-700001.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
 Head of Office/D.D.O., ITAT, Kolkata Benches