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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : May-10-1995

Reported in : (1995)54ITD433(Delhi)

Judge : M Bakhshi, G Aggarwal

Appellant : Modipon Ltd.

Respondent : Deputy Commissioner of

Judgement :

1. We are disposing of these cross appeals, one by the assessee and one by the revenue, relating to assessment year 1986-87 and directed against the order dated 31st March, 1992 of CIT(A)-XIL New Delhi, by this consolidated order.

2. Assessee is a limited company in which public are substantially interested. For assessment year 1986-87 return of income declaring income of Rs. 2,70,51,718 had been filed by the assessee. The Assessing Officer vide letter dated 30th March, 1989 completed the assessment at an income of Rs. 21,67,66,940. The CIT(A) allowed partial relief.

Assessee as well as the revenue is in appeal before us. Rival contentions have been heard and records perused.

3. First ground of appeal relates to the action of the Assessing Officer for assessing the income of M/s. Indofil Chemicals Ltd. with the income of the assessee on protective basis. Assessee had claimed M/s Indofil Chemicals Ltd.

had been amalgamated with it from 1-7-1982.

However, the Assessing Officer held that necessary formalities not having been completed during the year under appeal, the income of the amalgamated company was to be assessed separately. Since assessee had disclosed the income of Indofil Chemicals as its income, the Assessing Officer assessed the same on protective basis. The Assessing Officer also declined to allow deduction on account of advance-tax and TDS amounting to Rs. 65,10,495 paid in the name of Indofil Chemicals Ltd. CIT(A) has confirmed the action of the Assessing Officer. The relevant facts relating to this issue are that on 16th September, 1982, the Board of Directors of Modipon Ltd., ie., the appellant passed a resolution for the merger of Indofil Chemicals Ltd. into this company subject to (i) the approval of shareholders at the General Meeting; (ii) the High Courts of Allahabad and Bombay; (iii) the Controller of Capital Issues; (iv) the Central Government under the Monopolies and Restrictive Trade Practices Act; and (v) Approval of any such governmental or other authorities as may be required. The said resolution was passed Under Section 391 and 394 of the Companies Act, 1956. By virtue of this resolution the appointed date for the purpose of effecting the merger and for valuation of shares of both Indofil and the assessee-company was declared to be 1st July, 1982. The Ministry of Industry and Company Affairs approved the claim of amalgamation of IFCL with MPL vide letter dated 17-1-1985. The Bombay High Court approved the claim of amalgamation of IFCL with MPL w.e.f. 1 -7-1982 vide their order dated 16-9-1985. The Allahabad High Court approved the amalgamation of IFCL with MPL w.e.f. 1-7-1982 vide order dated 9-7-1985. The Controller of Capital Issues gave his consent to the issue of share of MPL to the erstwhile equity shareholders to IFCL vide letter dated 19-11-1985. According to the Assessing Officer since all the formalities regarding the amalgamation of the IFCL with MPL had not been completed by 30th June, 1985 which is the last day of the previous year for the assessment year 1986-87, the merger of IFCL with MPL could not be said to have been completed. This view has been confirmed by the CIT(A).

4. It was contended before us that all the formalities regarding the amalgamation of IFCL with MPL were admittedly completed by the end of March 1986. However,

the scheme of amalgamation was approved by the Bombay and Allahabad High Courts after the requisite Government approvals were received. The orders of the Bombay High Court and Allahabad High Court clearly indicate the date of amalgamation from the appointed date which is 1st July, 1982. The first year in which two companies stand amalgamated was the previous year ended on 30th July, 1983, ie., relevant to assessmer v ear 1984-85. Reliance was placed on the decision of the Bombay High Court in the case of CIT v. Swastik Rubber Products Ltd. [1983] 140 ITR 304 in support of the contention that the appointed date is the date on which the amalgamation takes place and the business of the amalgamated company is deemed to have been carried on by the transferee from that date. It was further brought to our notice that Assessing Officer had issued notices under Section 148 for assessment years 1984-85 and 1985-86 as also for the year under appeal in the name of M/s. Indofil Chemicals Ltd. to the Modipon Ltd. as their successor requiring to file the returns of income of M/s IFCL. The Delhi High Court has granted the stay against the said notices. It was accordingly prayed that assessment of the income of M/s Indofil Chemicals Ltd. in the hands of the assessee may be held to be on substantive basis and deduction of tax paid/recovered in the name of IFCL be allowed to be adjusted against the demand of the assessee.

5. The learned D.R., on the other hand, contended that mere passing of resolution by the companies for amalgamation was not sufficient in completing the amalgamation process. As per provisions of Sections 391 and 394 of the Companies Act, certain formalities are to be completed for the merger of the companies. Unless those formalities are completed amalgamation is ineffective and of no consequence. According to the learned D.R. since in this case admittedly all the formalities regarding the amalgamation of the two companies had not been completed by the end of the previous year, which was 30th June, 1985, for the year under appeal the income of IFCL was not assessable in the hands of the assessee. However, since the income had been disclosed by the assessee, the same was rightly assessed on protective basis as declared.

6. We have given our careful consideration to the rival contentions. It is evident from the undisputed facts that assessee had formulated a scheme of

amalgamation with M/s. IFCL. As per the scheme, the appointed date was fixed as 1-7-1982. The scheme was to be effective from the date on which the last of the approval was received from the authorities.

7. It is not disputed before us that the scheme of amalgamation was subject to the approval of the Department of Company Affairs, Ministry of Industry and Company Affairs, Government of India; (ii) Bombay High Court and Allahabad High Court; (iii) the Controller of Capital Issues; (iv) the Department of Economic Affairs. Ministry of Finance had also to approve the issue of share capital to the shareholders of the IFCL.

The RBI was also to approve the scheme. We have mentioned elsewhere in this order that the Department of Company Affairs has approved the scheme of amalgamation vide letter dated 18-1-1985.

The Allahabad and Bombay High Courts have approved the scheme of amalgamation vide orders dated 9-7-1985 and 16-9-1985 respectively. The Controller of Capital Issues has granted the approval for the issue of share capital to the shareholders of IFCL vide letter dated 18-11-1985.

The RBI, Kanpur approved the issue of shares to the non-resident shareholders vide letter dated 1-2-1986. It is, therefore, clear from the above facts that the last of the approval required for completion of the scheme of amalgamation was 1-2-1986 which was beyond the end of the previous year relevant to assessment year 1986-87, the previous year being ending 30th June, 1985. Whereas it is true that the amalgamation of the two companies would not be complete without the fulfilment of the formalities referred to above, however, once these formalities are completed it is to be seen as to what is the effective date of amalgamation. When we peruse the order of the Bombay High Court dated 16-9-1985 and the order of the Allahabad High Court dated 9-7-1985 we find that it has been made abundantly clear that the appointed date is 1-7-1982 and that the scheme of amalgamation as approved from the said date. The approval of the RBI, Kanpur also makes the amalgamation effective from 1 -7-1982. In the case of Swastik Rubber Products Ltd. (supra), their Lordships of the Bombay High Court held that the date of amalgamation for income-tax assessment would be the date

mentioned in the order of the Court. In this case the Tribunal found that as per the scheme of amalgamation of a bank with the assessee-company the entire undertaking of the bank would be transferred to the assessee w.e.f. July 1, 1971. On the petitions made to the High Courts under Sections 391 and 394 of the Companies Act, 1956, the High Court passed orders w.e.f. 1st July, 1971 directing that the whole of the business and the property and the liabilities of the bank shall stand transferred to the assessee without any further act or deed. According to clause 15 of the scheme of amalgamation the assessee was to approach the Controller of Capital Issues for the purpose of sanction of increase in share capital and the said sanction was obtained on December 31, 1971. Clause 15 of the scheme also provided that even though the scheme of amalgamation was to be operative from July 1, 1971, it was to take effect finally from the date on which any of the sanctions was last obtained.

8. The Income-tax Officer held that the date of amalgamation for the purpose of Section 170 was December 31, 1971. On appeal, the Tribunal took the view that the approval of the Controller of Capital Issues was a mere formality in view of the order of the High Court that the amalgamation was to be effective from July 1,1971, as for the purposes of income- tax that was the crucial date on which the assets and liabilities vested in the assessee. Accordingly, the Tribunal held that the date of amalgamation was July 1, 1971. On these facts reference to the High Court was declined. The Bombay High Court declined to interfere under Section 256(2). Special Leave Petition against the decision of the High Court was also dismissed by the Supreme Court as reported in 140 ITR (St.) 2. As is clear from the decision of the Bombay High Court the date of amalgamation is the appointed date as approved by the respective High Courts under Sections 391 and 394 of the Companies Act, 1956. In this case, the Allahabad High Court as well as the Bombay High Court have specified the date of amalgamation to the 1st July, 1982. As per the scheme of amalgamation Clause 4 provides that the properties, investments, etc., of IFCL shall without further act or deed be transferred to and vested and are deemed to be transferred and vested in Modipon pursuant to an order under Section 394 of the Companies Act, 1956 w.e.f. 1st July, 1982. The said clause is reproduced hereunder : With effect from t he 1st day of July, 1982 (hereinafter called "the Appointed Date) the properties, investments, rights, powers

and assets of every kind (hereinafter referred to as 'the said Assets') of INDOFIL shall, without further act or deed, be transfered to and vested and/or deemed to be transferred to and vested in MODIPON pursuant to an order under Section 394 of the Companies Act, 1956.

9. Clause 8 of the scheme provides that the payment of dividend, income accruing to INDOFIL or losses or expenditure arising or incurred by it after the appointed date upto the effective date shall, for all purposes, be treated as income or losses or expenditure as the case may be of MODIPON. Subject to the other provisions of this Scheme, all contracts, deeds, agreements and other instruments, to which INDOFIL is a party, subsisting or operative immediately on or before the Effective Date shall be in full force and effect against or in favour of Modipon as the case may be, and may be enforced as fully and effectively as if instead of INDOFIL, MODIPON had been a party thereto.

11. Clause 20 of the scheme provides that the scheme is conditional on the subject to the following : (a) the requisite sanction or approval, if any, of the Controller of Capital Issues under the Capital Issue (Control) Act, 1947, and of any other appropriate authorities being obtained and granted in the matters in respect of which such sanction or approval are required; (b) the approval of and agreement to the scheme by the requisite majority of the members of INDOFIL and of the member of MODIPON; (c) the necessary resolution by the members of MODIPON under Section 81 of the Companies Act, 1956; (d) the sanctions by the High Court of Judicature at Bombay and the High Court of Judicature at Allahabad under Section 391 of the Companies Act, 1957 and to the necessary order under Section 394 of the said Act being obtained; and (e) it become fully effective in accordance with sections 391 and 394 of the Companies Act, 1956.

This scheme (although operative from the Appointed Day) shall take effect finally upon and from the date on which any of the aforesaid sanctions or approvals shall be last obtained which shall be 'the effective date' for the purpose of this scheme.

12. In clause 20 referred to above, two expressions have been used, namely, appointed date and effective date. 'Appointed Date' is the date from which the scheme of amalgamation is operative ie., 1-7-1982.

'Effective Date' is the date on which all the formalities referred to above are completed. The effective date has not to be confused with the appointed date. Whereas the scheme of amalgamation would not be effective until all the formalities referred to in clause 20 of the scheme were completed but after the completion of the formalities the scheme would be effective from 1-7-1982.

13. As in the case of transfer of immovable property, sale deed is not effective till it is registered in accordance with the Registration Act. Once the document is registered, the transfer relates back to the date of execution. On the same analogy the scheme of amalgamation would not be effective until and unless all the formalities required under law for amalgamation of the two companies are completed. However, once the formalities are completed, the amalgamation is effective from the appointed date as indicated in the scheme of amalgamation and approved by the High Court. In this case, it is not disputed that by March 1986 all the formalities relating to the amalgamation of the two companies had been completed. It is also not disputed that the effective date referred to in the scheme of amalgamation is 1-7-1982. The Hon'ble Allahabad and Bombay High Courts have also indicated the appointed date as 1st July, 1982. Thus, the amalgamation, in our considered view, is effective from 1 -7-1982. We, therefore, hold that the income of Indofil Chemicals Ltd. for the previous year relevant to assessment year 1986-87 is assessable in the hands of the assessee on substantive basis as the scheme of amalgamation was effective from 1-7-1982.

14. The next related issue is as to whether the tax recovered/paid by the IFCL is to be adjusted in the hands of the assessee-company. A sum of Rs. 65,10,495 has been paid as advance-tax and TDS by erstwhile IFCL. Assessing Officer has not adjusted the amount in the assessment of the assessee. Since the income of the IFCL had been assessed on protective basis and the income was said to be assessable in the hands of IFCL, adjustment of taxes paid in the name of IFCL was not allowed.

Since we have held the income of the IFCL to the assessable in the hands of the assessee on substantive basis, the taxes paid in the name of IFCL are adjustable against the demand in the name of the assessee.

Where the income of another person is included in the income of the assessee the taxes paid in the name of the person whose income is assessed with the income of the assessee are adjustable in the hands of the assessee. We derive support for this view from the decision of the Supreme Court in the case of ITO v. Bachu Lal Kapoor [1966] 60 ITR 74 as also from the decision of the Delhi High Court in the case of CIT v.RamanandSachdeva [1982] 136 ITR 440. Respectfully following the afore-mentioned decisions, we direct the Assessing Officer to adjust the sum of Rs. 65,10,494 being the tax deducted at source and the advance-tax paid in the name of IFCL for the assessment year under appeal subject to verification of payments.

15 to 79. [These paras are not reproduced here as they involve minor issues.]

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