

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

INCOME TAX APPEAL NO.2747 OF 2009

The Commissioner of Income Tax-9
Mumbai

..Appellant.

Vs.

STS Chemicals Ltd.

..Respondent.

....

Mr. Suresh Kumar for the Appellant.

Mr. Prakash Shah with Mr. Jas Sanghavi i/b PDS Legal for the
Respondent.

.....

**CORAM : DR.D.Y.CHANDRACHUD &
J.P.DEVADHAR, JJ.**

15 June 2010.

P.C. :

1. The following question of law has been formulated in the
appeal by the Revenue under Section 260-A of the Income Tax Act,
1961 :

“Whether on the facts and in the circumstances of the case
and in law, the ITAT was justified in holding that the non-
compete fee received by the assessee of Rs.80,11,853/- is a
capital receipt not liable to tax.”

2. The appeal before the Court arises out of Assessment Year

2001-02. The assessee was engaged in the business of manufacturing and trading in chemicals and accessories including the manufacture of coating, bonding and sealing materials which are used in the automotive industry. The assessee entered into a joint venture agreement under which a unit of the assessee which manufactured coating, bonding and sealing materials was transferred to the joint venture by a slump sale. The capital gains arising out of such sale were offered for taxation. The issue before the Tribunal was whether an amount of Rs.80,11,853/- received by the assessee as a non-compete fee in the year under reference was a capital receipt, as claimed by the assessee or a receipt of a revenue nature as contended by the Revenue.

3. The Assessing Officer held the receipt to be of a revenue nature. The Tribunal has while evaluating the evidence furnished reasons for coming to the conclusion that the Assessing Officer had proceeded on an erroneous basis. The Tribunal has observed that the Assessing Officer had proceeded on the basis that the manufacturing

activity regarding coating, bonding and sealing material was continued by the assessee even after the agreement, but that as a matter of fact this was an erroneous premise. The Tribunal found as a matter of fact that (i) The assessee had discontinued manufacturing activity in Assessment Year 2001-02; (ii) The director's report showed that the unit of the assessee had been sold on 1 September 2000; and (iii) The manufacturing activity had continued only until 31 August 2000. The Tribunal has observed that the Revenue had not controverted this factual position. We may also note that during the course of the proceedings before this Court in the appeal also Counsel appearing on behalf of the Revenue has not drawn the attention of the Court to any material that would controvert the preponderant weight of the evidence which has been considered by the Tribunal. From the judgment of the Tribunal it has also emerged that paragraph 4.5 of the agreement prohibited the assessee to compete directly or indirectly in the business which forms the subject matter of the non-compete agreement. The finding of fact therefore is that in the present case the manufacturing activity of the assessee regarding

the manufacture of coating, bonding and sealing materials had been completely discontinued and the source of income for such activity was completely impaired. In these circumstances, the finding that the compensation would have to be treated as a capital receipt cannot be faulted.

4. The attention of the Court has been drawn to the fact that by the Finance Act of 2002 and with effect from 1 April 2003 Section 28 has been amended so as to bring to bear to tax under the head of profits and gains of business or profession any sum whether received or receivable under an agreement inter alia for not carrying out any activity in relation to any business (clause va). These provisions have been held in a judgment of a Division Bench of this Court in the **Commissioner of Income Tax v. Narendra Desai** (ITA 64 of 2005) decided on 4 December 2007 to be prospective in their application. In the present case, the appeal relates to Assessment Year 2001-02 when the amended provisions of Clause (va) of Section 28 were not brought into force in the statute. For these reasons we are of the

view that the appeal does not raise any substantial question of law.

The appeal is dismissed.

(Dr. D.Y.Chandrachud, J.)

(J.P. Devadhar, J.)