kps

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1110 OF 2012

M/s Crompton Greaves Limited
having its office at
6th Floor, CG House,
Dr.A.B. Road, Prabhadevi,
Mumbai-400025. ..Appellant

-Versus-

Deputy Commissioner of Income Tax
Circle 6(2), having his office at
Room No.563, 5th Floor, Aayakar Bhavan,
M.K.Road, Mumbai-400020. ..Respondent

.....

Mr.Hira Rai a/w Mr.Subhash Shetty and Mr.Jintendra Singh, for the Appellant/ Assessee.
Mr.Tejveer Singh, for the Respondent/ Revenue.

.....

CORAM : S.C.DHARMADHIKARI
&
GIRISH S. KULKARNI, JJ.

Reserved on : 05th March, 2014
Pronounced on : 25th March, 2014

JUDGMENT (Per S.C.Dharmadhikari, J.):

1 This Appeal challenges the order of the Income Tax Appellate Tribunal, Mumbai Bench dated 13th April, 2012 in Income Tax Appeal No.2652/Mum/2007. The Assessment Year is 2002-2003.

2 Mr.Rai, learned counsel appearing for the Appellant, submits that there are substantial questions of law arising for determination and consideration in this Appeal which have been formulated by the Appellant. He submits that the Appellant is a company carrying on business of manufacturing of transformers, switch gears, electrical products, home appliances, etc.. It also has an engineering and project division. The Appellant filed the returns of income for the Assessment Year 2002-2003 declaring the total income under normal provisions as well as under Section 115JB of the Income Tax Act, 1961 at Rs.NIL. During the previous year relevant to the Assessment Year 2002-2003, the Appellant claimed a capital loss of Rs.34,52,77,992/- and required the same to be carried forward for set off in subsequent years. The Appellant was to receive amounts of Rs.17,87,31,508/- and Rs.17,25,46,484/- from M/s Bharat Starch Industries Limited and M/s JCT Limited, respectively. The Appellant received only shares worth of Rs.60,00,000/- from M/s Bharat Starch Industries Limited towards dues. The wrote off balance of Rs.34,52,77,992/- was claimed as a capital loss. The write off was in the course of schemes of arrangement which were subsequently sanctioned by the Gujarat and Punjab and Haryana High Courts, respectively. The Respondent rejected the claim by holding that in order to be eligible to carry forward of the capital loss, there should be a capital asset as defined in Section 2(14) and the same should be transferred in the manner as defined in Section 2(47) of the Income Tax Act, 1961. Since the deposits or advances given to M/s JCT Limited and M/s Bharat Starch Industries Limited and written off, are not capital assets nor there was any transfer, no capital loss is allowed to be carried forward to the subsequent year. That is how the Assessing Officer passed the order of assessment dated 29th March, 2005.

3 Being aggrieved and dissatisfied by this order, an Appeal was filed before the Commissioner of Income Tax (Appeals) on 02nd May, 2005 inter-alia objecting to the disallowance of capital loss claimed by the Appellant. The Commissioner of Income Tax (Appeals) rejected the claim for disallowance of capital loss. That order passed on 23rd January, 2007 was appealed to the Tribunal and the Tribunal by the impugned order dismissed the Appeal.

4 Mr.Rai submitted that the Appeal deserves to be entertained on the substantial questions of law. They have been formulated in paragraph 3 of the memo of Appeal at pages 6 and 7. Mr.Rai has addressed us essentially on the question of law formulated at paragraph 3(a) and submitted that the impugned order fails to take note of the relevant legal provisions. He submits that the Appellant/ Assessee had submitted before the Income Tax Appellate Tribunal, as also, the Commissioner of Income Tax (Appeals) that in case of M/s Bharat Starch Industries Limited and M/s JCT Limited, the advances have been written off. It is submitted that there was no possibility of recovery of loans and hence, same were written off. The sum consisted of interest from both companies. Since interest has already been offered for tax on accrual basis, therefore, at least these amounts should be allowed. It may be that this part of the order of the Commissioner of Income Tax (Appeals) takes care of this controversy. However, what was argued was, there was Inter-Corporate Deposit (for short ICD). The inter-corporate deposits and the amounts in that regard were brought to the notice of the Tribunal. It has been submitted that in the case of M/s Bharat Starch Industries Limited, there was reconstruction and its business was transferred to M/s English

Clay India Limited. There is an order of the Honourable Gujarat High Court dated 08th February, 2002. Therefore, this was the case where right to recover the amount was extinguished by the order of the Court. In both cases, ICDs were capital assets in the hands of the Assessee. The term "capital asset" has been defined in Section 2(14) of the Income Tax Act, 1961 and would include such ICDs also in its ambit.

5 It was argued before us that the Tribunal committed a grave error in rejecting the claim for capital loss of Rs.21.40 crores. The argument before us is that if the inter-corporate deposits (ICDs) were capital assets in terms of Section 2(14) and there has been transfer of the same in terms of Section 2(47) of the Income Tax Act, 1961, then, the Appellant is entitled to claim a capital loss in the above figure. The Tribunal's conclusions, therefore, are totally contrary to law and should be quashed and set aside. Reliance is placed upon a decision of the Honourable Supreme Court reported in **76 ITR 471 (SC)** (*Ahmed G.H.Ariff and others v/s Commissioner of Wealth Tax, Calcutta*).

6 Mr.Tejveer Singh, learned counsel appearing on behalf of the Respondent/ Revenue, on the other hand, supported the orders passed by the Commissioner of Income Tax (Appeals) and the Tribunal. He submits that the Appeal does not raise any substantial question of law and on a limited issue.

7 We have carefully considered the rival submissions. We have also perused the orders of the Authorities and to the extent relevant for this Appeal. We have also carefully perused the legal provisions and decisions brought to our notice.

8 Since a very limited point is raised before us, it is not necessary to refer to all orders in detail. Suffice it to state that the Authorities found that the Assessee has written off the advances of the above sum and claimed the same as a capital loss to be carried forward for set off for subsequent years. The details have been noted and equally the relevant legal provisions. The Assessing Officer has referred to the definitions of terms “capital asset” and “transfer” appearing in Sections 2(14) and 2(47) of the Income Tax Act, 1961. He held that in order to be eligible for carry forward of capital loss, the capital asset should be of the nature defined in Section 2(14) and should be transferred in the manner defined in Section 2(47). Equally, it should be subjected to tax as per Section 45(1) of the Income Tax Act, 1961. The advances given to M/s JCT Limited and M/s Bharat Starch Industries Limited and written off are not the capital assets nor there is any transfer. Therefore, they were not allowed to be carried forward to subsequent years. It is the capital loss and therefore, should be ignored. The claim was, thus, disallowed.

9 Before the Commissioner of Income Tax (Appeals), the argument was almost identical and in paragraph 9.6 of the order of the Commissioner of Income Tax (Appeals), it is held that the loss incurred by the Appellant/ Assessee is not a capital loss in relation to the transfer of asset. The Company to whom the advance was given was amalgamated. On amalgamation, it has given equity shares of Rs.60 lacs only as against an advance of Rs.17.25 crores and Rs.17.87 crores, respectively. The Appellant, therefore, lost the advance due to amalgamation of the Company with one of it's sister concern. The loss has been rightly determined as a capital loss and that is how the Commissioner of Income

Tax (Appeals) agreed with the Assessing Officer. However, he partly allowed the Appeal of the Appellant/ Assessee insofar as the claim or ground for interest portion is concerned.

10 The matter was carried in appeal to the Income Tax Appellate Tribunal. The Tribunal, in paragraph 7 of the impugned order, has held that the Assessee has written off the advances given to M/s Bharat Starch Industries Limited and M/s JCT Limited. It also referred to the note which was filed. It also referred to the findings of the Assessing Officer and the Commissioner of Income Tax (Appeals).

11 In dealing with the submission that there was inter-corporate deposit (ICD) of Rs.10 lacs given to M/s JCT Limited in the year 1996-1997 and further amount of interest of Rs.7.25 crores was due on account of interest, so also, the contentions of the Revenue to the contrary, the Tribunal concluded that in the light of materials on record it is clear that the loans were not given in the ordinary course of business. In fact no claim under the head “bad debts” has been made. The claim is that the loan was in the form of ICD which is a case of capital asset and it has been transferred. The Tribunal found that there is no evidence to show that it is a case of an ICD because before the Assessing Officer it was claimed that the loss was on account of writing off of the advances given to M/s Bharat Starch Industries Limited and M/s JCT Limited. Then it was claimed that the advances were written off. There is no material to show that the case of ICD has been made out. The loans, therefore, cannot be termed or construed as capital assets.

12 The judgments relied upon have been, therefore,

distinguished and we do not find that in the facts and circumstances of the present case, the Tribunal was required to render any other finding or conclusion. The observations from paragraph 13 onwards are based on assumption. The assumption is made by the Tribunal and in that regard, reference to various judgments has been made including the order passed on the Petition for amalgamation by the Gujarat High Court. We are of the opinion that the Tribunal was strictly not required to go into any other matters. Therefore, the findings based on assumption need not detain us.

13 We are of the opinion that the findings of fact rendered in the peculiar factual backdrop do no give rise to any substantial question of law. The questions as projected before us cannot be said to be rising from the orders impugned before us. In the facts and circumstances, we do not feel that the Appeal is required to be entertained.

14 In all fairness, we must refer to the judgments cited before us. The argument is that the definition of "capital asset" in Section 2(14) of the Income Tax Act, 1961 is wide enough to include even advance of money. In other words, the property of any kind held by the Assessee, whether or not connected with his business or profession, is a capital asset. It is, therefore, capable of being transferred and the basis on which the Authorities proceeded in this case is, thus, untenable in law. The judgment cited of the Honourable Supreme Court in the case of *Ahmed G.H. Ariff and others v/s Commissioner of Wealth Tax, Kolkata* (supra), was in the context of the provisions in the Wealth Tax Act, 1957. The question that was raised before the Honourable Supreme Court was that the right of Assessee to receive a specified share of the net income from the estate

in respect of which wakf-alal-aulad has been created, is an asset assessable to wealth tax. It is in that context that the definition of the term "asset" as defined in Section 2(e) of the Wealth Tax Act, 1957 and Section 6(dd) of the Transfer of Property Act has been referred to. All conclusions which have been rendered by the Honourable Supreme Court, must be, therefore, read in the peculiar factual situation and circumstances. In dealing with the argument that the right claimed of the nature cannot be termed as property that the Honourable Supreme Court held that the property is a term of the widest import and subject to any limitation which in the context is required. It signifies every possible interest which a person can clearly hold and enjoy. We are of the opinion that on the basis of the definition noted by us that the Honourable Supreme Court held as above. This judgment, therefore, cannot be of any assistance to the Assessee before us.

15 The judgment of the Honourable Gujarat High Court in the case of *Commissioner of Income Tax, Gujarat-III v/s Minor Bababhai @ Lavkumar Kantilal* reported in **128 ITR 1 (Gujarat)**, has been rightly distinguished by the Authorities. The question before the Honourable Gujarat High Court was a distinct one. There, a sum of Rs.25,000/- was advanced to the Company by the Assessee on a promissory note. The Company suffered financial difficulties and went into liquidation. The scheme of compromise and arrangement was approved by the Court and as per the Scheme, the Assessee realized only Rs.13,323/- from the Company. The balance was claimed as capital loss during the relevant Assessment Year. This claim was negatived by the Income Tax Officer, but allowed in Appeal. The argument of the Revenue before the Tribunal was that there must be an element of consideration for extinction of the rights

in the capital assets before any gains or losses from such extinguishment could be brought for computation under the head “Capital Gains”. Thus, there was no controversy that what was before the Authorities was a claim in relation to capital asset. The Tribunal held that there was extinguishment of the Assessee's right in the capital asset which had brought him the loss. It is in that context the Division Bench found that there was consideration backing up the transfer of the capital asset as reflected by the extinguishment of the Assessee's rights in the earlier existing capital asset. Therefore, all requirements of Section 45 r/w Section 2(47) of the Income Tax Act, 1961 were complied with. This judgment also cannot assist the Assessee in this case because what was argued before the Authorities was that the loss incurred is capital loss in relation to transfer of capital asset. However, now what has been argued is that the advances were not as such, but Inter-corporate Deposits (ICDs). Therefore, alternate argument which was raised was in relation to the loss of advance due to amalgamation of the Company to which it was advanced with one of the sister concern of the Assessee before us. That was an alternate argument and in relation to which the judgment of the Gujarat High Court was cited. Once this issue did not arise for determination and consideration of the Authorities and particularly because of the stand taken now before us that we are of the opinion that the judgment of the Gujarat High Court is of no assistance to the Assessee.

16 As a result of the above discussion, we find that this Appeal does not give rise to any substantial question of law. It is, accordingly, dismissed, but without any order as to costs.

(Girish S. Kulkarni, J) **(S.C. Dharmadhikari, J)**