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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Date of Decision: 13.07.2012

% W.P.(C) 4163/2012 & C.M. No.8647/2012

GOVT. OF INDIA (DEPTT OF REVENUE) DIRECTOR GENERAL OF INCOME TAX AND ANR ..... Petitioners
Through: Mr. D.R. Jain, Senior Standing Counsel.

versus

M/S ORIENT VEGETAX PRO LTD AND ORS ..... Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J. (Oral)

1. The respondent no.1 company went into financial difficulties and thus approached the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'the said Act'). In the proceedings before the BIFR, a draft rehabilitation scheme was formulated and duly circulated. Undisputedly, the petitioner/income tax department did not file any objections to the draft scheme, by the time it came up for consideration before the BIFR for finalization on 15.10.2007, but were represented through counsel before the BIFR.

2. The proceedings of the BIFR dated 15.10.2007 show that the

income tax department canvassed a proposition that the various concessions sought from the income tax department should be directed to be considered by the department, and should not be granted by the BIFR itself. One of the aspects of concession was the benefit under Section 72A of the Income Tax Act, 1961 from the date of the sanction of the scheme. This plea was opposed by the respondent company. The BIFR accepted the plea of the respondent company that the aspect of relief flowing from Section 72A of the Income Tax Act should be granted by the BIFR itself, and should not be asked to be considered by the department. However, simultaneously, the BIFR directed modification of the other paragraphs of the draft scheme relating to the concession sought from the income tax department, whereby the department was asked to consider the grant of the various concessions.

3. The income tax department, aggrieved with the aforesaid aspect, preferred an appeal before the AAIFR which was dismissed on 23.06.2011, and is now sought to be assailed in the present writ petition under Article 226 of the Constitution of India.

4. We may, at the threshold, note that the writ petition has been filed only on 17.05.2012, after almost 11 months of the passing of the order of the AAIFR. The petition is completely silent on the aspect of the inordinate period of delay in challenging the order of the AAIFR and

the oral explanation for the same, given by the learned counsel for the petitioner, is the routine one, i.e. the time consumed in obtaining of sanctions and permissions from various authorities and the normal lethargy of government departments.

5. Such a plea, in our considered view, cannot be canvassed and accepted in view of the judgment of the Supreme Court in the ***Office of Chief Post Master General & Ors. v. Living Media Ltd. & Anr.,*** *(2012) 3 SCC 563*. Suffice it to say, that the conclusions drawn in the judgment are to the effect that all government bodies, their agencies and instrumentalities must be informed that unless they have reasonable and acceptable explanation for delay and there has been a bona fide effort in approaching the Court, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process.

6. We have, however, considered it appropriate to deal also with the merits of the controversy, as we have heard learned counsel for the petitioner at some length.

7. In order to appreciate the plea of learned counsel for the petitioner, it is appropriate to extract the relevant portion of Section 72A of the Income Tax Act as it existed prior to 01.04.2000, and as it exists now, after amendment since 01.04.2000.

8. Relevant portion of Section 72A of the Income Tax Act, as it stood before 01.04.2000 read:

> ***"72-A. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation****.—(1) Where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company and the Central Government, on the recommendation of the specified authority, is satisfied that the following conditions are fulfilled, namely:—*
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> *(a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses and other relevant factors;*
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> *(b) the amalgamation was in the public interest; and*
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> *(c) such other conditions as the Central Government may, by notification in the Official Gazette, specify, to ensure that the benefit under this section is restricted to amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company, then, the Central Government may make a declaration to that effect, and thereupon, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and the other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.*
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> *.....".*

9. The relevant extract of the provision, as on date, reads as follows:

> ***"72-A. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation***

allowance in amalgamation or demerger, etc.—[2]*[(1) Where there has been an amalgamation of—*

(a) a company owning an industrial undertaking or a ship or a hotel with another company; or

(b) a banking company referred to in clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949) with a specified bank; or

(c) one or more public sector company or companies engaged in the business of operation of aircraft with one or more public sector company or companies engaged in similar business,

then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.]

.....”

10. A comparison of the erstwhile provision of Section 72A with the current Section 72A of the Income Tax Act would show that, whereas, prior to its amendment on 01.04.2000, for the said provision to apply a declaration was required to be made by the Central Government in terms of Section 72A(1) on the recommendation of the specified authority (the expression “specified authority” was defined in Section 72A(5)(b) to mean such authority as the Central Government may, by notification in the official gazette, specify for the purpose of the said Section), after 01.04.2000, the requirement of a declaration being

made by the Central Government on the recommendation of the specified authority, to avail of the benefit of Section 72A has been dispensed with.

11. The effect of the aforesaid amendment is that, while the earlier provision required the satisfaction of the Central Govt. to be declared on the recommendation of the specified authority for availing the benefit conferred by the said provision, that methodology has been done away with and the income tax officer will examine the merits of the case to determine, whether the benefit of Section 72A would be available to the assessee, on the strength of this provision.

12. Section 32(2) of the said Act which has remained on the statute book unamended from the time of enactment of the Act in the year 1985, reads as under:

> *"32. Effect of the Act on other laws*
>
> *(1) ....*
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> *(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company*".

13. A reading of the aforesaid provision shows that in case of

amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act would apply in relation to such amalgamation, with the modification that the power of Central Govt. under that section may be exercised by the Board, without any recommendation by the specified authority referred to in that section.

14. It is the say of the learned counsel for the petitioner that Section 32(2) of the said Act has become redundant and even qua the concession envisaged under the said provision, the BIFR, while framing the sanction scheme, should have only called upon the income tax department to consider whether Section 72A should be made applicable or not.

15. To buttress the said submission, learned counsel for the petitioner seeks to draw strength from the fact that in the budget speech delivered at the time of presentation of the Finance Bill, 1999 on 27.02.1999 by the Hon'ble Finance Minister, it had been stated that the requirement to route the proposal through BIFR is being removed, and this would necessitate Section 32 to be suitably amended for this purpose.

16. We are unable to accept the aforesaid plea. The amendment in Section 32 of the said Act had not been made by the Parliament. The provision continues to dictate that the power of the Central Government under Section 72A of the Income Tax Act shall be

exercised by the Board without the recommendation of the specified authority even though, under the amended Section 72A, no role is ascribed to the Central Government with or without the recommendation of the specified authority.

17. The submission that somehow this aspect has escaped the attention of the Parliament cannot be accepted, as the Court cannot presume that the Parliament would be ignorant of this fact. Even factually this is not correct, as it is the own case advanced by learned counsel for the petitioner that the budget speech of the Hon'ble Finance Minister itself records the necessity for amending Section 32(2) of the said Act. This has not happened for the last 12 years. It would be impermissible to make a statutory provision otiose and some meaning must be given to it, if it continues to exist in the statute book.

18. In our view, the only manner of reading Section 32(2) in the context of the said Act and in the context of amended provision of Section 72A of the Income Tax Act is that the requirement of recommendation by the specified authority and the consequent satisfaction of and declaration by the Central Govt. would not arise, but that in no manner would take away the power of the BIFR to make the direction itself. Thus, it cannot be said that the BIFR fell into an error by directing this concession to be granted itself, rather than requiring the Income Tax Officer to examine this aspect of the concession.

19. The Supreme Court dealt with the aspect of grant of concession under Section 72 of the Income Tax Act in ***Indian Shaving Products Limited Vs. Board of Industrial and Financial Reconstruction and Another,*** *(1996) 1 SCC 683*. In this case, the BIFR while sanctioning the scheme of amalgamation of a sick subsidiary, namely, Sharp Edge Limited with the parent company, namely, Indian Shaving Products Limited declined to make the declaration in terms of Section 72(A) as existed prior to 01.04.2000 in exercise of the power conferred under Section 32(2) of the Act. The said decision was upheld in appeal by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). The matter travelled to the Supreme Court. The Supreme Court referred to its earlier decision in ***Commissioner of Income-Tax, Bombay and Others Vs. Mahindra and Mahindra Ltd. and Others****, (1983) 144 ITR 225 (SC)*. The Supreme Court in ***Mahindra and Mahindra Ltd.*** (supra) observed that the object with which Section 72(A) was introduced in the Act would need to be examined, so as to understand the mischief or situation that was intended to be remedied by its introduction. It was observed that from the Budget Speech of the Finance Minister the notes on clauses of the Finance (2) Bill of 1997, and the memorandum explaining the provisions of the said Bill, it appeared *"that sickness among industrial undertakings was regarded as a mailer of grave national concern inasmuch, as, closure*

of any sizable manufacturing unit in any industry entailed social costs in terms of loss, of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; it was felt that a more effective method would-be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Govt. of uneconomical burden of taking over and ruining sick units but save the Govt. from social costs in terms of loss of production and unemployment. With such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf, Section 72A was introduced in the Act, whereunder, by a deeming fiction, the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company although a successor in interest, would be entitled to carry forward and set off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the

amalgamation was in public interest. The expression "financial non-viability" has not been defined in the Act but the Finance Minister's speech, the Notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in Clause (a) of Sub-section (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant facts."

20. The Supreme Court in ***Indian Shaving Products Limited*** (supra) thereafter observed as under*:*

> *"10. Under Section 72 of the Income Tax Act, to give to the amalgamated company the benefit of the loss or, as the case may be, allowance for depreciation of the amalgamating company for the previous year in which the amalgamation was effected for the purposes of the Income Tax Act, the Central Government must, upon the recommendation of the specified authority, be satisfied that the amalgamating company was not, immediately*

before the amalgamation, financially viable by reason of its liabilities, losses and other relevant factors, and that the amalgamation was in the public interest. By reason of Section 32(2) of the said Act, where there has been under any scheme thereunder an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act shall apply in relation to such amalgamation, subject to this modification that the power of the Central Government is to be exercised by the BIFR without the necessity of a recommendation by the specified authority mentioned in Section 72A of the Income Tax Act. This is because, for the purposes of according sanction to a scheme of amalgamation of a sick industrial undertaking with any other company Under Section 18 of the said Act, the BIFR has to be satisfied that the amalgamating company is not financially viable, which is the effect of Section 3(o) of the said Act, arid that the amalgamation is necessary or expedient in the public interest, which is the effect of Sections 17 and 18 of the said Act read together. ***Sanction of a scheme of amalgamation Under Section 18 of the said Act necessarily implies that the requirements of Section 72A of the Income Tax Act have been met and the BIFR must exercise the power conferred upon it by Section 32(2) of the said Act and make the declaration contemplated by Section 72A of the Income Tax Act.***

11. The conditions for sanctioning a scheme Under Section 18 of the said Act being the same as those required for a declaration Under Section 72A of the Income Tax Act, the BIFR could not have sanctioned the scheme of amalgamation of Sharp Edge with the appellant but declined to make the declaration Under Section 72A of the Income Tax Act with regard to that amalgamation." (Emphasis supplied)

21. In our view the aforesaid decision supports our conclusion that the BIFR was justified in directing, in paragraph 13 of its order/proceedings of 15.11.2007, the incorporation of a clause in the scheme as per which the company would get the benefit of Section

72A of the Income Tax Act from the date of the sanction of the scheme.

22. We have examined the order passed by the AAIFR and the reasoning contained therein in paragraph 7 onwards in support of the view taken by it, and we find ourselves in agreement with the same.

23. The writ petition is, accordingly, dismissed.

SANJAY KISHAN KAUL, J

VIPIN SANGHI, J

JULY 13, 2012
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