IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 54 OF 2006

The commissioner of Income Tax,
Having office at Aayakar
Bhavan Patto, Plaza,
Panaji, Goa. ..... Appellant

V e r s u s

M/s. Hede Consultancy Company Pvt. Ltd.,
Rua-Ismail Gracias,
Panaji, Goa. ..... Respondent

Ms. Asha Dessai, Advocate for the Appellant.

Mr. Y. V. Nadkarni with Ms. D. Shirgam, Advocate for the Respondent.

Coram :- **NARESH H. PATIL &**
F. M. REIS, JJ.

Date : **23rd October, 2013.**

JUDGMENT *(Per F. M. Reis, J.)*

Heard Ms. Asha Dessai, learned Counsel appearing for the Appellant and Shri Y. V. Nadkarni, learned Counsel appearing for the Respondent.

2. The above Appeal was admitted by this Court on 26.09.2006 on the following substantial question of law :

> "Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the transaction of transferring the shares of the group companies at low price causing long term capital loss and sale of shares of Mackhinon & Mackenzie Co. Ltd., at high price, making short term capital gains,

thereby setting off the short term capital gains against the long term capital loss, is a colourable device to evade tax ?"

3. Briefly, the facts of the case are that the Respondent is a Company engaged in a business of Travel Agency and consultancy. On 02.12.1996, the Respondent filed the return of income declaring a total income of Rs.20,38,500/-. On 19.03.1999, the assessment was reopened under Section 147 of the Income Tax Act, by issuing a notice under Section 148. The Respondent filed a letter requesting that the return of Income filed on 02.12.1996 be considered as the return under Section 148. The assessment was completed by Order dated 30.03.2001 thereby disallowing the claim of the Respondents of long term capital loss of Rs.1,17,87,564/- and, consequently, a sum of Rs.45,99,337/- were brought to tax. The Commissioner of Income Tax in the Appeal preferred by the Respondent, by Order dated 18.10.2002, reversed the assessment Order holding that the transfer of the shares is not a colourable transactions and hence the long term capital loss is required to be set off against the short term capital gains made by sale of shares of Mackhinon & Mackenzie Co. Ltd. The Appeal preferred before the Income Tax Appellate Tribunal, by Order dated 27.01.2006, upheld the Order of the Commissioner of Income Tax holding that both the transactions of transfer of shares of its group companies as well as sale os shares of Mackhinon & Mackenzie Co. Ltd., are genuine transactions. Being aggrieved by the impugned Order dated 27.01.2006, the Appellants have preferred the present Appeal under Section 260A of the Income Tax Act.

4. Mrs. Asha Dessai, learned Counsel appearing for the Appellants, has taken us through the substantial question of law and pointed out that the authorities have misconstrued the transactions entered into by the Respondents and has erroneously come to the conclusion that the transaction was not a colourable transaction. Learned Counsel further pointed out that in Order to set off the short term capital gains against the losses, the shares of the group company were sold at a less price and, as such, it is clear that the transaction is a colourable one. The learned Counsel has further pointed out that transfer of shares at farcical price to the group Company managed by the same persons was made clearly with the sole purpose of evading the tax on the sale of shares of Mackinon & Mackenzie Ltd., and hence the Assessing Officer was justified in applying the ratio laid down by the Apex Court by holding that sale of shares to a sister concern was a colourable transaction to avoid the capital tax in the case of ***Mc Dowell & Co. Ltd. vs. CIT 154 ITR 148 (SC)***. The learned Counsel has taken us through the Judgment of the Commissioner of Income Tax as well as the Income Tax Appellate Tribunal and pointed out that the authorities have erred in holding that the Appellants have failed to establish the whole exercise on the part of the Respondents is a device to avoid capital gain tax. The learned Counsel further pointed out that the Assessing Officer had rightly applied the ratio of ***Mc. Dowell & Co. Ltd.*** (supra) to come to the conclusion that selling of shares at Rs. 0.10 paise per share to the group entities clearly points out that the transaction was made with a sole purpose of evading the taxable capital gains. The learned Counsel has thereafter taken us through the Order of the Commissioner and pointed out that it has been wrongly held therein that the transactions were genuine transactions. Learned Counsel, as such

submits, that the substantial question of law framed by this Court is to be answered in favour of the Appellants/Revenue.

5. On the other hand, Shri Nadkarni, learned Counsel appearing for the Respondents, disputed the said contention. Learned Counsel pointed out that the Appeal was admitted without giving any hearing to the Respondents and, as such, it is open to the Respondents to disclose that the substantial question of law framed by this Court does not arise at all. Learned Counsel further pointed out that there is no challenged to the findings by the Tribunal below to the effect that the two transactions are genuine and the prices of the shares at which they have been sold are not inflated. Learned Counsel further pointed out that once the said findings have not been challenged, the question of this Court coming to any contrary conclusion would not arise, as such, substantial question of law framed by this Court does not arise at all. Learned Counsel further pointed out that there is no material on record to suggest that the transaction was colourable transaction and, as such, the Tribunal was justified to pass the impugned Judgment. In support of his submissions, the learned Counsel has relied upon the Judgments of the Apex Court reported in ***(2011) 1 S.C.C. 673*** in the case of ***Vijay Kumar Talwar vs. Commissioner of Income Tax, Delhi*** and ***(2005) 2 S.C.C. 324*** in the case of ***M. Janardhana Rao vs. Joint Commissioner of Income Tax***. The learned Counsel as such submits that the above Appeal be accordingly dismissed.

6. We have considered the submissions of the learned Counsel and we have also gone through the records. The Commissioner of Income Tax whilst

disposing of the Appeal preferred by the Respondents, by Order dated 18.10.2002, upon appreciating the material on record, has come to the conclusion that the price at which the Respondents had purchased the shares and thereafter has sold the shares, is not in dispute. The learned Commissioner has also noted that the transaction in respect of the sale of shares of Hede Navigation Ltd, resulting in long term capital loss had preceded the transaction involving the short term capital gains selling the shares of Mackinon & Mackenzie Ltd. The Commissioner also noted that the loss transactions therefore cannot be said to have been influenced by the gain transactions. The Commissioner has also noted that the Assessment Officer has not disputed about any of the transactions that have been duly completed under the law nor that the consideration received was not the market price. It is further noted that the shares of Mackinon & Mackenzie Ltd., were sold at the price quoted at the Stock Exchange whereas low price of M/s. Hede Navigation Ltd., shares at the rate of 10 paisa per share stands explained by the fact admitted by the Assessing Officer that the said Company was in red. The Commissioner also noted that even in case the second transaction had not taken place, the long term capital loss would have been accepted by the Assessing Officer and the Company would have been allowed to carry forward the said loss. The learned Commissioner has also noted that where transactions were genuine, such long term capital loss can be allowed to be set off. In the Appeal preferred before the Income Tax Appellate Tribunal, the said findings of facts arrived at by the Commissioner have been upheld and it has been held that the learned CIT (Appeal) has given cogent reasons for coming to the conclusion that both the transactions were genuine and that it is not the case of the Department that the

shares of Hede Navigation Ltd., had a higher price than the price at which it has been sold. In the present Appeal, we find that there is no challenge by the Appellants to the findings of the Tribunal that the transactions were genuine and that the price at which the shares were sold were not inflated. In such circumstances, the contention of Shri Y. V. Nadkarni, learned Counsel appearing for the Respondents, that as the genuineness of the transactions has not been disputed by the Appellants nor have been assailed in the present Appeal, the question of contending that the transactions were colourable transactions has to be accepted. The findings of facts arrived at by the Tribunal cannot be re-assessed by this Court in the present Appeal. The Apex Court in the said Judgment in the case of ***M. Janardhana Rao vs. Joint Commissioner of Income Tax*** (supra) has observed at Paras 10 and 18 thus :

> "10. Some of the provisions of Section 260-A are in pari materia with various sub-sections of Section 100 CPC. The provisions are Sections 260-A(1), 260-A(2)(*c*), 260-A(3), 260-A(4) of the Act corresponding to Sections 100(1), 100(3), 100(4) and 100(5) CPC.
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> ...
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> 15. An appeal under Section 260-A can only be in respect of a "substantial question of law". The expression "substantial question of law" has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In *Sir Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd.*[1] this

> Court laid down the following tests to determine whether a substantial question of law is involved. The tests are: (*1*) whether directly or indirectly it affects substantial rights of the parties, or (*2*) the question is of general public importance, or (*3*) whether it is an open question in the sense that the issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or (*4*) the issue is not free from difficulty, and (*5*) it calls for a discussion for alternative view. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact."

7. In the Judgment in the case of ***Vijay Kumar Talwar vs. Commissioner of Income Tax, Delhi*** (supra), the Apex Court has observed at para 23 thus :

> "23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See *Madan Lal* v. *Gopi*, *Narendra Gopal Vidyarthi* v. *Rajat Vidyarthi*, *Commr. of Customs* v. *Vijay Dasharath Patel*, *Metroark Ltd.* v. *CCE*–and *W.B. Electricity Regulatory*

Commission v. *CESC Ltd.*)"

8. Considering that the findings of facts arrived at by the Tribunal and the CIT(A) are on the basis of material on record and there is nothing brought by the Appellants to disclose any perversity, in such findings, the question of any interference by this Court under Section 260A of the Income Tax Act, would not arise.

9. We would also record the observations of the Apex Court in the Judgment reported in ***(2012) 6 S.C.C. 613***, in the case of ***Vodafone International Holdings BV vs. Union of India & anr.***, wherein it has been observed at Paras 68, 69, 70 and 72 thus :

> "68. The majority judgment in *McDowell* held that: (SCC p. 254, para 45)
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> > "*45*. Tax planning may be legitimate provided it is within the framework of law."
> >
> > In the latter part of para 45, it held that: (SCC pp. 254-55)
> >
> > "*45*. … Colourable devices cannot be [a] part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods."
> >
> > It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para 46 where the majority holds: (*McDowell case*, SCC p. 255)
> >
> > "*46*. On this aspect one of us, Chinnappa Reddy, J., has proposed a separate … opinion with which we agree."

> The words “this aspect” express the majority’s agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority.

69. In the judgment of Reddy, J. in *McDowell* there are repeated references to schemes and devices in contradistinction to “legitimate avoidance of tax liability” (paras 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from *Westminster* and tax avoidance—these are clearly only in the context of artificial and colourable devices.

70. Reading *McDowell*, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between *McDowell* and *Azadi Bachao* or between *McDowell* and *Mathuram Agrawal*·

71. ...

72. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned *separate entity principle* i.e. treat a company as a separate person. The Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle

> of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on stand-alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants that are subject to (personal or corporate) income tax, are generally taxed on profits derived in consideration of their shareholding/ participations, such as capital gains. Nowadays, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers."

10. Taking note of the said observations of the Apex Court, we find that the Tribunal has not committed any error in coming to the conclusion that the transaction arrived at by the Respondents was legitimate within the framework of law. As such, we find considering the findings of facts arrived at by the Authorities below, that there is nothing on record to assume that the transaction was dubious and that the exercise was to avoid tax by a colourable device. The Tribunal found that the transactions were in accordance with law and have been duly implemented. Hence, we find that the substantial question of law framed by this

Court is to be answered against the Appellants.

11. In view of the above, the above Appeal stands dismissed.

NARESH H. PATIL, J.

F. M. REIS, J.

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