IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 4TH DAY OF OCTOBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

I.T.A.No.568/2015

BETWEEN :

1 . THE COMMISSIONER OF
INCOME TAX, LTU, JSS TOWERS
BSK III STAGE, BANGALORE-560 085

2 . THE ADDL. COMMISSIONER
OF INCOME TAX, LTU,
JSS TOWERS, BSK III STAGE
BANGALORE-560 085 ...APPELLANTS

(BY SRI K.V.ARAVIND, ADV.)

AND :

M/s ABB LTD.,
KHANIJA BHAVAN
RACE COURSE ROAD
2ND FLOOR, EAST WING
BANGALORE-560 001
PAN:AAACA 3834B ...RESPONDENT

(BY SRI T.SURYANARAYANA, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 14.05.2015 PASSED IN ITA NO.1281/BANG/2010, FOR THE ASSESSMENT YEAR 1997-1998 PRAYING TO I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. II. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED

BY THE ITAT, BENGALURU IN ITA NO.1281/BANG/2010 DATED 14.05.2015 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ADDL. COMMISSIONER OF INCOME TAX, LTU, BENGALURU.

THIS APPEAL HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **S. SUJATHA, *J.***, DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 ['Act' for short] challenging the order of the Income Tax Appellate Tribunal, "B" Bench, Bangalore ['Tribunal' for short] dated 14.05.2015 passed in ITA No.1281/Bang/2010 relating to the assessment year 1997-98.

2. The appeal was admitted to consider the following substantial questions of law:

> *"1. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that gain on sale of "technical know-how" was is not capital in nature and it is also not chargeable to tax under Section 45 of the Act when the assessing authority rightly brought to tax as by holding that the consideration received by*

assessee towards sale of technical know-how was capital in nature of goodwill which is liable to be taxed under Section 45 of the Act as capital receipt?

2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in setting aside the addition made by assessing authority with regard to non-competition fee of Rs.30 crores as revenue receipt when the assessing authority has rightly made addition as it satisfies ingredients of income as defined under Section 2(24) of the Act and as such receipt is liable to be taxed?

3. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in deleting the levy of interest under Section 220(2) of the Act by relying on its earlier decisions which have not reached finality and are distinguishable from facts of present case?"

3. The assessee is a company engaged in the business of manufacture and trading of machinery

components of locomotives. Asseseee has filed its return of income for the period under consideration. Assessment order came to be passed under Section 143[3] read with Section 254 of the Act holding that the consideration received by the assessee towards the sale of technical know-how was capital in nature as goodwill liable to be taxed under Section 45 of the Act as capital receipt at the value given by the purchaser in its financials. The Assessing Authority further held that non-competition fee of Rs.30 crores as revenue receipt and the said authority also levied interest under Section 220[2] of the Act.

4. Being aggrieved, assessee preferred an appeal before the Commissioner of Income Tax [Appeals] which came to be dismissed. Assessee preferred further Appeal before the Tribunal. The Tribunal has partly allowed the appeal.

5. Being aggrieved by the order of the Tribunal in allowing the appeal on certain issues, the Revenue has preferred this appeal.

6. Learned counsel for the Revenue submitted that the Assessing Officer has held that goodwill and technical know-how are one and the same whereas the Commissioner of Income Tax [Appeals] has held that no evidence was produced by the assessee to substantiate not just the expense incurred towards the acquisition/improvement/development of technical know-how but even the fact of its very existence; consideration received in the guise of transfer of technical know-how was merely a ruse to avoid tax liability that would clearly arise otherwise. The Tribunal ought to have examined that the gain on sale of technical know-how was capital receipt chargeable to tax under Section 45 of the Act. Learned counsel further argued that the Assessing officer has rightly charged

Rs.53.10 Crores as long term capital gain and brought the entire sum of Rs.33.21 Crores received towards non-competition fee and interest as income from other sources. The Tribunal erred in setting aside the addition made by the Assessing Authority with regard to non-competition fee of Rs.30 Crores as revenue receipt, though the same satisfies the ingredients of income as defined under Section 2[24] of the Act as such the receipt is liable to be taxed. It was further argued that the Hon'ble Tribunal has set aside the interest levied under Section 220[2] of the Act merely placing reliance on the earlier decision of the assessee's case though is distinguishable and the same is perverse and warrants interference.

7. Learned counsel for the assessee submitted that by an agreement dated 28.06.1996, the assessee has agreed to transfer and sell to ABB Daimler Benz Transportation [India] Ltd., the transportation business-

railway equipment business/undertaking for a sale consideration of Rs.53,10,00,000/-. It was agreed that the assessee will not compete with ABB Bahnbeteiligungen GmbH for which it had paid Rs.3,00,00,000/-. The said transfer was with retrospective effect from 01.01.1996. The undertaking was a going concern on an as-is-where-is basis and included all plant, machinery, current assets, industrial and other licenses, all intangible assets, all benefits and obligations of all current and pending contracts, technology for design, manufacture, test, quality assurance and servicing for all railway equipment and parts/components thereof as existing with the assessee, all liabilities relating to the operations and activities of the assessee's transportation business. Thus, it was slump sale. In the first round of litigation, the said contention of slump sale was not accepted by the department up to the Tribunal. Revenue in the first round of litigation has asserted that the said

consideration of Rs.53,10,00,000/- was towards the sale of technical know-how as no cost of the said assets could be determined. Referring to the remand order made by the Tribunal in the first round, it was argued that the Tribunal has observed that if the assessee has treated the cost/expenses relating to the acquisition/improvement/development of intangible non-depreciable assets in the revenue field, the gains arising as a result of sale thereof will have to be necessarily treated in revenue field either under Section 28 or Section 56 and not as capital gains. The provisions of Section 56 read with Section 10[3] are quite apposite. Entire sale consideration not allocable to inventories and non-depreciable assets can also be considered for taxation as a receipt of casual and non-recurring nature under Section 56 of the Act, if the assessee is not in a position to establish that the income accruing to it on account of the impugned transfer is not exempt from tax or is not liable to be taxed under

Section 28. Neither the Assessing Officer nor the Commissioner of Income Tax [Appeals], has recorded any finding of fact in this behalf. The matter was remanded to the Assessing Officer with a direction to verify the aforesaid aspects and to decide the matter after giving a reasonable opportunity of hearing to the assessee. But surprisingly, the tenor of the remand order was given a go-bye by the authorities. The authorities proceeded to hold that the transaction as a sale of goodwill, contrary to their earlier stance taken i.e., technical know-how. Placing reliance on the judgment of the Hon'ble Apex Court in ***CIT V/s. B.C.Srinivasa Setty [(1981) 128 ITR 294 (SC)]*** which dealt with the question whether the capital gain accrue or arise when "Goodwill" of a business is transferred and thereby held that the goodwill is something built up by the carrying on of a business or profession and cannot be by just paying money and such a case does not fall within the charging Section. Technical know-

how and goodwill cannot be equated. Hence, the Tribunal rightly held that the profit on sale of technical know-how cannot be brought to tax as "capital gain" under Section 45 of the Act.

8. Learned counsel submitted that the assessing officer has failed to comply with the directions of the Tribunal. No finding has been given either by the Assessing Authority or the Appellate Authority as to whether the transaction in question falls within the ambit of Section 28[iv] of the Act. It was further submitted that charging interest under Section 220[2] of the Act would amount to charging interest on interest. The Tribunal having meticulously examined all these issues has rightly allowed the appeal filed by the assessee.

9. We have carefully considered the rival submissions of the learned counsel appearing for the parties and perused the material on record.

Re. substantial question of law No.1:

10. Section 2[42C] of the Act was inserted by Finance Act, 1999 with effect from 01.04.2000 which reads thus:

> *""slump sale" means the transfer of one or more undertakings by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales."*

11. The judicial pronouncement on the aspect of slump sale would indicate that the said slump sale would not be taxable neither as business income under Section 41[2] nor under Section 45 of the Act. In the case ***B.C.Srinivasa Setty*** Supra, the Hon'ble Apex Court has held that the charging section and computation section are integrated code and if one fails, other fails. Thus, it was held that the gain from the transfer of a bundle of asset on a slump basis is not

chargeable to capital gain nor under Section 41 of the Act.

12. Section 50B of the Act was inserted with effect from 01.04.2000. Subsequent to decision of ***V.C.Sreenivas Setty*** supra, the Legislature inserted Section 55[2][a] by the Finance Act, 1987 with effect from 01.04.1989 to bring the transfer of goodwill under the tax net. By the Finance Act, 1997 with effect from 01.04.1998, provisions of Section 55][2][a] were amended. Circular No.763 dated 18.02.1998 was issued by the CBDT explaining the provisions of the Finance Act, 1997 wherein it is made clear that cost of acquisition and cost of improvement of certain capital assets of the assessment year 1988-89, relating to the gains arising on the transfer of goodwill were not liable to tax in the wake of the judicial pronouncement by the Hon'ble Apex Court in ***B.C.Srinivasa Setty*** supra.

13. Thus, Section 55[1] and 55[2] of the Act were amended in order to bring extinguishment of such a right to manufacture etc., within the ambit of the capital gains tax. It has been clarified that the cost of acquisition and cost of improvement to be determined in the same manner as for the goodwill. Goodwill is neither equated to trademark nor technical know-how. As could be seen from the original order of the Tribunal after rejecting the claim of the assessee inasmuch as the transaction is a slump sale, has held that if the assessee is treated the cost/expenses relating to acquisition/improvement/development of intangible non-depreciable assets in the revenue field, the gains arising as a result of sale thereof will have to be necessarily treated in the revenue field either under Section 28 or Section 56 and not as capital gains; the provisions of Section 56 read with Section 10[3] are quite apposite. Since there was no findings recorded on this aspect, the matter was restored to the file of the

Assessing Officer. But even after remand, Assessing Officer/Commissioner of Income Tax [Appeals] has not given any finding on this specific direction issued by the Tribunal. In such circumstances, the finding of the Assessing Officer that the transfer of know-how was transfer of goodwill is wholly unsustainable. The Tribunal has assigned reasons for negating the ground of Revenue treating the transaction under consideration as goodwill, in paragraph 24, it is held thus:

> *"24. As already stated at no point of time did the Revenue or the Tribunal in its order doubt the fact that the Assessee in fact transferred "Technical know-how" and that the consideration for such transfer was a sum of Rs.43,17,62,000/- as recorded by the Purchaser in their books of accounts as allocable to transfer of "Technical know-how". The reason why the Revenue wants to treat the payment of Rs.43,17,62,000/- as consideration towards goodwill is because even though "goodwill" is a self-generated asset and therefore its*

costs of acquisition cannot be determined, by reason of amendment to the provisions of Sec.55(2)(a) of the Act by the Finance Act, 1987 w.e.f. 1.4.1989, the cost of acquisition of "Goodwill" is nil and therefore it is possible to compute of capital gain on transfer of goodwill. Such an approach cannot be adopted if the capital asset transferred is "Technical know-how". As we have already noticed the Hon'ble Supreme Court in the case of in CIT v. B. C. Srinivasa Seetty [1981] 128 ITR 294(SC) dealt with the question whether capital gain accrue or arise when "Goodwill" of a business is transferred. The Hon'ble Supreme Court held that section 45 of the Act operates if there is a transfer of a (Assessment Year 2000-01) capital asset giving rise to a profit or gain. The Hon'ble Court held that the expression "capital asset" is defined in section 2(14) to mean "property of any kind held by an assessee" and therefore was of the widest amplitude, and apparently covers all kinds of property and goodwill is not expressly excluded by the

definition. The Hon'ble Court however held that the definitions in section 2 of the Act are subject to an overall restrictive clause viz., "unless the context otherwise requires". The Hon'ble Court therefore went into the question whether contextually section 45, in which the expression "capital asset" is used, excludes goodwill. The Hon'ble Court after referring to Sec.48 which provides the mode of computation of capital gain viz., deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset "the cost of acquisition of the capital asset ", held that the asset contemplated in sec.45 of the Act is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. The Hon'ble Court held that goodwill is something built up by the carrying on of a business or profession and cannot be acquired by just paying money. Therefore there can be no cost of acquisition for goodwill which is a self - generated. The Court held that Sec.45

which is the charging section and Sec.48 which is the computation provision together constitutes an integrated code. When there is a case to which the computation provisions cannot apply at all, such a case was not intended to fall within the charging section. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain."

14. In the case of ***Mangalore Ganesh Beedi Works V/s. Commissioner of Income-tax, Mysore [(2015) 62 taxmann.com 400 (SC)]***, the Hon'ble Apex Court has held that under heading, business expenditure, expenditure incurred by the assessee on acquiring trademark on copy right of know-how, come within the definition of plant and the assessee's claim for depreciation in respect of the same has to be allowed under Section 32 read with Section 43[3] of the Act. A reference has been made to the case of ***M.Ramnath Shenoy [ITA No.258/Bang.1997 dated 10.07.1997]*** and

observed that for the relevant assessment year 1995-96, the Tribunal accepted (after a detailed discussion) the contention of the assessee that trademarks, copy rights and technical know-how alone were comprised in the assets of the business and not goodwill. It was also held that when the Revenue alleges that it is goodwill and not trademark etc., that is transferred, the onus will be on the Revenue to prove it. The Tribunal then examined the question whether the sale of these intangible assets would attract capital gains. The question was answered in the negative and it was held that the assets are self-generated and would not attract the capital gains. The decision of the Tribunal has been accepted by the Revenue and thus the Hon'ble Apex Court held that there was no reason for taking a different conclusion with the said decision. This dictum pronounced by the Hon'ble Apex Court certainly has a bearing on the present set of facts. It cannot be gainsaid that the assets were self-generated and the cost of acquisition of

the said assets was indeterminable. The whole exercise was done by the Revenue merely for the reason that the purchaser in his books of accounts has shown the same as the technical know-how. If such technical know-how could not attract capital gains, in view of ***B.C.Srinivasa Setty*** supra, the Revenue has made an attempt to treat the technical know-how as goodwill in the second round.

15. This reasoning of the Tribunal cannot be faulted with, in the light of the judgment of the Hon'ble Apex Court in ***B.C.Srinivasa Setty*** supra. The gain from transfer of business by implication was not a Revenue receipt chargeable to tax either under Section 28 or under Section 56 or Section 10[3] of the Act. Moreover, the order passed by the Tribunal at the first instance has reached finality. Hence, this substantial question of law has to be answered in favour of the Revenue and against the assessee.

Re. substantial question of law No.2:

16. The main ground of challenge of the Revenue is that no evidence was placed by the assessee relating to the accounting statement, entries made in its books of accounts relating to the transaction in question, copies of relevant ledger/extracts/accounts etc., except producing the agreement dated 28.06.1996 for having transferred the transportation business before the authorities nor before the Tribunal. It is the grievance of the Revenue that the request made for remand was rejected by the Tribunal. In this context, learned counsel for the assessee would submit that the transaction in question was considered as a slump sale of the ongoing concern which was rejected by the authorities as well as the Tribunal in the original proceedings, as such no books of accounts or any other material evidence could be made available before the authorities, even on remand. Any further remand on this point would be a futile exercise. Learned counsel placed

reliance on the judgment of the Hon'ble Apex Court in the case of ***Parimisetti Seetharamamma V/s. Commissioner of Income-tax [(1965) 57 ITR 532 (SC)]***. The Hon'ble Apex Court in ***Parimisetti Seetharamamma*** supra, has observed thus:

> *"In so observing the High Court, in our judgment, has committed an error of law. By ss. 3 & 4 the Act imposes a general ability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing, provision. Where however a receipt is of the nature of income, the burden of proving, that it is not taxable because it falls within in exemption provided by the Act lies upon the assessee. The appellant admitted that she had received jewellery and diverse sums of money from Sita Devi and she claimed that these were gifts made out of love and affection. The case of the appellant was that*

the receipts did not fall within the taxing provision : it was not her case that being income the receipts were exempt from taxation because of a statutory provision. It was, therefore, for the Department to establish that these receipts were chargeable to tax."

17. Since we have held that the technical know-how is not a goodwill, the arguments of the Revenue for remand would not inspire any confidence.

18. The non-computation receipt of Rs.30 Crores was received by the assessee in cash. At this juncture, it would be beneficial to refer to the judgment of the High Court of Bombay in the case of ***Mahindra & Mahindra Ltd., V/s. CIT [261 ITR 501 (Bom)]*** wherein it is held that Section 28[iv] does not apply to benefits in cash or money, referring to the judgment of the Hon'ble High Court of Gujarat in ***CIT V/s. Alchemic Pvt. Ltd., [(1981) 130 ITR 168 (Guj)]***.

19. The non-computation fee was in fact a payment for sharing customer database and sharing of trained employees. The receipt towards the said transfer is not attributable to transfer of any assets or right and the mere fact that the receipt is not attributable to non-compete covenant, it cannot be automatically concluded that the receipt was either from business or income of an activity recurring in nature. ***(M/s. Helios & Matherson Information Technology Ltd.,)***.

20. For the aforesaid reasons, no exception could be found with the finding of the Tribunal. Thus, the substantial question of law No.2 is answered in favour of the assessee and against the Revenue.

Re. substantial question of law No.3

21. Section 220[2] of the Act reads thus:

> *"(2) If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest*

at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid :

Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded :

Provided further that where as a result of an order under sections specified in the first proviso, the amount on which interest was payable under this section had been reduced and subsequently as a result of an order under said sections or section 263, the amount on which interest was payable under this section is increased, the assessee shall be liable to pay

interest under sub-section (2) from the day immediately following the end of the period mentioned in the first notice of demand, referred to in sub-section (1) and ending with the day on which the amount is paid:

Provided also that in respect of any period commencing on or before the 31st day of March, 1989 and ending after that date, such interest shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent for every month or part of a month.

22. Learned counsel for the Revenue would argue that the interest paid on Section 244A granted earlier, has to be considered while computing the interest under Section 220[2] of the Act. The Revenue's stand that charging interest on interest is permissible in terms of the decision of the Hon'ble Apex Court in the case of ***Sandvik Asia Ltd., V/s. Commissioner of Income Tax I, Pune and Others [(2006) 2 SCC 508]*** is wholly misconceived.

23. In ***Sandvik Asia Ltd.,*** supra, the Hon'ble Court was considering the payment of interest by the Revenue, in the context of withholding the amounts unjustifiably. The Hon'ble Court enunciated the principles, assuming that there is no provision in the Act for payment for compensation, compensation for delay is required to be paid. The defence taken by the Revenue for not granting the interest was that the amounts on which interest was claimed were amounts of advance tax and no interest under Section 214 of the Act could be paid on advance tax after the date of the order of the assessment which was rejected by the Hon'ble Apex Court. Thus, it has been held that there is no exception to the principle laid down for an unjustifiable withholding. The said judgment would be of no assistance to the Revenue in the facts of the present case.

24. It is not in dispute that the interest under Section 244A of the Act was paid by the department for the delay caused in giving refund due to the assessee. If the orders under which such refund was made, subsequently if gets reversed, the interest paid to the assessee under Section 244A if to be withdrawn, no fault can be fixed on the assessee for the delay caused in the entire process, thereby seeking for compensatory interest. Claiming interest on the interest paid under Section 244A of the Act not being provided under the Statute, the Tribunal rightly held that the Assessing Officer shall recompute the interest chargeable under Section 220[2] of the Act by reducing only the principal amount of tax from the refund granted earlier and not to charge interest on the interest granted earlier under Section 244A of the Act, the same cannot be held to be unjustifiable. Thus, we find no perversity or illegality in the order of the Tribunal impugned.

25. For the reasons aforesaid, we answer the substantial question of law in favour of the assessee and against the Revenue.

In the result, appeal stands dismissed.

SD/-
JUDGE

SD/-
JUDGE

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