HIGH COURT OF DELHI

Commissioner of Income-tax - II, New Delhi

v.

Mira Exim Ltd.

SANJIV KHANNA AND SANJEEV SACHDEVA, JJ.
IT APPEAL NOS. 346, 347, 348 & 353 OF 2013
OCTOBER 3, 2013

N.P. Sahni and **Ruchesh Sinha** *for the Appellant.* **Vikas Jain** *for the Respondent.*

ORDER

Sanjiv Khanna, J. - Revenue by these appeals under Section 260A of the Income Tax Act, 1961 (Act, for short) relating to Assessment Years 2005-06, 2006-07, 2007-08 and 2008-09 submits that the respondent company-Mira Exim Limited is not entitled to depreciation on imported cars.

2. Revenue relies upon clause (a) to the proviso to Section 32(1) of the Act, which reads as under:-

"32.(1) In respect of depreciation of-

** ** **

Provided that no deduction shall be allowed under this clause in respect of-

(*a*) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used-

(*i*) in a business of running it on hire for tourists; or

(*ii*) outside India in his business or profession in another country ;"

3. As per the said proviso, no deduction towards depreciation can be allowed in respect of a motor car manufactured outside India where such car was acquired by the assessee after 28th February, 1975 but before 1st April, 2001. We need not refer to exceptions carved out by the proviso because they are not applicable. It is also clear from the clause itself that an imported motor car acquired by the assessee before 1st March, 1975 and on or after 1st April, 2001 is entitled to depreciation. The dates being the criteria, the word "acquisition" by the assessee, is the core or the cornerstone of the provision.

4. The accepted and admitted factual position is that the respondent is a public limited company engaged in the business of manufacturing and trading of readymade garments, accessories and made-ups. Under a scheme of arrangement and merger sanctioned by the Delhi High Court under Section 394 of the Companies Act, 1956 by order dated 5th October, 2004, proprietary concerns of the directors, M/s Vama Industries, Vikramaditya Exports and Meera Overseas had merged with the respondent-assessee. The appointed date was 1st April, 2004.

5. As per the said scheme, sanctioned by the High Court, upon merger, the assets and affects owned by the three concerns became assets and affects owned by the respondent company. Share capital was issued to the proprietors, as consideration for transfer of the said assets and business of the three concerns.

6. Imported motor cars were originally acquired by the merged entities between 1st March, 1975 and 31st March, 2001, but upon and in view of the scheme sanctioned by the Delhi High Court vide order dated 5th October, 2004, the said cars became the properties of the respondent-assessee with effect from 1st April,

2004. The question raised is whether the respondent-assessee is entitled to claim depreciation as the imported cars were acquired by them after 1st April, 2001. The contention of the Revenue is that the motor cars were acquired by the merged entities within the specified dates and, therefore, even the respondent assessee is not entitled to depreciation on motor cars under the proviso. The said view of the Assessing Officer was affirmed by the Commissioner of Income Tax (Appeals), but the tribunal by the impugned order has accepted the plea of the respondent assessee but on the question of costs or the written down value for the purpose of depreciation, matter has been remanded to the Assessing Officer.

7. Order of the tribunal, while dealing with the contentions raised by the Revenue, has referred to Explanation 7 to Section 43(1) and Explanation 2(b) to Section 43(6). However, learned Sr. Standing Counsel for the Revenue did not refer to these provisions and was lucid that he does not rely upon them. He has, however, submitted that this is not a case of transfer as defined in Section 2(47) of the Act and even under the part E of Chapter IV provisions relating to capital gains (i.e. Sections 45 to 55A), scheme of merger or amalgamation is not treated as transfer. The respondent assessee cannot and should not be allowed depreciation on the motor cars.

8. We have, however, examined Explanation 7 to Section 43(1) and Explanation 2(b) to Section 43(6). The two Explanations relate to computation of actual cost or written down value for the purpose of depreciation in cases of amalgamation. Section 43 falls under the heading "*Definitions of certain terms relevant to income from profits and gains of business or profession*". The heading may not and cannot control the main provision but it is apparent that sub-section (1) to Section 43 deals with the definition of term "actual cost" and sub-section (6) to Section 43 defines the term "written down value". None of these provisions really seek to define the expression "acquired", which is the expression specifically used in the proviso to Section 32, which we have to interpret. Section 32 relates to and stipulates conditions necessary for claiming depreciation. The conditions stipulated should be satisfied. The expression "written down value" or "actual cost" are relevant for computing the quantum or value of the capital cost or written down value on which depreciation is to be computed, but cannot without any express stipulation or implied construction, be read as a disabling provision, controlling or restricting the expression "acquired" in the proviso to Section 32. Computation provision is no doubt relevant and apropos, albeit can curtail the words in the main provision when the computation provision negates or affirms one interpretation, viz. another interpretation. If the computation provision makes one plausible interpretation unworkable and impossible, the other interpretation which otherwise appears to be remote and contorted may be adopted. In *Commissioner of Income-tax Commissioner of Income-tax v. Srinivasa Setty (B.C.)* (1981**)** 128 ITR 294, it has been observed:-

> "……..Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings s. 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head "Capital gains ".
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> Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I. T. Act, where under each head of income the charging pro-vision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the

computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."

In the present case, the computation provisions do not negate, or require a different or specific meaning should be given to the word "acquire".

9. On the other hand, Explanation 7 refers to acquisition of an asset under the scheme of amalgamation. This indicates that the Legislature has treated amalgamation as transfer and, therefore, had specifically thought it appropriate to provide how actual cost of the capital asset should be computed. Similarly, under sub-section (6) to Section 43 by defining the expression "written down value" reference is made to the written down value in the block of assets of the amalgamating company transferred to the amalgamated company. The said provision also uses the term "transferee company and transferor company" clearly indicating that in cases of amalgamation there is transfer of assets. Thus, we do not agree with the findings recorded by the tribunal that it is not a case of amalgamation; or merger and amalgamation are different or it is a case of purchase of business as a going concern and, therefore, different principles apply. In the present case, there was transfer, as merger or amalgamation results in transfer.

10. Term "merger or amalgamation" has no precise legal meaning but it involves blending of two or more existing undertaking into one.

In case of merger, there is complete blending of the merged undertaking into the other company, but this does result in the transfer of the assets from the merged undertaking. Assets are acquired by the other undertaking. Upon merger, the earlier concern or undertaking loses its identity and the ownership in the asset. (see *Saraswati Industrial Syndicate Limited* v. *Commissioner of Income Tax*, [(1990) 186 ITR (SC)]. In *Hindustan Lever* v. *State of Maharashtra*, (2004) 9 SCC 438 expounding on the concept of amalgamation and whether it amounts to transfer, it was held as under:-

"9.Section 394 provides that application and order of amalgamation under Section 394 is based on compromise or arrangement which has been proposed for the purpose of amalgamation of two or more companies. The amalgamation scheme, which is an agreement between the companies is presented before the court and the court passes an appropriate order sanctioning the compromise or arrangement. The foundation or the basis for passing an order of amalgamation is agreement between two or more companies. Under the scheme of amalgamation, the whole or any part of the undertaking, properties or liability of any company concerned in the scheme is to be transferred to the other company. The company whose property is transferred would be the transferor company and the company to whom property is transferred would be considered as the transferee company. The scheme of amalgamation has its genesis in an agreement between the prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the transferee company. The intended transfer is a voluntary act of the contracting parties. The transfer has all the trappings of a sale. The transfer is effected by an order of the court. The proposed compromise or arrangement is subject to verification by the court as provided therein. First is that the scheme of compromise or arrangement proposed for the purposes of amalgamation or in

connection therewith, shall not be sanctioned unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest; and secondly, that the order of resolution of transfer of the company shall not be made unless official liquidator on scrutiny of the books and papers of the company makes a report to the court that the affairs of the company had not been conducted in a manner prejudicial to the interest of its members or to public interest."

11. Similar view was taken earlier in the case of *Singer India Limited* v. *Chander Mohan Chadha*,(2004) 7 SCC 1 wherein the following extract from *Halsbury's Laws of England (4th Edn., Vol. 7) paragraph 1539* was quoted:-

"Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings, but the context to which the term is used may show that it is intended to include such an acquisition.

The question whether a winding up is for the purposes of reconstruction or amalgamation depends upon the whole of the circumstances of the winding up."

12. In the case of *Singer India Limited*(*supra*), question arose whether upon amalgamation the tenancy rights were transferred and whether there was subletting. It was held that there was transfer and the tenancy or right to occupation of the transferor company got vested in the transferee company. Thus, there was subletting. The law on subletting under the Delhi Rent Control Act, 1958 did not make any exception in favour of a lessee, who may have adopted a course of action of amalgamation. Similar view has been taken in *Speedline Agencies* v. *T. Stanes & Company Limited*, (2010) 6 SCC 257.

13. In *Commissioner of Income Tax* v. *Mrs. Grace Collis*,(2001) 248 ITR 323 (SC) pursuant to scheme of arrangement, assets and liabilities of the amalgamating company became assets and liabilities of the amalgamated company. Shareholders of amalgamating company were issued shares of amalgamated company in lieu of the shares held by them in amalgamating company. The assessee had sold the shares of the amalgamated company and the question related to the purchase cost of the shares of the amalgamated company. The question raised was whether there was transfer within the meaning of Section 2(47), when an assessee acquired shares in the amalgamated company. It was observed by the Supreme Court that the definition of 'transfer' in Section 2(47) was wider and broader than even its ordinary, common and natural meaning. The word 'transfer' as defined in Section 2(47) includes extinguishment of any right and it was further observed that the said expression i.e. 'extinguishment of any right' would include extinguishment of a right in a capital asset, independent of and otherwise than on account of transfer.

14. Explanation 2 to Section 43(1) refers to acquisition of asset by gift or inheritance. Thus, acquisition of asset may be by way of sale for a price i.e. money, in exchange, or by way of several other modes including gift or inheritance. Merger and acquisition can be modes of acquisition of an asset.

15. In terms of the order passed under Section 394 of the Companies Act, 1956, the respondent company acquired the imported motor cars. The cars were not acquired and the respondent assessee was not owner of the motor cars prior to the said date. On merger of the three concerns with the respondent assessee, shares were issued as consideration to the proprietors of the business concerns. The shares issued were consideration for the transfer of the assets. It is immaterial, according to us, whether there was transfer of an undertaking, including the block of assets, which also included the imported motor cars.

16. It is clear that the respondent assessee had acquired the asset i.e. imported cars after the cut off date i.e. 1st April, 2001 and, therefore, is entitled to depreciation and the bar/prohibition in clause (a) to proviso to Section 32(1) would not apply. The tribunal has rightly decided the issue in favour of the respondent assessee and against the Revenue. There is no merit in the present appeals and the same are dismissed.

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