Income Tax Appellate Tribunal - Ahmedabad
Bio Pharma vs Ito, Ward-2(3), Baroda on 6 September, 2005
Equivalent citations: 2006 5 SOT 478 Ahd
ORDER G.D. Agarwal, A.M.

This appeal by the assessee is directed against the order of the Commissioner (Appeals) for assessment year 1996-97. The first three grounds of the assessee's appeal read as under:

1. The Commissioner (Appeals) erred in upholding the decision of the assessing officer to tax the short-term capital gain of Rs. 2,03,50,292 in the hands of the assessee.

2. The Commissioner (Appeals) erred in holding that the assessing officer was justified in not accepting the order of the Civil Court cancelling the transaction of transfer of an industrial undertaking from the assessee to Century Pharmaceuticals Ltd.

3. The Commissioner (Appeals) erred in rejecting the alternative contention of the assessee that even if the court decree is to be disregarded since there was a transfer of the entire industrial undertaking by the assessee to Century Pharmaceuticals Ltd. even then the point would be covered in favour of the assessee by another Ahmedabad Tribunal decision in Industrial Machinery Associates v. CIT (2001) 81 ITD 482 (Ahd), and, therefore, there will be no capital gain exigible to tax; section 50B applies from assessment year 2000-01 and not the assessment year herein concerned 1996-97,

2. The facts of the case are that the assessee-firm was engaged in the business of manufacture of bulk drugs and pharmaceuticals up to 31-12-1995. The firm is comprised of two partners namely Shri Janak K. Seth and Smt. Manjula K. Seth each having 50 percent share. On 31-12-1995 the assessee-firm sold the business to M/s. Century Pharmaceuticals Limited as a going concern at a slump price of Rs. 3,64,00,000 as per agreement dated 19-12-1995 and 8-6-1996. As per the agreements the two partners of the assessee-firm became the directors of the said company. The relevant details regarding the consideration paid are as under :

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Shares Number Value Unsecured Loan Total Janak K. Seth 17,00,000 170,00,000 3,53,685 173,53,685 Mrs. Manjula 17,50,000 17,50,000 175,00,000 175,00,000 15,46,375 15,46,375 190,46,315 190,46,315 34,50,000 345,00,000 19,00,000 364,00,000 On the basis of these facts the assessing officer computed short-term capital gain aggregating to Rs. 2,03,50,292 which was challenged by the assessee-firm before the Commissioner (Appeals). The Commissioner (Appeals)

vide order dated 19-3-1999 sustained the addition.

3. The assessee filed the appeal against the order of the Commissioner (Appeals) before the Tribunal. Vide ITA No. 1453/Abd./99, the Tribunal set aside the matter back to the file of the assessing officer. The assessing officer vide order dated 28-3-2003 gave effect to the order of the Tribunal, wherein he repeated the addition of Rs. 2,03,50,292 as made in the original assessment order dated 15-9-1998. The assessee filed the appeal before the Commissioner (Appeals), who vide order dated 12-3-2004 sustained the order of the assessing officer. Hence this appeal by the assessee.

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4. At the time of hearing before us, the contention of the learned counsel for the assessee was two fold; (i) that the Civil Court vide order dated 3-10-2000 in Civil Suit No. 855 of 2000 reduced the sale consideration at Rs. 1,41,49,707 and has directed the defendant i.e., the assessee-firm and its partners to pay the sum of Rs. 2,03,50,292 to M/s. Century Pharmaceuticals Limited. The above order of the Civil Court has been accepted by the parties and acted upon. He pointed out that the sale consideration was paid by M/s. Century Pharmaceuticals Limited mainly through allotment of shares to the partners of the asscssee-firm viz., Shri Janak K. Seth and Smt. Manjula Seth. That as per the order of the Civil Court, the above two partners have surrendered the shares to the company and the company has cancelled those shares and intimation of cancellation of shares is duly sent to the Registrar of Companies. He also pointed out that the partners have also refunded to the company the dividend received by them on the above shares surrendered by them. The company has also revised its balance sheet and reduced the share capital. In view of above, he submitted that the order of the Civil court has been acted upon by the parties and the same has to be taken into consideration while computing the capital gain. He also pointed out that in the first round of appeal, the matter travelled up to the Tribunal and the Tribunal vide its order in ITA No. 1453/A/99 directed the assessing officer to take into account the order of the Civil Court while considering the capital gain. The above order of the Tribunal has been accepted by the parties and therefore, the assessing officer while passing the order in pursuance to the order of the Tribunal, had no jurisdiction to ignore the order of the Civil Court. He further contended that once the order of the Civil court is taken into account, there is no capital gain.

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4.1 The learned counsel for the assessce further submitted that the assessee has sold the entire business as a going concern. In support of this argument, he referred to the agreement between the assessee and M/s. Century Pharmaceuticals Limited and pointed out that the entire business as a going concern including all tangible and intangible assets (except cash and NSCs) was sold as a going concern. That the Ahmedabad Bench of Tribunal in the case of Industrial Machinery Associates (supra) and in the case of Rakshak Chemicals (P.) Ltd. v. Joint CIT (IT Appeal No. 1527 (Ahd.) of 2001) has taken the view that the assessee is not liable for capital gain tax when there was slump sale of business as a going concern. He further submitted that the Legislature has introduced section 50B for levy of capital gain in the case of slump sale by the Finance Act, 1999 with effect from 1-4-2000. From the introduction of above special provision for levy of capital gain in the case of slump sale, it is clear that in the earlier provision slump sale was not liable for capital gain and therefore, there was requirement of a specific provision in this regard. However, this provision has been made effective from 1-4-2000 and therefore, will not be applicable to the year under consideration which is assessment year 1996-97. He, therefore, submitted that the levy of capital gain tax at Rs. 2,03,50,292 may be deleted.

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been made effective from 1-4-2000 and therefore, will not be applicable to the year under consideration which is assessment year 1996-97. He, therefore, submitted that the levy of capital gain tax at Rs. 2,03,50,292 may be deleted.

5. The learned Departmental Representative on the other hand, argued at length. He submitted that the decree by the court obtained in pursuance to Civil Suit No. 855/2000 is a collusive device by the partners of the assessee-firm to reduce the sale consideration. He pointed out that the partners of the assessee-firm hold 98 per cent shares in the company M/s. Century Pharmaceuticals Limited. That the company went to the court only after the issue of levy of capital gain tax was decided against the assessee by the Commissioner (Appeals). That in pursuance to the Civil Suit filed by the company, the assessee-firm agreed for reduction of sale consideration and therefore ,the decree passed by the court is only on the admission of the parties and that is not the independent view of the Civil Court. He further submitted that the decree was issued by the Civil Court within 15 days of the filing of the Suit which also proves that the court has not applied its mind but since the parties have agreed. Such agreement was given the shape of decree. He further contended that the Income-tax authorities are not bound by the decree of the Civil Court. He, therefore, submitted that for computing capital gain the decree of the Civil Court is to be ignored and the capital gain is to be computed as per the original sale consideration. He also contended that the surrender of shares by the partners of the assessee-firm is a separate and independent transaction and will not affect the sale consideration, which was fixed as per the agreement between the assessee-firm and M/ section Century Pharmaceuticals Limited.

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5.1 The learned DR further contended that the business was transferred as a going concern but the sale was not slump sale because the two assets were left out viz., Kisan Vikas Patra/NSC worth Rs. 7,000 and cash in hand amounting to Rs. 1,517. He further contended that the assets were revalued at market value and on the basis of such revaluation of assets, the sale consideration was fixed. The

valuation was done by a qualified Engineer asset-wise and therefore, it is evident that all the assets except KVPs and cash, were sold and it is not the case of slump sale of business as a going concern. In view of above facts the decision of the Tribunal in the cases of Industrial Machinery Associates (supra) and Rakshak Chemicals (P.) Ltd. (supra) relied upon by the learned counsel for the assessee, would not be applicable. The learned DR, on the other hand, relied upon the following decisions :

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Kishorchand K. Bansal v. Dy. CIT(2002) 80 ITD 585 (Ahd.) Kampli Co-op. Sugar Factory Ltd. v. Joint CIT (2002) 83 ITD 460 (Bang.) CIT v. Artex Mfg. Co. (1997) 227 ITR 260 (SC).

6. We have carefully considered the arguments of both the sides and perused the material placed before us. As we have noted earlier, this is second round of appeal. In the first round the matter travelled up to the Tribunal and the Tribunal vide ITA No. 1453 /Ahd./99 set aside the matter back to the file of the assessing officer with certain specific observations. Both the parties have accepted the above order of the Tribunal and therefore, the assessing officer, while giving effect to the order of the Tribunal, was bound by the observations /findings of the Tribunal in ITA No. 1453/Ahd./99. The only issue in the above appeal was against the addition of Rs. 2,03,50,292 made by the assessing officer on account of short-term capital gain. During the course of hearing before the Tribunal in ITA No. 1453/Ahd./99, the assessee sought for the admission of the following additional ground:

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"In view of the order of 8th Jt. Civil Judge (S.D.), Vadodara dated 3-10-2000 in Civil Suit No. 855 of 2000 there remains no justification for taxing the capital gain of Rs. 2,03,50,392."

The learned DR had objected to the admission of the said ground on various reasons as under:

(i) that the assessee cannot be allowed to raise additional ground based on certain additional facts which were not before, the assessing officer or Commissioner (Appeals).

(ii) That the assessee had taken resort to collusive device of artificially modifying the sale consideration with the ulterior motive of evading capital gain tax. He had pointed out that the Commissioner (Appeals) dismissed the assessee's appeal on 19-3-1999 and immediately thereafter collusive suit had been filed by the vendee-company on 29-1-2000 and the consent decree had been passed by the Civil Judge on 3-10-2000.

(iii) That the order of the Civil Court is not binding on the Income-tax authorities.

In view of the above submissions, the learned DR had objected to the admission of additional ground as well as additional evidence. The assessee's counsel had pleaded in support of the admission of additional ground as well as additional evidence. The Tribunal admitted the additional ground as well as additional evidence and restored the matter back to the file of the assessing officer for fresh adjudication. The findings of the Tribunal as contained in paras 8 to 10 of its order read as under:

"8. We have given our thoughtful consideration to the rival contentions made before us with regard to the admission of the additional ground as well as the additional evidence concerning the levy and computation of short-term capital gains on the sale of the industrial undertaking by the assessee. We have no hesitation in holding that the subsequent events which have taken place culminating in the passing ofan order by the Civil Court reducing the value of sale consideration have a vital bearing on the present controversy before us. The subject-matter of the present appeal is obviously levy and Computation of short-term capital gains in respect of the transaction of sale of the industrial undertaking by the assessee to the company. The subsequent events whereby the Civil Suit has been filed by the company alleging manipulation of accounts and consent decree has been passed by the Civil Court directing refund of the excess sale consideration to the extent of Rs. 203.50 lakhs by the partners has in our opinion direct bearing on the adjudication of the dispute before us. In our opinion, no additional disputes or controversies are being raised by filing the additional ground which are outside the domain of the subject-matter of the present appeal. The basic question is whether the Tribunal has jurisdiction to admit additional evidence regarding a subsequent event. In our considered opinion, the Tribunal has jurisdiction in the matter. If any authority is required for the purpose, the decision of the Supreme Court in Anglo American Direct Tea Trading Co. v. Commissioner Agriculture Income-tax 69 ITR 667 (SC) may be referred to. A further reference may be made to the decision of Kerala High Court in the case of Commissioner of Agriculture Income-tax v. Amalgamated Tea Estate Co. Ltd. 77 ITR 455 (Kar) where a similar proposition has been laid down. Wefeel that the events regarding filing of the Civil Suit, and passing of the order by the Civil Court reducing the consideration cannot be brushed aside as irrelevant for the adjudication of the present issue.

9. We have carefully perused the various judicial authorities cited by the learned DR against the entertainment of additional ground or additional evidence. Needless to say that the SUbject-matter of the dispute namely levy and computation of capital gains is not being extended by considering the fresh facts brought on record by the learned counsel before us. These decisions therefore, do not render any assistance to the case of the revenue.

10. Since fresh facts are being admitted by us we think that the entire issue of levy of short-term capital gain would need be restored to the file of the assessing officer for fresh adjudication. Regarding the contentions of the learned DR that the orders of the Civil Court are not binding on the Income Tax Authorities, we feel that the proposition is unexceptionable and the decisions of the Civil Court would not ipso facto oust the jurisdiction of the Income Tax authorities conferred under the Income Tax Act. However, such orders and decisions passed by the Civil Courts, even if the Income Tax department is not a party to the proceedings before the Civil Courts, would constitute relevant evidence for considering and deciding the matters under the Income Tax Act." (Emphasis italicised in print supplied).

7. From the above it is evident that the Tribunal has not accepted the revenue's contention that obtaining of decree was a collusive device by the assessee resorted with the ulterior motive of evading capital gain tax. On the other hand, the Tribunal held that the order of the Civil Court reducing the value of sale consideration have a vital bearing on the controversy before the Tribunal, the same was reiterated and it was held that the decree of the Civil court directing refund of excess of sale consideration to the extent of Rs. 203.50 lakhs by the partners has a direct bearing on the adjudication before the Tribunal. Again it was stated that the events of filing of Civil Suit and passing of the order by the Civil Court cannot be brushed aside as irrelevant for the adjudication of present issue and at last in para 10 it was concluded that the order of the Civil Court would constitute relevant evidence for considering and deciding the matter under the Income-tax Law even though the Income-tax department is not a party to such proceedings. The above order of the Tribunal has been accepted by the revenue and therefore, the assessing officer while giving effect to the order of the Tribunal, cannot take a view contrary to the above observations of the Tribunal. The assessing officer has ignored the order of the Civil Court mainly on the ground that obtaining of the decree was a collusive and pre-planned with the only motive of evasion of tax. We find that similar arguments were already raised before the Tribunal, by the learned DR in ITA No. 1453/Ahd./99. The Tribunal did not accept the above arguments of the learned DR and held that the order of the Civil Court is relevant evidence for considering the deciding the levy of capital gain tax. Therefore, in our opinion, the assessing officer was not at all justified in ignoring the decree of the Civil Court. While giving effect to the order of the Tribunal, he was bound to consider the decree of the Civil Court as a relevant evidence for deciding the levy of capital gain upon the assessee as was observed by the ITAT in paras 8 to 10 of its order.

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of sale consideration to the extent of Rs. 203.50 lakhs by the partners has a direct bearing on the adjudication before the Tribunal. Again it was stated that the events of filing of Civil Suit and passing of the order by the Civil Court cannot be brushed aside as irrelevant for the adjudication of present issue and at last in para 10 it was concluded that the order of the Civil Court would constitute relevant evidence for considering and deciding the matter under the Income-tax Law even though the Income-tax department is not a party to such proceedings. The above order of the Tribunal has been accepted by the revenue and therefore, the assessing officer while giving effect to the order of the Tribunal, cannot take a view contrary to the above observations of the Tribunal. The assessing officer has ignored the order of the Civil Court mainly on the ground that obtaining of the decree was a collusive and pre-planned with the only motive of evasion of tax. We find that similar arguments were already raised before the Tribunal, by the learned DR in ITA No. 1453/Ahd./99. The Tribunal did not accept the above arguments of the learned DR and held that the order of the Civil Court is relevant evidence for considering the deciding the levy of capital gain tax. Therefore, in our opinion, the assessing officer was not at all justified in ignoring the decree of the Civil Court. While giving effect to the order of the Tribunal, he was bound to consider the decree of the Civil Court as a relevant evidence for deciding the levy of capital gain upon the assessee as was observed by the ITAT in paras 8 to 10 of its order.

7.1 At the time of hearing before us also the revenue has strenuously argued that obtaining of decree from the Civil Court was only a collusive device and moreover it was only a consent decree without any finding by the court itself. However, we find that this aspect of the matter is already concluded by the decision of the Tribunal in ITA No. 1453/Ahd./99 and therefore, it is not open either for the revenue to re-agitate the same or for us to re-adjudicate the same. At the cost of repetition, we mention here again that both the parties have accepted the order of the Tribunal in ITA No. 1453/Ahd./99 and since the same has become final, the parties are bound by the findings given in the said order. It is fairly admitted by both the parties that once the sale consideration is reduced as per the decree of the Civil Court, there would be no liability to capital gain tax. The decree of the Civil Court reads as under :-

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"Suit of the plaintiff is hereby decreed.

It is declared that the true transaction value for transferring the assets and liabilities of M/s. Bio Pharma as going concern as on 31-12-1995 be Rs. 1,41,49,707.43 ps. and that the consideration

payable to the defendant Nos, 2 and 3, be adjusted at Rs. 1,41,49,707.43 ps. The defendants to do pay to the plaintiff-company Rs. 203,50,392.57ps. along with running interest at the rate of 12 per cent per annum from the date of the suit till realization. The defendants are severally and jointly liable. Plaintiff is also entitled to recover the said sum by selling their movables and immovables and also ordered that the defendant Nos. 2 and 3 to surrender the equity shares of the plaintiff-company.

Defendants to pay the cost of the suit to the plaintiff and bear their own.

Decree be drawn accordingly.

Signed and pronounced in open court today on this 3rd day of October, 2000." (Emphasis supplied)

8. From the above it is clear that out of sale consideration received by the assessee, the Civil Court had directed to refund the sum of Rs. 2,03,50,292 which has been refunded by the partners of the assessee-firm by surrender of 20,35,020 equity shares of Rs. 10 each. The refund of sale consideration directed by the Civil Court is equal to the capital gain worked out by the revenue. Therefore, once the sale consideration is reduced by the sum of Rs. 2,03,50,292, there would remain no capital gain.

8. From the above it is clear that out of sale consideration received by the assessee, the Civil Court had directed to refund the sum of Rs. 2,03,50,292 which has been refunded by the partners of the assessee-firm by surrender of 20,35,020 equity shares of Rs. 10 each. The refund of sale consideration directed by the Civil Court is equal to the capital gain worked out by the revenue. Therefore, once the sale consideration is reduced by the sum of Rs. 2,03,50,292, there would remain no capital gain.

9. Once there is no capital gain, the argument whether the sale by the assessee is slump sale and liable to capital gain tax or not, has become academic and need no adjudication. In view of above, we delete the addition of Rs. 2,03,50,292.

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10. Ground Nos. 4 to 6 of the appeal read as under:

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4. The Commissioner (Appeals) erred in rejecting the contention that the assessee will be entitled to the deduction of Rs. 42,76,197 under section 80HHC.

5. The Commissioner (Appeals) erred in holding that interest on the margin money kept with the banks in connection with the export obligation will not be business income eligible to 80HHC relief.

6. The Commissioner (Appeals) erred in holding that the export loss is to be deducted from 90 per cent of the export incentive and on the balance only 80HHC relief will be available. The recent Supreme Court decision in Ipca Laboratory Ltd. v. Dy. CIT(2004) 266 ITR 521(SC) will be relevant on the point.

11. At the time of hearing before us, these grounds were not pressed and accordingly, the same are rejected.

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