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

INCOME TAX APPEAL NO. 2153 OF 2011

The Commissioner of Income Tax 6,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020. … Appellant

v/s

M/s.Bharat Bijlee Ltd.,
6th floor, Electric Mansion,
Appasaheb Marathe Marg,
Prabhadevi, Mumbai-400 025. … Respondent

Mr.Suresh Kumar for the appellant.

Mr.J.D. Mistry, senior counsel with Mr.Nitesh Joshi i/by Mr.A.K. Jasani for the respondent.

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

JUDGMENT RESERVED ON 29/04/2014
JUDGMENT PRONOUNCED ON 09/05/2014

JUDGMENT:

1 This appeal filed by the revenue challenges the judgment and order passed by the Income Tax Appellate Tribunal (ITAT for short) dated 11th March, 2011 in Appeal No.6410/MUM/2008. The assessment year in question is 2005-2006. The revenue submits that

each of the questions and which are set out at paragraph 4(i), 4(ii) and 4(iii) are substantial questions of law arising for determination in this appeal.

2 The revenue submits that the Income Tax Appellate Tribunal erred in reversing the order passed by the Commissioner of Income Tax (Appeals) dated 25th July, 2008 and that of the Assessing Officer dated 31st December, 2007.

3 It is submitted that the return of income declaring the total income of Rs.25,12,50,208/- was filed by the assessee on 31st October, 2005. Subsequently, the case was selected for scrutiny for issue of statutory notice under Section 143 (2) of the Income Tax Act, dated 26th October, 2006 which was served on the assessee. The notice under Section 143(2) was issued on 26th October, 2006 and was served on the assessee on 27th October, 2006. The notice under Section 143(1) of the Income Tax Act, 1961 along with the questionnaire was issued.The Assessing Officer, *inter alia,* disallowed the claim of the assessee observing that transfer of its Lift Division is an exchange and not a sale and, therefore, not liable to tax. The Assessing Officer held that in Section 2(24C) of the Income Tax Act,

the term 'slump sale' has been defined. The transaction in this case is squarely falling within this definition. Therefore, the Assessing Officer held that the transfer of Lift Division is a slump sale and was taxable in terms of Section 50B of the Income Tax Act. It was taxed accordingly.

4 This order of the Assessing Officer was confirmed by the Commissioner of Income Tax (Appeals). The Tribunal has reversed it in allowing the assessee's appeal.

5 Mr.Suresh Kumar, learned advocate appearing on behalf of the revenue in support of this appeal relied upon a judgment of the Division Bench of Delhi High Court in the case of **SREI Infrastructure Finance Ltd. V/s Income Tax Settlement Commission,** delivered in Writ Petition (Civil) No.1592 of 2012, decided on 30th March, 2012.

6 Mr.Suresh Kumar submitted that the law has been amended specifically to take care of the tendency of assessee's like the one before us in transferring the divisions or units and trying to pass off the transaction as not a sale but handing over of a running unit or

going concern. The attempt is to circumvent and bypass the legal provisions with regard to the imposition of taxes on transfer. Earlier such transaction was not capable of being brought to tax and in terms of the applicable provisions. Therefore, the legislature intervened and by an amendment to the Act inserted the definition of "slump sale" and thereafter inserted Section 50B. The scheme has been set out in the judgment of the Delhi High Court. The controversy, therefore, before us should be determined and decided in the light of this judgment. It is submitted by him that transfer of the Lift Division was for consideration. That consideration was in rupees/Indian currency. That has been indicated in details by the Assessing Officer. It may be that the consideration is the value of the shares which have been handed over as a part of the transfer or the transaction. That does not mean that the transfer is not a slump sale. Merely because the transfer has been brought about by filing a petition before this Court and getting an order sanctioning the scheme of arrangement of transfer by this Court does not mean that it is a slump sale. For all these reasons it is submitted by Mr.Suresh Kumar that this appeal raises a substantial question of law, at least partially and deserves to be admitted.

7 Mr.Mistry, learned senior counsel appearing on behalf of the assessee submitted that the appeal does not raise any substantial question of law. He submits that the controversy in the present appeal stands covered by judgments of the Hon'ble Supreme Court. In relation to all the questions, the Tribunal has applied the correct legal principles. Mr.Mistry submits that, with regard to the first question, namely, the provisions for warranty that is covered in favour of the assessee and against the revenue in the case of **Rotork Controls Pvt. Ltd. v/s Commissioner of Income Tax,** reported in **(2009) 314 ITR 62 (SC).**

8 Mr.Mistry submits that, insofar as the deletion of the addition on account of the long term capital gains from the transfer of Lift Division is concerned, even that question cannot be said to be a substantial question of law. Mr.Mistry has invited our attention to the order passed by the Tribunal and submits that the view taken by the Tribunal is in consonance with law and the factual materials placed on record. The factual material placed on record would indicate that the transaction or transfer cannot be said to be a slump sale. For slump sale, the transfer has to be by way of sale. In the present case, the Lift Division of the assessee has been transferred to

other Company and in consideration of the same that other Company issued preference shares to the assessee. There was no price in money and which was paid and received. The value of the shares, therefore, could not have been taken as the basis. The Assessing Officer erroneously assumed that the value of the shares is the price or monetary consideration for the transfer. The Tribunal has corrected this mistake and by referring to the documents including the order passed by this Court. Once the Scheme is sanctioned by this Court and the Lift Division is transferred not by way of sale, then, the Tribunal's view cannot be said to be erroneous in law nor can it be termed as perverse. The appeal, therefore, does not raise any substantial question of law.

9 We have with the assistance of the learned counsel appearing for the parties perused the appeal paper-book including the order of the Income Tax Appellate Tribunal. We have also perused the relevant legal provisions and the decisions brought to our notice by the learned counsel for both parties.

10 At the outset, the counsel agreed that the question posed at paragraph 4(i), namely, the deduction claimed by the assessee on

account of the provisions for warranty is concerned, that is fully covered in favour of the assessee and against the revenue by the judgment of the Hon'ble Supreme Court in the case of **Rotork Controls Pvt. Ltd.** (supra). The appeal, therefore, does not raise any substantial question of law in relation to this deduction.

11 The appeal survives now in relation to the transfer of Lift Division.

12 In relation to that, what has come on record and admittedly is that, during the assessment year in question, namely, 2005-3006, the assessee transferred its Lift Division to M/s. Tiger Elevators Pvt. Ltd., according to the Assessing Officer, for a consideration of Rs.36.5 crores. The Company transferred its Lift Field Operations Undertaking to Tiger Elevators Pvt. Ltd. under the Scheme of Arrangement. That was by invoking Section 391 read with Section 394 of the Companies Act, 1956. That scheme was sanctioned by this Court. The order of the Court is effective from 23rd December, 2004. The Assessing Officer notes that the transfer of the undertaking took place in exchange of preference shares and bonds issued by Tiger Elevators Pvt. Ltd. as per fair valuation report

obtained from Bansi S. Mehta & Co., dated 21st October, 2005.

13 In relation to this transfer, the arguments of both sides have been considered at great length by the Tribunal. The Tribunal noted that, if the transfer of the undertaking by the assessee is considered as a sale, then, the provisions of Section 2(42C) of the Income Tax Act, 1961 would be applicable and by virtue of Section 50B of the Act, 1961 the gains would have been brought in to tax in terms of this provision.

14 The definition of the term “slump sale” in Section 2(42C) reads as under :-

> “**Sec.2(42C)**: 'Slump sale' means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.
>
> *Explanation 1:-* For the purpose of this 'undertaking' shall have the meaning assigned to it in Explanation 1 to Clause (19AA).
>
> *Explanation 2:-* For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.”

15 This definition together with the explanations, has been referred by the Tribunal in paragraph 37 of its order. Thereafter the Tribunal analyzed the transaction/transfer in the present case in the backdrop of the legal principles. The Tribunal referred to the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax, Andhra Pradesh v/s Motors & General Stores (P) Ltd.,** reported in **(1967) Vol.66 ITR 692**. The Hon'ble Supreme Court referred to Section 10(2)(vii) of the Indian Income Tax Act, 1922. It also referred to a transaction dated 21st February, 1956 which was the subject matter of the appeal. It also posed the question as to whether such a transaction as was subject matter of "exchange deed" could be termed as a sale and alternatively whether the consideration of the sale is not the market value of the shares as on the date of the transaction, namely, Rs.95/- per share but the face value of the shares.

16 In answering this question, the Hon'ble Supreme Court held that, it is only if there is a sale of the cinema house and the other assets that the taxable profits and gains are to be computed under Section 10(2)(vii) as the amount by which the written down value

exceeds the amount for which the assets are actually sold. The Supreme Court held that the word “sale” or “sold” have not been defined in the Indian Income Tax Act, 1922. These words, therefore, have to be construed by reference to other enactments. The Supreme Court then referred to the definition of the term “sale” as appearing in the Transfer of Property Act, 1882 and the Sale of Goods Act, 1930. The Hon'ble Supreme Court then referred to the definition of the term “Exchange” as appearing in the Transfer of Property Act, 1882. It then rejected the contention of the revenue that the transaction of 20th February, 1956 was a sale. The Hon'ble Supreme Court held that it was a transfer but by way of exchange. The Hon'ble Supreme Court then held thus -

> “We pass on to consider the argument of Mr.Narasaraju that in revenue matters it was the substance of the transaction which must be looked at and not the form in which the parties have chosen to clothe the transaction. It was contended that, in the present case, there was in substance a sale of Sree Rama talkies by the assessee-company for a money consideration of Rs.1,20,000/- though the mode of payment was by transfer of shares and the resolution of the board of directors dated September 9, 1955, clearly indicated that the intention of

the assessee company was to sell Sree Rama talkies along with its equipment concerned for a consideration of Rs.1,20,000. In the present case, however, there is no suggestion behalf of the appellant of bad faith on the part of the assessee company nor is it alleged that the particular form of the transaction was adopted as a cloak to conceal a different transaction. It is not disputed that the document in question was intended to be acted upon and there is no suggestion of mala fides or that the document was never intended to have any legal effect. In the absence of any suggestion of bad faith or fraud the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is emobdied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction. In Bank of Chettinad Ltd. v/s Commissioner of Income Tax it was pointed out by the Judicial Committee that the doctrine that in revenue cases the "substance of the matter" may be regarded as distinguished from the strict legal position, is erroneous. If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In Duke of Westminister's

case deeds of covenant had been executed by the Duke in favour of the employees in such amounts that the covenantees, if remaining in the Duke's service, would receive respectively sums equivalent to their wages and salaries. If they left the service of the Duke the payments would still have been due, but it was in nearly all instances explained to the employee that so long as the service continued, while the deed did not prevent his claiming ordinary wages in addition, it was expected that he would not do so. It was argued for the Crown that though in form a grant of an annuity, the transaction was in substance merely one whereby the annuitant was to continue to serve the Duke at his existing salary, so that the annuity must be treated as salary. Neither the Court of Appeal nor the House of Lords agreed with this contention. To regard the payments under the deed as in effect payments of salary would be to treat a transaction of one legal character as if it were a transaction of a different legal character. With regard to the supposed contrast between the form and substance of the arrangement, Lord Russell of Killowen stated at page 524 as follows :

"If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India v. Schble*; that and no more. If, on the other hand, the doctrine means

that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing or the right and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine."

In a later case – *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society* – Viscount Simon expressed the principle as follows :

"It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. Secondly, a transaction, which on its true construction is of a kind that would escape tax, is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax."

17 In the light of the principles laid down in the above referred decision, the Tribunal concluded in paragraph 40 that the Scheme of Arrangement approved by this Court in the present case, cannot be said to be a sale of the Lift Division or undertaking by the assessee. The Tribunal referred to Clause 3.1 of the Scheme. It then referred to Clause 1.36 in its entirety. Then, it referred to Clause 14.1 of the

Scheme.

18 The Tribunal then held that, a reading of the clauses in the Scheme of Arrangement shows that the transfer of the undertaking has took place in exchange for issue of preference shares and bonds. It held that, merely because there was quantification when bonds/preference shares were issued, would not mean that the monetary consideration was determined and its discharge was only by way of issue of bonds/preference shares. In other words, the Tribunal held and as a fact that this is not a case where the consideration was determined and decided by parties in terms of money but its disbursement was to be in terms of allotment or issue of bonds/preference shares. In fact, all the clauses read together and the entire Scheme of Arrangement envisages transfer of the Lift Division not for any monetary consideration. The Scheme does not refer to any monetary consideration for the transfer. The parties were agreed that the assessee was to transfer the undertaking and take bonds/preference shares as consideration. Thus, it was a case of exchange and not a sale. Therefore, the Tribunal held that Section 2(42C) of the Act was inapplicable. If that was not applicable and was not attracted, then, Section 50B was also

inapplicable.

19 We are of the opinion that the findings of fact rendered by the Tribunal from paragraph 40 and in relation to Ground No.2 are thus rendered by applying the legal principles to the facts and circumstances of the assessee's transaction. In the given facts and circumstances and going by the clauses of the Scheme and reading them harmoniously and together, the Tribunal held that the transfer of Lift Division comes within the purview of Section 2(47) of the Act but cannot be termed as a slump sale.

20 This finding of fact cannot be said to be perverse or based on no material. It also cannot be said to be vitiated by an error of law apparent on the face of the record. It is in these circumstances, we find that this appeal does not raise any substantial question of law.

21 It also does not raise any substantial question of law because the alternative argument, though formulated for consideration before the Assessing Officer and covered by question No.4(iii), is not pressed before us.

22 Before us, the emphasis of the revenue is on the applicability of Section 2(42C) of the Income Tax Act, 1961.

23 Before parting, we must make a reference and in all fairness to a Division Bench judgment of the Delhi High Court rendered in the case of **SRIE Infrastructure Finance Ltd.** (supra). This decision is heavily relied upon by Mr.Suresh Kumar, learned counsel appearing for the revenue in support of this appeal. Mr.Suresh Kumar submits that the order of the Tribunal runs contrary to the law laid down in the judgment of the Delhi High Court. The Delhi High Court has considered the matter in the light of the amendments made to the Income tax Act, 1961, particularly, by the Finance Act, 1999, with effect from 1st April, 2000.

24 We see no force in the contention of Mr.Suresh Kumar. Firstly, it is not necessary for us to decide any wider question or larger controversy. The judgment of the Delhi High Court would apply provided the transfer is by way of a sale. Before the Delhi High Court, facts were that the petitioner Company was engaged in project financing through term loans and leasing in specified sectors. For the assessment year 2009-20010, the petitioner had disclosed

loss of more than Rs.76 crores in their return. No return was filed for the assessment year 2010-2011. The book loss was more than Rs.72 crores. An application was filed before the Settlement Commission for the two assessment years and disclosing additional income. The Settlement Commission passed an order and which is termed as final order in paragraph 4 of the judgment of the Delhi High Court, determining and deciding various questions which are raised in the writ petition. In the writ petition, the only aspect was that of taxability of Rs.375 lacs under Section 50B of the Income Tax Act as capital gains on 'slump sale' paid under the Scheme of Arrangement to the petitioner by its subsidiary. The Settlement Commission held that the amount of Rs.375 lacs received by the petitioner from its subsidiary on transfer of its project finance business and assets based on financing business including its shareholding in SRIE Insurance Broking Pvt. Ltd. was taxable under Section 50B of the Act as a slump sale.

25 The argument of the petitioner was that this is a transfer under the Scheme of Arrangement but is not a sale. The Scheme of Arrangement was sanctioned by the High Court of Calcutta. The argument was that this is a transfer of a statutory interest and

character. Section 50B therefore had no application as the Scheme of Arrangement is not a slump sale.

26 It is in dealing with that argument and in the peculiar facts that the Delhi High Court held that the petitioner's contentions cannot be accepted. The petitioner before the Delhi High Court had admitted that there was a monetary consideration in the Scheme of Arrangement. The money was paid and additionally shares of a third company were issued in favour of the assessee. Thus, the consideration was in money as also shares and not shares or bonds exclusively. The transfer could not be termed as an exchange but a sale. In that light the Delhi High Court held that the consideration of Rs.375 lacs was received on transfer of the project finance business of the assessee's subsidiary including its shareholding in another company. Therefore, the transaction itself was by way of a sale and not an exchange.

27 There is no necessity for us to analyze the circumstances in which the Section 50B was inserted in the statute book. Before us, the issue as to whether the conclusions reached by the Hon'ble Supreme Court in the case of **Motors & General Stores (Pvt) Ltd.**

(supra) would still hold good or that they would not be the enabling principles after the amendment to the Income Tax Act, does not arise at all. We proceed on the footing that the statute was amended with some specific object and purpose. However, we are in agreement with the learned senior counsel appearing for the assessee before us that the applicability of Section 50B would have to be considered in the facts and circumstances of each case. If the transfer is by way of sale, only then it could be termed as a slump sale and then Section 50B would be attracted. It is in these circumstances and going by the facts of the present case that we have decided the present appeal. No larger question or wider controversy need be decided as we are of the opinion that even the judgment rendered by the Delhi High Court is distinguishable on facts.

28 For the above reasons, we do not find any merit in the appeal. The same does not raise any substantial question of law. It is accordingly dismissed.

(G.S. KULKARNI, J.) **(S.C.DHARMADHIKARI, J.)**