IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.8.2020	DELIVERED ON : 08.9.2020

CORAM

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

TAX CASE APPEAL NO.673 OF 2018
(heard through video conferencing)

M/s.Areva T & D India Ltd.,
Now known as M/s.GE T & D India
Ltd., rep.by its Authorized
Signatory Mr.S.Sivaramakrishnan
Chennai
(cause title accepted vide order of court dated
17.7.2018 made in CMP.No.11866 of 2018 in
TCA.SR.No.29825 of 2018 By IBCJ & PTAJ) ...Appellant

Vs

The Commissioner of Income
Tax, Nehru Inner Ring Road, Anna
Nagar Western Extension, Chennai-101. ...Respondent

सत्यमेव जयते

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 27.11.2017 made in ITA.No.668/Mds/ 2011 on the file of the Income Tax Appellate Tribunal, Chennai 'B' Bench for the assessment year 2006-07.

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For Appellant : Mr.Tushar Jarwal for
Mr.Karthik Sundaram
For Respondent : Mrs.R.Hemalatha, SSC

JUDGMENT

T.S.SIVAGNANAM,J

This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 27.11.2017 made in ITA.No.668/Mds/2011 on the file of the Income Tax Appellate Tribunal, Chennai 'B' Bench (for brevity, the Tribunal) for the assessment year 2006-07.

2. The appeal has been admitted on 20.11.2018 on the following substantial questions of law :

> *"i. Whether the Tribunal was correct in holding that the transfer of appellant's non transmission and distribution business valued at Rs.41.3 Crores in exchange of issuance and allotment of equity shares under a scheme of arrangement approved by the Calcutta High Court under Sections 391 and 393 of the Companies Act, 1956 is a slump sale and exigible to capital gain tax under Section 50B of the Income Tax Act, 1961 ? and*

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> *ii. Whether, in the facts and circumstances of the present case, the finding of the Tribunal is clearly in teeth with law declared by the Bombay High Court in CIT Vs. Bharat Bijlee Ltd. [reported in (2014) 365 ITR 258]? "*

3. We have elaborately heard Mr.Tushar Jarwal, learned counsel appearing on behalf of Mr.Karthik Sundaram, learned counsel appearing for the appellant – assessee and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondent – Revenue.

4. The assessee filed its return of income for the assessment year under consideration namely 2006-07 on 29.11.2006 declaring a total income of Rs.100,84,51,266/-. Subsequently, the assessee filed a revised return of income on 31.3.2008 declaring a total income of Rs.100,35,99,280/-. The returns were processed as per the provisions of Sub-Section (1) of Section 143 of the Act. The case was selected for scrutiny and a notice under Section 143(2) of the Act was issued on 05.10.2007. The case was transferred to the Large Taxpayer Unit (LTU) and an opportunity of being heard was provided to the assessee by issuance of a notice under Sections 143(2) and 142(1) of the Act and subsequently on 28.7.2008.

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5. Though there were several issues, which were the subject matter of assessment, in this appeal, we are concerned with the disallowance under Section 54EC of the Act.

6. During the course of scrutiny assessment, a questionnaire was issued to the assessee calling for certain clarifications. The assessee, by their letter dated 23.7.2009, stated that they had transferred their non Transmission and Distribution business (non T & D business) to their subsidiary company namely M/s.Alstom Industrial Products Limited and that the entire non T & D business was transferred for a total consideration of Rs.413 million being the fair value of the non T & D business as determined by the valuers by their joint report dated 05.1.2006. The assessee further stated that the net worth of the undertaking worked out to Rs.29,33,04,531/-, that the capital gains arising out of the transfer worked out to Rs.11,96,95,469/-, that after setting off the long term capital loss of the earlier years amounting to Rs.1,78,27,854/-, the taxable capital gains for the assessment year worked out to Rs.10,18,67,615/- and that the assessee did not pay any capital gains tax since the entire capital gains were to be invested in Tax Savings Bonds as notified under Section 54EC of the Act.

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7. Without prejudice to the above mentioned submissions, with regard to exemption from capital gains tax under the provisions of Section 54EC of the Act, the assessee stated that the transfer should not suffer any capital gains tax at all, referred to Section 50B of the Act and relied upon the decision of the Mumbai Bench of the Tribunal in the case of ***Avaya Global Connect Ltd. Vs. ACIT, Mumbai [reported in 2008-TIOL-415-ITAT-MUM].***

8. The assessee further stated that in their case also, the transfer of non T & D business was by way of a scheme of arrangement under Sections 391 and 394 of the Companies Act and could not be considered as a '***sale of business***' and that any transfer of an undertaking otherwise than as a result of sale will not qualify as a slump sale and thus, the provisions of Section 50B of the Act could not be applied to their case.

9. The Assessing Officer considered the said submissions and held that the assessee had agreed that the transfer of the non T & D business to its subsidiary was a transfer as per the provisions of Section 50B of the Act, that the assessee approached the relevant Bond Issuing Authorities for the purpose of Section 54EC of the Act in order to claim deduction on the same and that since the bond required by the assessee was not allocated to the assessee as per the

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amendment to Section 54EC of the Act, the assessee had not invested the said amount during the current year. It has been further stated that challenging the Notification of the Government dated 22.12.2006, before this Court, the assessee filed a writ petition, which was dismissed and the special leave petition filed before the Hon'ble Supreme Court was also dismissed on 04.5.2009 vide SLP.No.9694 of 2009.

10. Thus, the Assessing Officer concluded that the assessee themselves having agreed that the transfer fell under the provisions of Section 50B of the Act, the claim of the assessee that the same should not be regarded as transfer as per the said decision of the Mumbai Bench of the Tribunal in the case of ***Avaya Global Connect Ltd.,*** could not be accepted. The Assessing Officer stated that the assessee had not claimed the same during the original return as well as in their revised return, that in terms of the decision of the Hon'ble Supreme Court in the case of ***M/s.Goetze India Ltd. Vs. CIT [reported in (2006) 284 ITR 323],*** the claim should be made by filing the return of income or by filing revised return of income, that since the assessee had not claimed the same by way of return of income, the submission of the assessee could not be accepted. Accordingly, the Assessing Officer taxed the assessee on the long term capital gains by way of

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slump sale of its non T & D business as per the provisions of Section 50B of the Act and the assessment was completed by order dated 29.12.2009.

11. Aggrieved by the said order of assessment, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), LTU, Chennai-101 [hereinafter called the CIT(A)] and it was dismissed by order dated 31.1.2011 virtually on the same lines as done by the Assessing Officer, in effect, holding that the assessee was stopped from now raising the plea that the transfer of non T & D business was not a transfer by way of slump sale and that the argument that the provisions of Section 50B of the Act would have no application could not be accepted.

12. As against the said order passed by the CIT(A), the assessee preferred further appeal before the Tribunal and it was also dismissed by the impugned order. The Tribunal opined that the transfer of the non T & D business to the assessee's subsidiary company was a transfer under Section 50B of the Act as claimed by the assessee themselves; that the assessee made this claim neither in the return nor in the revised return; that the scheme of arrangement showed that the value of the net assets of the non T & D business had been determined at Rs.31.3 Crores, that the consideration of the transfer

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had been specified in the said scheme at Rs.41.3 Crores and that there was a difference of Rs.10 Crores, which had not been explained by the assessee. The Tribunal further held that though the assessee mentioned that the valuation was as per the valuation done by the accountants, still the valuation arrived at by the accountants was to an extent of Rs.41.70 Crores and even that was not the consideration for the transfer because as per the scheme, the consideration of the transfer was shown as Rs.41.30 Crores. The Tribunal also held that a perusal of the scheme of arrangement showed that the term used was '***consideration for the transfer***' and the word '***exchange***' was not used and that there was no error in the finding of the Assessing Officer or even the CIT(A).

13. The issue, which falls for consideration, is as to whether the transfer of the non T & D business of the assessee to its subsidiary by a scheme of arrangement as approved by the High Court of Calcutta in C.P.No.164 of 2006 dated 22.3.2006 could be brought under Section 50B of the Act. This provision is a special provision for computation of capital gains in case of slump sale. The assessee was non-suited primarily on the ground that they had accepted the transfer to be a sale falling within the provisions of Section 50B of the Act, as the assessee approached the Bond Issuing Authorities for investment in

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certain bonds in terms of Section 54EC of the Act to avoid payment of capital gains tax.

14. The first aspect, which we need to consider, is as to whether the assessee was estopped from raising the contention by way of an alternate plea. The fundamental legal principle is that there is no estoppel in Taxation Law. It is beneficial to refer to the decision of the Division Bench of the Delhi High Court in the case of ***CIT Vs. Bharath General Reinsurance Co. Ltd. [reported in (1971) 81 ITR 303].*** The relevant portion of the decision of the Delhi High Court reads thus:

> *"It is true that the assessed itself had included that dividend income in its return for the year in question but* ***there is no estoppel in the Income-tax Act a****nd the assessed having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resoled from the position which it had wrongly taken while filing the return. Quite apart from it, it is incumbent on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessed wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the department to*

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> *tax that income in that year even though legally such income did not pertain to that year. We are, therefore, of the view that the income from dividend was not assessable during the assessment year 1958-59 but it was assessable in the assessment year 1953-54. It cannot, therefore, be taxed in the assessment year 1958-59."*

15. Therefore, in our considered view the Assessing Officer, the CIT(A) and the Tribunal committed a fundamental error in shutting out the contention raised by the assessee solely on the ground that the assessee approached the Bond Issuing Authorities for availing the benefit under Section 54EC of the Act. A careful reading of the submissions made by the assessee before the Assessing Officer would make things further clear. The first contention raised by the assessee was that they had transferred the non T & D business to its subsidiary and that the total consideration of Rs.413 million was the fair value of the non T & D business, which was determined by a joint valuation report prepared by M/s.Bansi S.Mehta & Co. and M/s.N.M.Raiji & Co., dated 05.1.2006.

16. Further, on a reading of the statement filed under Section 393 of the Companies Act, 1956 in C.P.No164 of 2006, there was a

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reference to the valuation of Rs.413 million in paragraph 4(f). In that, paragraph 4(d) stated that with effect from the appointed date, the non T & D business of the assessee including all properties, assets, rights and powers and all debts, liabilities, duties and obligations of the assessee comprised therein and/or relating thereto, should be transferred to the transferee company as a going concern in accordance with and subject to the modalities for transfer and vesting stipulated in the scheme. Paragraph 4(l) would be relevant for this appeal, which reads as follows :

> *"Upon the scheme becoming effective and in consideration of transfer of the non T & D business, AIPL shall, without further application, issue and allot to ATDIL 39,00,000 equity shares of Rs.10/- each in AIPL, at a premium of Rs.96/- per share, credited as fully paid up. Such new equity shares issued and allotted by AIPL to ATDIL under the scheme shall rank pari passu in all respects with the existing equity shares of AIPL."*

17. In terms of the above clause, the consideration of transfer was to issue and allot to the assessee 39,00,000 equity shares of Rs.10/- each in the transferee company at a premium of Rs.96/- per share. The value of the share worked out to Rs.106/- multiplied by

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39,00,000 equity shares, which, in turn, again worked out to Rs.413 million (Rs.41.3 crores). Clause 8 of the statement filed under Section 393 of the Companies Act further stated that in terms of the scheme, the non T & D business would be transferred to the transferee company for a total consideration of Rs.413 million to be discharged by the transferee company by issue and allotment of equity shares credited as fully paid up as mentioned in the statement and the said consideration for the arrangement had been fixed on a fair and reasonable basis and on the basis of the joint valuation report of M/s.N.M.Raiji & Co. and M/s. Bansi S.Mehta & Co., Chartered Accountants with regard to the fair value of the non T & D business and the report of M/s.Muku Associates, Chartered Accountants on the issue of shares and capital structure of the transferee company.

18. Schedule 1 of the scheme of arrangement contains the statement of assets and liabilities (audited) of the non T & D business as on 31.12.2005, which shows the total net assets as Rs.313 million. The scheme was approved by the High Court of Calcutta by order dated 22.3.2006. Paragraph 7 of the order of the Calcutta High Court deals with issue of shares by the transferee company and Paragraph 7.1 would be relevant, which reads as follows :

"Upon the scheme becoming

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effective and in consideration of transfer of the non T & D business, AIPL shall, without further application, issue and allot to ATDIL 39,00,000 equity shares of Rs.10/- each in AIPL, at a premium of Rs.96/- per share, credited as fully paid up. Such new equity shares issued and allotted by AIPL to ATDIL under this scheme shall rank pari passu in all respects with the existing equity shares of AIPL."

19. With the above submissions, the assessee stated that the taxable capital gains for the assessment year in question worked out to Rs.10,18,67,615/-, but they did not pay any capital gains tax since the entire capital gains were to be invested in tax saving bonds as notified under Section 54EC of the Act.

20. Though such a stand was taken, there was a road block for the assessee as a Proviso was inserted in Section 54EC of the Act by the Finance Act, 2007 with effect from 01.4.2007 fixing the outer limit for investment as Rs.50 lakhs. This necessitated the assessee to approach this Court by filing a writ petition, which was dismissed and the special leave petition filed before the Hon'ble Supreme Court against that was also dismissed. In fact, the dismissal of the writ petition can have no impact on the present assessment. This is so because the assessee took a stand that they did not pay capital gains

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tax because they were to invest the same in the tax saving bonds as notified under Section 54EC of the Act. However, on account of the monetary restrictions, the assessee was not issued with the requisite bonds. Further, in the submissions before the Assessing Officer, the assessee took an alternate plea. We have held that such an alternate plea can be raised and it can be even a plea, which is mutually contradictory to the earlier plea, as it is a question of law, which requires to be considered.

21. It appears that an alternate submission was raised by the assessee during the course of assessment proceedings largely influenced by the decision of the Mumbai Bench of the Tribunal in the case of ***Avaya Global Connect Ltd.*** They have contended that the transfer of non T & D business was by way of a scheme of arrangement approved by the High Court of Calcutta under Sections 391 and 394 of the Companies Act and therefore, it could not be considered as a sale of business and would not qualify as a slump sale because what were issued were equity shares and no monetary consideration was paid.

22. Unfortunately, the Assessing Officer, the CIT(A) and the Tribunal did not adjudicate this issue on the ground that the assessee was estopped from raising such a contention. We have held that the

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assessee could not be held to be estopped from raising such a legal contention and the Authorities below as well as the Tribunal fell in error in not adjudicating the issue. Therefore, we are required to consider as to whether the submission of the assessee raised as an alternate plea merits consideration.

23. Section 50B of the Act is a special provision for computation of capital gains in case of slump sale. Sub-Section (1) of Section 50B of the Act reads as follows :

> *"Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place."*

24. In terms of the above provision, any profits or gains arising from slump sale shall be chargeable to income tax as capital gains arising from the transfer of long term capital assets and shall be deemed to be the income of the previous year in which the transfer took place.

25. Section 2(42C) of the Act defines the expression '***slump sale***' to mean the transfer of one or more undertakings as a result of

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the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

26. Section 2(47) of the Act defines the term '***transfer***' in relation to capital assets and it is an inclusive definition, which includes

i. sale, exchange or relinquishment of an asset;

ii. extinguishment of any rights;

iii. compulsory acquisition;

iv. conversion of asset as stock in trade of a business;

v. maturity or redemption of zero coupon bonds;

vi. any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882;

vii. any transaction, which has the effect of transferring or enabling the enjoyment of any immovable property.

27. The argument of the Revenue before us is that plea of the assessee that the transaction was not a slump sale, but an exchange would also be covered within the definition of the expression '***transfer of capital asset***' because it is an inclusive definition and transfer includes exchange. Therefore, it is submitted that it will fall within the definition of the expression '***slump sale***' as defined under Section

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2(42C) of the Act and consequently, Section 50B of the Act would stand attracted.

28. Admittedly, the word '***sale***' is not defined under the Act. Therefore, necessarily one has to rely upon the definitions in the other Statutes, which define the word '***sale***'.

29. Section 54 of the Transfer of Property Act, 1882 defines the word '***sale***' to mean a transfer of ownership in exchange for a price paid or promised or part paid and part promised. The word '***price***' is not defined either under the Income Tax Act, 1961 or under the Transfer of Property Act, 1882, but is defined under Section 2(10) of the Sale of Goods Act, 1930 to mean money consideration for the sale of goods.

30. Therefore, to bring the transaction within the definition of Section 2(42C) of the Act as a slump sale, there should be a transfer of an undertaking as a result of the sale for lump sum consideration. Therefore, necessarily the sale should be by way of transfer of ownership in exchange of a price paid or promised or part paid and part promised and the price should be a money consideration. If there is no monetary consideration involved in the transaction, then it would be not possible for the Revenue to bring the transaction done by the assessee within the definition of the term '***slump sale***' as defined

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under Section 2(42C) of the Act.

31. Section 118 of the Transfer of Property Act, 1882 defines the term '***exchange***' by stating that when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange.

32. The legal issue, which arises for consideration before us, was considered by the Bombay High Court in the case of ***CIT Vs. Bharat Bijlee Ltd. [reported in (2014) 365 ITR 258].*** In the said case, there was a transfer of lift division and the assessee claimed it to be an exchange and not a sale. The Assessing Officer held that the transaction would squarely fall within the definition of the expression '***slump sale***' under Section 2(42C) of the Act. This order was confirmed by the CIT(A), which was reversed by the Tribunal. Challenging the same, the Revenue was on appeal before the Bombay High Court. The Revenue relied upon the decision of the Delhi High Court in the case of ***SREI Infrastructure Finance Ltd. Vs. Income Tax Settlement Commission [reported in (2014) 2 ITR-OL 274].*** It was contended by the Revenue that merely because the transfer has been brought about by filing a petition before the Court, getting an order of sanctioning the scheme of arrangement of transfer did not

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mean that it was a slump sale. The assessee contended that for a slump sale, the transfer has to be by way of sale and the lift division of the assessee has been transferred to another company and in consideration of the same, the other company issued preference shares to the assessee. There was no price in money, which was paid and received. It was further contended that once the scheme was sanctioned by the Court and the lift division was transferred not by way of sale, then the Tribunal's view could not be said to be erroneous in law nor could it be termed as perverse. The Court, after noting the factual position and the decision of the Hon'ble Supreme Court in the case of ***CIT Vs. Motors and General Stores (P.) Ltd. [reported in (1967) 66 ITR 692]*** and in the case of ***Commissioners of Inland Revenue Vs. Wesleyan and General Assurance Society [reported in (1948) 16 ITR (Supp) 101 (HL)],*** held as follows :

> *"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*

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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 February 20, 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 (page 699) :

"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 inten tion of

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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 trans action is embodied 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. CIT [1940] 8 ITR 522 (PC) 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

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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 Westminster's case [1935] 19 TC 490 (HL) 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 pay ments 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

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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. Scoble [1903] AC 299; 4 TC 618 (HL) ; 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 [1948] 16 ITR (Suppl.) 101 (HL)—

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Viscount Simon expressed the principle as follows (page 103) :

'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

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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.

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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 the 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

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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 SREI 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 April 1, 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, the facts were that the petitioner company was

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engaged in project financing through term loans and leasing in specified sectors. For the assessment year 2009-10, the petitioner had disclosed loss of more than Rs. 76 crores in their return. No return was filed for the assessment year 2010-11. The book loss was more than Rs. 72 crores. An application was filed before the Settlement Commission for the two assessment years and disclosing the 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 lakhs 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 lakhs received by the petitioner from its subsidiary on transfer of its project finance business and assets based on financing business including its shareholding in SREI Insurance Broking Pvt. Ltd. was taxable under section 50B of the Act as a slump sale.

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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 lakhs 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

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a sale and not an exchange.

27. There is no necessity for us to analyze the circumstances in which 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 and 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.

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> *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."*

33. As could be seen from the above legal position, the Court distinguished the decision in the case of ***SREI Infrastructure Finance Ltd.,*** as it found a monetary consideration in that case.

34. In the earlier part of this judgment, we have referred to the scheme of arrangement and we find that there is no monetary consideration, which was passed on from the transferee company to the assessee, but there is only allotment of shares.

35. The Revenue has argued before us that even in the scheme of arrangement, the word '***consideration***' has been used and that therefore, it is a transfer and the provisions of Section 50B of the Act would stand attracted.

36. An identical question was considered by the Hon'ble Supreme Court in the case of ***Motors and General Stores (P.) Ltd.*** In that case also, the agreement contained the expression '***consideration of the transfer***'. After considering the documents in its entirety, the Hon'ble Supreme Court observed that the operative part of the document showed that there was an exchange of properties described

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in schedule I for 5% tax free cumulative preference shares of the company and the valuation was done for the purpose of stamp duty and in essence, the transaction was one of exchange and there was no sale of the properties described in schedule I for any monetary consideration. That apart, the Hon'ble Supreme Court noted that there was no suggestion on behalf of the Revenue of bad faith on the part of the assessee company nor it was alleged that particular form of the transaction was adopted as a cloak to conceal a different transaction. In the case before us also, there is no such allegation made by the Revenue against the assessee company. Thus, this decision will clearly support the case of the assessee and mere use of the expression '***consideration for transfer***' cannot be said to be a transaction as a sale.

37. To the same effect is the decision of the Hon'ble Supreme Court in the case of ***CIT, Bombay Vs. Rasiklal Maneklal (HUF) [reported in (1989) 177 ITR 198]*** wherein it was held that the allotment of shares could not be construed to be a transfer.

38. Another important aspect, which needs to be noted, is the effect of approval of the scheme of arrangement by the High Court of Calcutta. This issue was considered by the Bombay High Court in the case of ***Sadanand S. Varde Vs. State of Maharashtra [reported***

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(2001) 247 ITR 609] wherein after referring to various decisions, it has been held that there is overwhelming authority of precedents suggesting that when an amalgamation takes place, the transfer of assets takes place by the force of the company court's order and/or by operation of law and it ceases to be a contractual or a consensual transfer.

39. The Assessing Officer, the CIT(A) and the Tribunal found fault with the assessee in not filing a return or revised return raising such a plea. The decision of the Hon'ble Supreme Court in the case of ***M/s. Goetze India Ltd.,*** was referred to come to such a conclusion. A similar contention was raised before the Hon'ble Division Bench of this Court in the case of ***CIT Vs. Abhinitha Foundation Pvt. Ltd. [reported in (2017) 396 ITR 251],*** in which, one of the substantial questions of law, which fell for consideration was as to whether the finding of the Tribunal was bad because it issued a direction to the Assessing Officer to consider the claim afresh in respect of the deduction under Section 80IB(10) of the Act especially when no such claim was made in the original return filed nor any revised return filed claiming the same nor any petition under Section 264 which was against the law laid down by the Apex Court in the case of ***M/s.Goetze India Ltd***. After referring to a long line of decisions, it

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was held that the failure to advert to the claim in the original return or the revised return could not denude the appellate authorities of their power to consider the claim, if, the relevant material was available on record and was otherwise tenable in law.

40. The decision of the Hon'ble Supreme Court in the case of ***M/s.Goetze India Ltd.,*** made it clear that the issue in the said case was limited to the power of the Assessing Authority and did not impinge the power of the Tribunal under Section 254 of the Act. Hence, the CIT(A) as well as the Tribunal fell in error in non-suiting the assessee on the ground that they had not raised such a plea in the return nor in the revised return.

41. The Constitution Bench of the Hon'ble Supreme Court in the case of ***Devi Das Gopal Krishnan Vs. State of Punjab [reported in (1967) 20 STC 430],*** while interpreting the provision of the Punjab General Sales Tax Act, 1948, considered the definition of the word '***purchase***', which was inserted in the said Act as Section (ff) by way of amendment, which defined it with all its grammatical and cognate expressions to mean the acquisition of goods specified in schedule C for use in the manufacture of goods for sale for cash or deferred payment or other valuable consideration otherwise than under a mortgage, hypothecation, charge or pledge. It was argued that the

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definition of the word '***purchase***' is more comprehensive within the definition of the word '***sale***' under the Indian Sale of Goods Act and therefore, the State Legislature was incompetent to make a law in the Entry "Sale or Purchase" in List II of the Seventh Schedule to The Constitution. The Constitution Bench referred to the decision in the case of ***State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd. [reported in 1959 SCR 379]*** wherein it has been held that in order to constitute a sale, it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which, of course, presupposed capacity to contract, that it must be supported by money consideration and that as a result of the transaction property must actually pass in the goods and unless these elements were present, there could be no sale. Thus, if merely title to the goods passed but not as a result of any contract between the parties, express or implied, there was no sale.

42. The above judgment of the Constitution Bench will come to the aid and assistance of the assessee as the transfer, pursuant to approval of a scheme of arrangement, is not a contractual transfer, but a statutorily approved transfer and cannot be brought within the definition of the word '***sale***'.

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43. As pointed out earlier, the Assessing Officer, the CIT(A) and the Tribunal opined that the assessee raised a contrary plea and that they were estopped from raising such a plea. We nowhere find the plea to be contrary or conflicting. During the course of assessment, the assessee came across the decision of the Mumbai Bench of the Tribunal in the case of ***Avaya Global Connect Ltd.,*** and raised a contention without prejudice to the other contentions raised by them. This cannot be construed to be a contrary plea or a contrary claim.

44. The Hon'ble Supreme Court, in the decision in the case of ***National Thermal Power Co. Ltd. Vs. CIT [reported in (1998) 229 ITR 383],*** held that while the appeal was pending before the Tribunal, it was found that when a non-taxable item was taxed or a permissible deduction was denied, it did not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time so long as the relevant facts were on record in respect of that item.

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45. In the assessee's case, all the relevant facts were available even before the Assessing Officer while the scrutiny assessment was in progress. Therefore, there is no estoppel on the part of the assessee to pursue their claim and accordingly, we reject the argument of the Revenue in this regard. The Revenue largely rested their argument

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based on the decision of the Delhi High Court in the case of ***SREI Infrastructure Finance Ltd., which, we have already held to be not applicable to the facts*** and we refer to the decision in the case of the Bombay High Court in the case of ***Bharat Bijlee Ltd.,*** which had noted the factual position in the decision of the Delhi High Court in the case of ***SREI Infrastructure Finance Ltd.,*** where, admittedly, there was a monetary consideration, which is conspicuously absent in the assessee's case. Therefore, the said decision can be of no assistance to the case of the Revenue.

46. The Revenue has also placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Hindustan Lever Ltd. Vs. State of Maharashtra [reported in AIR 2004 SC 326],*** which pertains to levy of stamp duty on the order of amalgamation passed under Section 394 of the Companies Act and while considering the said issue, the Court analyzed as to what was the effect of the scheme of amalgamation and the entire discussion proceeded with regard to the effect of the order of the High Court approving the scheme of amalgamation qua the provisions of the Indian Stamp Act. We are of the view that this decision is distinguishable on facts.

47. In the case on hand, the Tribunal, in paragraph 13.2 of its order, while discussing this issue, referred to the valuation arrived by

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the accountants at Rs.41.70 Crores. However, this valuation does not pertain to the assessee, but pertains to the valuation of the T & D business of the assessee whereas the case before us relates to a non T & D business and in the valuation report submitted by M/s.A.F. Fergusaon & Co., dated 17.5.2004, in the summary of valuation, the value of T & D business units worked out to Rs.417 million (Rs.41.70 Crores). Thus, the Tribunal appears to have committed a factual mistake in referring to a valuation report not concerning the transaction, which was the subject matter of assessment and accordingly, we clarify the same. The Tribunal observed that the value of the net assets of the non T & D business was determined at Rs.31.30 Crores whereas in the scheme, it had been mentioned as Rs.41.30 Crores and faulted the assessee for not explaining the difference of Rs.10 crores.

48. The explanation given before us is satisfactory because the net asset value of the non T & D business was determined at Rs.31.30 Crores as on 31.12.2005. But, the parties agreed to have a joint valuation by using a combination of three methods namely

(i) price earnings capitalization
(ii) net assets and
(iii) market values reflected in actual dealings on the stock exchanges

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during the relevant period.

After following such a procedure, the fair value was computed at Rs.413 million and this has been clearly set down in the statement filed under Section 393 of the Companies Act before the High Court of Calcutta in C.P.No.164 of 2006 and recorded in the order dated 22.3.2006. For all the above reasons, the assessee is entitled to succeed and the substantial questions of law framed for consideration are to be answered in their favour.

49. In the result, the above tax case appeal is allowed and the substantial questions of law framed are answered in favour of the appellant – assessee. No costs.

08.9.2020

Speaking Order
Index/Internet : Yes

To
1.The Income Tax Appellate Tribunal, Chennai 'B' Bench.
2.The Commissioner of Income Tax, Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai-101.

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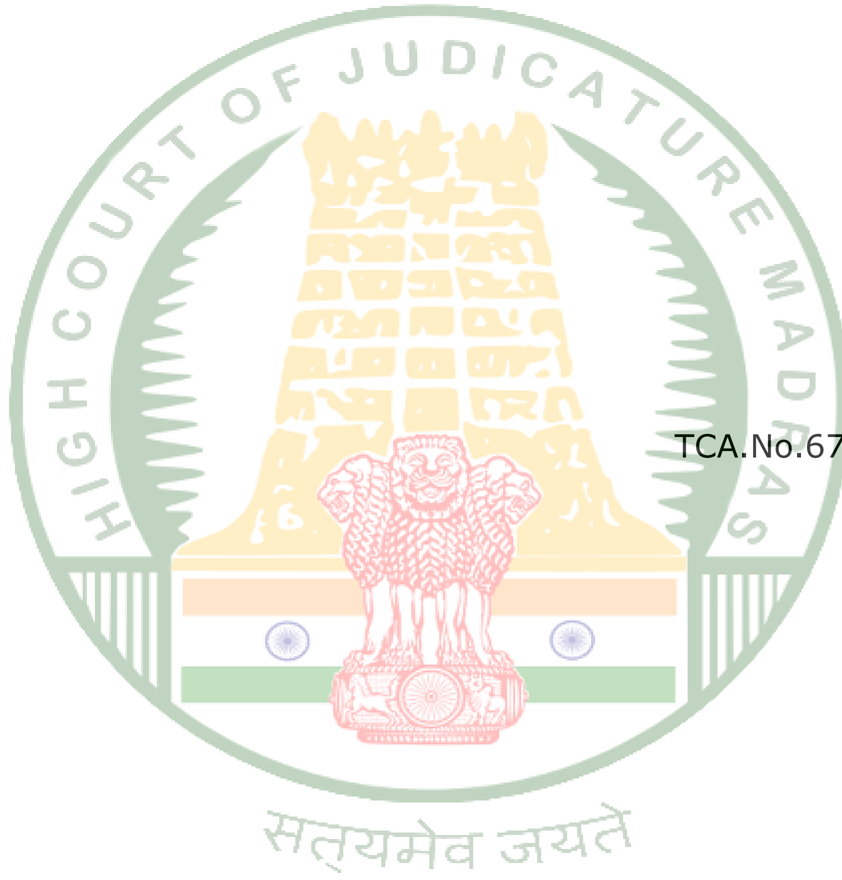
T.S.SIVAGNANAM,J
AND
PUSHPA SATHYANARAYANA,J

RS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