IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.11.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.943 of 2019

The Commissioner of Income Tax-II,
Coimbatore. .. Appellant

Versus

M/s.Lakshmi Machine Works Ltd.,
Perianaickenpalayam,
Coimbatore – 641 020
(PAN No.AACL5244N) .. Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai dated 23.12.2010 made in I.T.A.No.1632/Mds/2010 relating to the Assessment Year 2005-06.

For Appellant : Mr.T.R.Senthilkumar
Senior Standing counsel
and Mrs.K.G.Usharani

For Respondent : Mr.R.Vijayaraghavan
For M/s.Subbaraya Aiyar Padmanabhan

JUDGMENT

[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal by the Revenue filed under Section 260 A of the Income Tax Act, 1961 ('the Act' for brevity), is directed against the order dated 23.12.2010 passed by the Income Tax Appellate Tribunal, Chennai, 'A' Bench ('the Tribunal' for brevity) in I.T.A.No.1632/Mds/2010 for the Assessment Year 2005-06. The Revenue has filed this appeal, raising the following Substantial Question of Law:

> *"1.Whether on the facts and in the circumstances of the case the Income-tax Appellate Tribunal was right in law in dismissing the revenue's appeal on the ground, the assessing officer can not go beyond the directions of the Commissioner of Income tax, even though during the course of fresh assessment proceedings, it is open to the assessing officer to examine any items other than specific item examine to have the proper income assessed as prospective?"*

2. We have heard Mr.T.R.Senthilkumar, learned Senior Standing counsel and Mrs.K.G.Usharani, learned counsel for the appellant / Revenue and Mr.R.Vijayaraghavan, learned counsel for M/s.Subbaraya Aiyar Padmanabhan, learned counsel for the respondent/assessee.

3. We need not labour much to decide the Substantial Question of Law raised by the appellant / Revenue in this appeal on account of the fact that the order, which is impugned before us passed by the Tribunal is as a result an order passed by the Commissioner of Income Tax dated 09.06.2008 under Section 263 of the Act.

4. This order was on the subject matter of consideration in the assessee's own case for the earlier Assessment Year, which travelled up to the Hon'ble Division Bench of this Court in the case of ***The Commissioner of Income Tax-II Vs. Lakshmi Machine Works Limited in T.C.A.No.747 of 2009 dated 13.02.2019*** and the appeal filed by the Revenue was dismissed. This judgment was followed by the Hon'ble Division Bench of this Court in the assessee's own case for the Assessment Year 2005-06 in T.C.A.No.1199 of 2010, wherein there is a reference to the judgment dated 13.02.2019 in T.C.A.No.747 of 2009. For better appreciation, we quote the judgment in T.C.A.No.747 of 2009 as hereunder:

"The Commissioner of Income Tax (II) (in short 'CIT') is aggrieved with an order of the Income Tax Appellate Tribunal (in short 'Tribunal') dated 08.08.2008

allowing the appeal filed by the assessee challenging an order passed under section 263 of the Income Tax Act, 1961 (in short 'Act') dated 15.04.2008.

2. The following substantial question of law has been raised and admitted for our adjudication:

'Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was right in law in quashing the order passed under section 263 of the Income Tax Act, 1961, even though the assessing officer is allowed the claim of carried forward of losses under section 72A, based on an incorrect assumption of facts is valid?"

3. An order of assessment was initially passed under section 143(3) of the Act on 22.08.2006. The Assessing Authority examined several issues arising out of the return of income filed by the assessee. One of the issues taken up for scrutiny related to a claim for set-off of carried forward loss of an amount of Rs.128,19,50,761/-. The claim arose in the light of an order passed by the Board for Industrial and Financial Re-construction (in short 'BIFR') dated 22.10.2003 in Case No.407 of 2002 filed by M/s.Textool Company Limited (in short 'Textool').

4. Textool had approached the BIFR seeking a scheme of re-construction of its business in pursuance of section 17(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'SICA'). A rehabilitation proposal had been prepared and submitted, that involved

amalgamation of Textool with the assessee before us. The details of the scheme are adverted to only in so far as they relate to the issue raised for our resolution. The proposal included the vesting of two spinning units of Textool with the assessee. After a detailed consideration of the rehabilitation proposal, the BIFR sanctioned the same on 22.10.2003. The provisions of Section 72A of the Act relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in cases of amalgamation or demerger were also noted by the BIFR in its sanction order. The relevant portions of the order are extracted below:

'6.0 MERGER/REHABILITATION PROPOSAL

The present rehabilitation scheme has been prepared based on the proposal submitted by the company involving merger of TCL with LMW. LMW has made cash accruals of Rs.5337 lacs on a total income of Rs.53458 lacs during 2002-03. The secured creditors of TCL are fully settled by LMW and liabilities of unsecured creditors are being absorbed by LMW. No reliefs/concessions are sought from secured/unsecured creditors. As per the scheme of amalgamation, one equity share of Rs.100/- each in LMW is proposed to be allotted to the shareholders of TCL for every 200 shares of Rs.10/- each held. The proposal also involves vesting of the 2 spinning units that are presently with TCL with LMW or with its wholly owned subsidiary or subsidiaries in existence or to be formed, at the option of LMW. The merger Scheme (copy placed at Appendix I) would be operative from April 1, 2003 (the appointed date) and shall be effective from "effective date".

7.0 RELIEFS AND CONCESSIONS DIRECTORATE OF INCOME TAX (RECOVERY)

To consider extending tax benefits under sections 72 A of the Income Tax Act on account of carry forward losses of TCL to the merged company.'

5. Now coming to the scrutiny assessment

proceedings, in considering the claim of the assessee for carry forward of loss and unabsorbed depreciation, the Assessing Authority had called upon the assessee to produce various particulars. A questionnaire under section 142(1) accompanied with a notice under section 143(2) of the Act dated 09.06.2006 was issued calling upon the assessee to show compliance with the conditions laid down under section 72A.

6. In reply, the assessee, vide communication dated 29.05.2006, referred to the scheme dated 22.10.2003 sanctioned by the BIFR under the SICA in the case of Textool, pointing out that the provisions of section 72A have been referred to by the BIFR and no separate satisfaction of the conditions set out in the statutory provision was called for in such circumstances. Thus, according to the assessee, it was entitled to the claim for carry forward of loss made in the return of income, simply by virtue of the scheme sanctioned by BIFR that took into account the provisions of sections 72 A as well. The assessee also relied on the judgment of the Supreme Court in the case of Indian Shaving Products Ltd. V. BIFR ((1996) 218 ITR 140).

7. The Assessing Authority was in agreement with

the view taken by the assessee and allowed the claim. Though the allowance of the claim is not supported by any reasons set out in the order of assessment, the Officer does refer to the provisions of section 32(2) of the SICA and the judgment of the Supreme Court in Indian Shaving Products Ltd (supra).

8. Thereafter, the CIT, being of the view that there had been no application of mind by the Assessing Authority while allowing the assessees' claim and no reasons in support thereof, proposed a revision of the order of assessment and the allowance of the claim under section 263 of the Act. Despite objections put forth by the assessee, the assessment came to be revised by order dated 15.04.2008 passed by the CIT under section 263 of the Act.

9. As against the same, the assessee filed an appeal before the Tribunal that held the issue in favour of the assessee. The Tribunal took a cue from the rationale of Circulars Nos.523 dated 05.10.1988 and 576 dated 31.08.1990 by virtue of which the impact of the provisions of Sections 41(1) and 139(3) of the Act relating to cessation of liability and return of loss that enabled an assessee to claim carry forward of losses under section 80 of the Act,

was minimised in cases where the BIFR had sanctioned a scheme of rehabilitation. The Circulars provided that in such circumstances, the Scheme sanctioned by the BIFR would override the statutory provisions as aforesaid.

10. According to the Tribunal the very fact that the BIFR has sanctioned the scheme was sufficient and no further compliance need be called for in regard to the conditions set out under section 72A of the Act as the provisions of the SICA would override those of the Income tax Act. The order under section 263, to the extent to which it revised the order of assessment was quashed, and the conclusion of the Assessing Officer in order dated 22.08.2006 allowing the claim of the assessee for carry forward of loss was confirmed. It is as against the aforesaid order that the revenue is in appeal before us.

11. We have heard learned counsel and the detailed rival submissions advanced.

12. The SICA is a special enactment, the purpose of which is rehabilitation and revival of sick industries. The provisions of section 32(2) thereof read as under:

'32. Effect of the Act on other laws.—

(1).....

(2)Where there has been under any scheme under this Act an amalgamation
of a sick industrial company with another company, the provisions of Section 72- A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation, by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.'

13. The provisions of Section 32(2) of the SICA as well as 72A of the Act and the interplay thereof came to be considered by the Supreme Court in the case of Indian Shaving Products Ltd (supra). The Bench was considering an appeal against an order of the Appellate Authority for Industrial and Financial Reconstruction upholding an order of the BIFR refusing to grant the benefit of the provisions of Section 71 (a) of the Income Tax Act to the appellant upon amalgamation and sanction of a scheme by the BIFR.

14. After noting that that BIFR had been enacted in public interest, with a view to secure timely detection of sick and potentially sick companies owning industrial undertakings and to determine preventive, ameliorative, remedial and other measures required to be taken with respect to such companies, the Bench considered the various provisions of the SICA, in specific Section 32(2).

15. Reference is made to the judgement of the Supreme Court in the case of Commissioner of Income Tax and others vs. Mahindra and Mahindra and Others (144 ITR 225) that considered a challenge to Section 72 A. The following paragraph from the judgement in Mahindra's case has been particularly noted and extracted:

'Before undertaking a scrutiny of these reasons for ultimately deciding whether the impugned conclusion of the Specified Authority and the Central Government is liable to be interfered with or not it will be useful to indicate briefly the object with which this new provision of s. 72A was introduced in the Act as it will throw light on what was the mischief or situation that was intended to be remedied by its introduction as also the true concept of financial Don-viability. From the budget speech of the Finance Minister, the Notes on Clauses of the Finance Bill (No. 2) of 1977 and the Memorandum explaining to provisions of the said Bill it will appear clear that sickness among industrial undertaking was regarded as a matter of grave national concern inasmuch as closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; it was felt that a more effective method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf s. 72A was introduced in the Act where under by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated

company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation was in public interest. The expression "financial non-viability" had not been defined in the Act but the Finance Minister's speech, the notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in cl. (a) of sub-s. (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant facts'

16. The above judgment was rendered prior to coming into force of SICA in terms of which the BIFR was constituted, in an era when sanction was specifically required to be given by the Central Government upon recommendation of the Specific Officer thereunder. Thus, financial viability or otherwise, of the amalgamating company had to be determined first, in order to attract the provisions of Section 72A. However, after the enactment of

the SICA and the Constitution of the BIFR, the question of sickness or robust health of the entity is to be determined by the Board. It is only when the Board was satisfied that it would have, in the first place, entertained applications for revival, sanctioning appropriate schemes for rehabilitation. Thus, a sanction by the BIFR implies that the requirements of Section 72(2) of the Act have been met.

17. This provision, and the interplay thereof with the provisions of the Income tax Act has been considered by the Supreme Court in the case of Indian Shaving Products (supra) where at paragraph 7 the Bench holds as follows:

'7. Under Section 72 of the Income Tax Act, to give to the amalgamated Company the benefit of the loss or, as the case may be, allowance for depreciation of the amalgamating company for the previous year in which the amalgamation was effected for the purposes of the Income Tax Act, the Central Government must, upon the recommendation of the specified authority, be satisfied that the amalgamating company was not, immediately before the amalgamation, financially viable by reason of its liabilities, losses and other relevant factors, and that the amalgamation was in the public interest, By reason of Section 32(2) of the said Act, where there has been under any scheme thereunder an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act shall apply in relation to such amalgamation, subject to this modification that the power of the Central Government is to be exercised by the BIFR without the necessity of a recommendation by the specified authority mentioned in Section 72A of the Income Tax Act. This is because, for the purposes of according sanction to a scheme of amalgamation of a

sick industrial undertaking with any other company under Section 18 of the said Act, the BIFR has to be satisfied that the amalgamating company is not financially viable, which is the effect of Section 3(o) of the said Act, and that the amalgamation is necessary or expedient in the public interest, which is the effect of Sections 17 and 18 of the said Act read together. Sanction of a scheme of amalgamation under S ection 18 o f the said Act necessarily implies that the requirements of S ection 72A o f the Income Tax Act have been met and the BIFR must exercise the power conferred upon it by Section 3 2 (2} of the said Act and make the declaration contemplated by Section 7 2A o f the Income Tax Act, The conditions for sanctioning a scheme under Section 18 o f the said Act being the same as those required for a d eclaration under Section 72A o f the Income Tax Act, the BIFR could not have sanctioned the scheme of amalgamation of Sharp Edge with the a ppellant but declined to make the declaration under Section 72A o f the I ncome Tax Act with regard to t hat amalgamation'

(underlining for emphasis, ours)

18. Nothing further remains to be said in the light of the categoric conclusion of the Supreme Court emphasised above. The view taken by the Assessing Authority to the effect that the claim of the assessee is liable to be allowed in the light of the provisions of section 32(2) of the SICA and its interpretation by the Supreme Court is thus, the correct one.

19. The jurisdiction exercised by the CIT to correct the alleged error in assessment was in terms of section 263 of the Act. Section 263 empowers the Commissioner of Income tax to revise an order of assessment if the order in question is erroneous and

prejudicial to the interests of the revenue, both conditions to be satisfied concurrently. The action of the assessing officer, though prejudicial, can hardly be termed as 'erroneous' in so far as the officer has followed the dictum laid down by the Supreme Court in the case of Indian Shaving products (supra). Thus, in the absence of concurrent satisfaction of the two conditions under section 263 of the Act, the action of the CIT was contrary to statute and liable to be set aside.

20. In the light of the aforesaid discussion, the appeal filed by the Revenue is dismissed. The substantial question of law is answered in favour of the assessee and against the Revenue. No costs."

5. It is a submission of Mr.T.R.Senthilkumar, learned Senior Standing counsel for the appellant / Revenue that the Revenue is contemplating of filing a Review Application before the Hon'ble Division Bench.

6. If at all, the appellant / Revenue is of such opinion, they ought to have filed a Review against the judgment dated 13.02.2019 in T.C.A.No.747 of 2009, which appears to have been not done till date. Apart

from that, the appellant / Revenue has not filed any appeal as against the judgment dated 28.01.2020 in T.C.A.No.1199 of 2010.

7. Therefore, the appeal filed by the appellant / Revenue has to be necessarily dismissed, taking note of the factual and legal position as set out in the assessee's own case in the aforementioned paragraphs.

8. In the result, the Tax Case Appeal is dismissed and the Substantial Questions of Law is answered against the appellant / Revenue. No costs.

(T.S.S.,J) (V.B.S.,J)

03.11.2020

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Index: Yes / No
Internet: Yes / No
Speaking Order/Non-Speaking Order

T.S.SIVAGNANAM, J.

AND
V.BHAVANI SUBBAROYAN, J.

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To
The Income Tax Appellate Tribunal,
'A' Bench, Chennai.

T.C.A.No.943 of 2019

03.11.2020