आयकर अपीलीय अधिकरण, मुंबई " के" खंडपीठ

Income-tax Appellate Tribunal -"K"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, संदीप गोसांई, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Sandeep Gosain,Judicial Member

आयकर अपील सं./I.T.A./6107/Mum/2016,निर्धारण वर्ष /Assessment Year: 2011-12

Supermax Personal Care Private Limited Mumbai-Agra Road, Naupada PO, Wagle Indutrial Estate, Thane-400 604 **PAN:AAOCS 7144 Q**	Vs.	ACIT-(LTU)-1 Centre No.1, World Trade Centre Cuff Parade, Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Samuel Darse-CIT-DR

Assessee by: Shri Nitesh Joshi

सुनवाई की तारीख **/ Date of Hearing: 22/03/2018**

घोषणा की तारीख **/ Date of Pronouncement:01/06/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार -PER RAJENDRA, AM-

Challenging the order,dated 30/09/2016 CIT(A)- Mumbai-I the assessee has filed the present appeal.Assessee-Company,engaged in the business of manufacturing and selling of shaving products and systems,filed its original return of income on 30/11/2011 declaring total Loss at Rs.19.78 crores.The Assessing Officer (AO)completed assessment u/s. 143 (3) r.w.s. 92CA of the Act on 31/03/2016 determining income of the assessee at Rs.32,68,71,48,000/-.

2.The assessee has raised two effective grounds of appeal.First one is about validity of the proceedins,whereas in the second ground merits of the order of the First Appellate Authority (FAA)has been challenged.

2.1. During the assessment proceedings,the AO found that,the assessee had entered into the two Business Transfer Agreement (BTA),on 30/12/2010,with RCC Sales Pvt. Ltd. (RCC)and Vidyut Metallics Pvt.Ltd.(VMPL)for acquisition of business operations of said companies on a slump sale basis for a consideration of Rs.27.30 crores and Rs. 110.50 crores respectively, that on 30/03/2011,it issued 37,600 fresh equity shares @ 39,500/- per share of Rs.10/-each to Super Max Singapore Pte Limited(SSPL),the 99.99% shareholder of the assessee.Thus, there was infusion of share capital of Rs.148,52,00,000/-during the year under consideration. He further observed that M/s. Actis Consumer Grooming Products Ltd., Mauritius(Actis) subscribed to 29.17% shares of Super Max Offshore Holdings (SMOH), Cayman Islands for Rs.1002.50 crores,that remaining 70.83% stake was transferred to M/s.Super Max Mauritius, that sale of stock to M/s.Actis was to be taken as basis of valuing the stake of remaining 70.83% shares.

In light of the above discussion,he held that the assessee had transferred the stake outside India to M/s.Super Max, Singapore at 148.52 crores, that the actual value of transfer of shares was Rs.3437.02 crores,that an amount of Rs.3288.50 crores was not offered for taxation , that Explanation-2to section 2(47)of the Act was applicable to the facts under consideration. He also referred to the provisions of section 9 and proposed addition of Rs.3288.50 croers to the income of the assessee.In response to show-cause notice issued by him for proposed addition, the assessee filed reply on 17/03/16.After considering the same,he held that the restructuring has been carried out with a clear motive of evasion of capital gains tax, that the assessee company had transferred the stake outside India to Singapore entity,that the period between slump sale and the transfer of ownership by giving away direct transfer to M/s. Super Max, Singapore and indirect transfer to Actis was less than one year, that the stake sale was to be taxed as short term capital gains in the hands of the assessee .

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority (FAA) and made detailed submissions.After considering the available material,he held that the assessee had submitted that provisions of section 9(1) were not applicable, that the Explanatory Memorandum to Finance Bill 2012 left no doubt that section 9 itself was a charging section. He referred to letter dated 29/5/12 issued by the CBDT (F.No.500/111/2009-FTD-1(PT) and held that the disputed amount was taxable in India in the hands of the assessee. He further observed that capital asset, as mentioned in the provisions of section 9,would include shares as well as interests (stake) in a company or entity registered or incorporated outside India.If the stake derived its value,directly or indirectly,substantially from the assets located in India, that the AO had clearly mentioned that assessee had transferred its stake,that it had transferred interest in itself to Singapore entity and made indirect transfer to Actis,that the transaction was covered by Explanation 5 to section 9, that Group companies located outside India were having interest in assessee company directly or indirectly that they were merely investment holding companies and that they existed merely on paper, that the transfer of interest by the assessee in itself derived its value from the business /assets located in India, that the transfer of interest by the assessee was held as income deemed to accrue or arise in India, that the AO had made addition on the basis of transfer of stake(interest).He observed that the assessee had co-operated with the AO and had not provided necessary information about its non-resident AE.s, that the AO had to take help of FTD of the CBDT.He referred to the case of Sumati Dayal(214ITR801)and held

that preponderance of probability was looked into.He also referred to the case of Killick Nixon Ltd.(208taxmann45).

4.Before us,the Authorised Representative(AR)argued that there had been no change in shareholding of assessee till date,that prior to the infusion of capital by the parent company, SSPL,was the 99.99% shareholder,that post the infusion SSPL continued to be 99.99% share -holder of assessee,that during the transfer pricing(TP)proceedings,the Transfer Pricing Officer(TPO), after enquiring into the arm's length pricing of the 37,600 shares issued, agreed with the submissions made by the assessee and made no adjustments with respect thereto , that it was not explained as to how the AO made the assertion that STCG had occurred to the assessee,that it had not transferred any capital asset,that it had only acquired the business of VMPL and RCC vide BTA.s dated 30/12/2011,based on valuation reports issued by an independent Chartered Accountancy Firm,that the genuineness of the valuation had not been challenged,that for funding the acquisition,SSPL infused capital of approximately Rs. 148.52 crores by way of subscription to 37,600 shares in the assessee,that the valuation of shares had been subject to the audit by the TPO and that the same had been accepted as being at arm's length,that it had neither issued any shares to Actis nor had any other dealings with Actis,that the assessee had not received any monies from Actis,that it had not transferred any assets during the captioned year-barring the sale of certain vehicles,that it had not received any consideration towards issue of shares other than Rs.48.52 crores paid by SSPL,that the departmental authorities were not justified in arriving at the conclusion that the assessee had transferred stake/ interest in itself outside India to SSPL,that the provisions of section 9 were not applicable to the facts of the case,that reliance placed by the AO on the same and upheld by the FAA was without any basis and hence bad in law,that the assessee had merely issued further shares to its parent company,that consideration received from issuance of shares was a capital receipt and hence not liable to tax.,that SMOH had merely issued fresh shares to Actis,that SMOH was the ultimate share holder of M/s. Super Max group of the companies, that it was investment holding company for the group companies encompassing number of operating companies outside India apart from the assessee,that the amount of Rs.1002 crores from Actis was received by SMOH and not by the assessee, that in the affidavit dtd. 26/7/16 filed with the Hon'ble Bombay High Court in Writ Petition No.1641 of 2016 the AO had mentioned that the Malhotra-Family-Directors were the real beneficiaries,that while complet -ing the assessment the AO had held that the assessee had transferred the stake in itself outside India to SSPL,that the addition was made by placing reliance on certain un-

substantiated assumptions,incorrect facts and conjectures,that SMOH had merely issued fresh shares to Actis,that there was no transfer,that the assessee was not a party to the transaction entered into by Actis and SMOH.He further stated that even if there was a transfer of shares / interest to Actis by SMOH,such a transfer could not result in alleged gains in the hands of the assessee for being taxed in India,that the assessee was not even a party to the transaction,that several commercial considerations were the cause of creating various entities outside India, that global structure was not created merely to hold business interest in the assessee company.

The Departmental Representative(DR)relied upon the order of the FAA.While filing written submission,he has made elaborate arguments about validity of the assessment proceedings. But,on merits he has referred to the orders of the AO and the FAA.

5.We have heard the rival submissions and perused the material before us.

5.1. Undisputed facts of the case are that:

i.the assessee is a corporate entity,
ii.during the year under appeal the assessee purchased businesses of RCC and VMPL on slump sale basis for Rs.27.30 crores and Rs.110.50crores.
iii.SSPL,was issued shares by the assessee @39,500/- per share of Rs.10/-each and it received Rs. 148.52 crores from the Singapore entity during the year under appeal.
iv.valuation of the RCC and VMPL and the valuation of the share issued by the assessee to SSPL has not been questioned by the departmental authorities
v.that one of the holding companies,i.e. SOHM (fifth degree company)located outside India, issued 29.17% shares to Actis for Rs.1002 crores .
vi.the AO determined the tax liability of the assessee under the head 'income from short term capital gains' and the FAA confirmed his order.

5.1. Before proceeding futher,we would like to consider the historical back ground of capital gains tax.Certain important amendments were effected in the Income-tax Act by Act XXII of 1947.A new definition of 'Capital Asset'was inserted as Section 2(4A) and capital asset was defined as'property of any kind held by an assessee,whether or not connected with his business, profession or vocation',and the definition then excluded certain properties mention -ed in that clause.The definition of 'Income'was also expanded, and word income was defined so as to include 'any capital gain chargeable according to the provisions of Section 12B'.Section 6 of the Income-tax Act was also amended by including therein an additional

head of income, and that additional head was Capital Gains'.Resultanly,Section 12B came in to exitence,which specifically dealt with capital gains.Section provided that the tax shall be payable by an assessee under the head 'capital gains'in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31/03/ 1946, and that such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place.There were several provisos to section.Sub-section (2) of Section 12B provided that the amount of a capital gain shall be computed after making certain deductions from the full value of the consideration for which the sale,exchange or transfer of the capital asset is made;and one of the important deductions is the actual cost to the assessee of the capital asset.Looking to these provisions,it can be said that what the Legislature taxed was the capital value of certain assets, the capital value being computed in a particular manner.In other words,all assets were not taxed, but only those assets which were either sold, transferred or exchanged.On the sale, exchange or transfer of a capital asset, the capital asset was represented by the sale proceeds or what the capital asset realised. The Legislature did not intend to tax the full value of the capital asset as represented by the sale proceeds,but permitted the assessee to deduct from the sale proceeds the actual cost to him of that capital asset.Therefore, there was no tax on capital value in respect of all assets of an assessee; nor was the tax on the full value of the capital asset.The tax was conditioned by the capital asset being sold,exchanged or transferred; and it was further conditioned by certain deductions which were permissible to the assessee, the most important of them being the cost of the capital asset to him.In the year 1956,some changes were made to capital gains tax.In the present Act,capital gains tax find place in sections 45 to 55 and word transfer is part of section 2 (47).In short,section 12B was been bifurcated and has been suitably amended.

5.2. We can safely say that the incidence of levy u/s.45 of the Act is on the capital gains to be computed in the manner provided for in section 48 r.w.s.55(2) of the Act.The deduction permissible u/s.48 is the cost of acquisition of the capital asset transferred for consideration, whether or not it was a capital asset on the date of its acquisition.What is taxable u/s.45 are the "profits or gains arising from the transfer of a capital asset" and the charge of income-tax on the capital gains is on income of the previous year in which the transfer takes place.The only condition which must be satisfied in order to attract the charge to tax u/s.45 is that the property transferred must be a capital asset on the date of transfer.

In the matter of Chunnilal Prabhudas & Co.,the Hon'ble Calcutta High Court (76 ITR 566), had observed as under:

> *In order to be taxable capital gain within the meaning of section 12B of the Income-tax Act, there has to be: (1) profit or gain, (2) capital asset, (3) the profit or gain must arise out of transfer, and (4) "sale, exchange and relinquishment or transfer".*

The basic principle,enumerated in the above matter,is applicable as it is,even today.In the case of Baroda Cement and Chemicals Ltd.,(158 ITR 636)the Hon'ble Gujarat High Court had held that the two basic requirements for charging capital gains were (i) there must be a transfer of a capital asset;(ii) profit or gains must have arisen from the transfer after making deductions as provided by section 48 of the Act.The Hon'ble Gujarat High Court,in the matter of Mohanbhai Pamabhai(91 ITR 393)has observed that section 2(47)defines transfers in relation to a capital asset,that the transfer of a capital asset in order to attract capital gains tax must be one as a result of which consideration would be received by the assessee or would accrue to the assessee.Here,we would also like to reproduce the relevant part of the judgment of the Hon'ble Madras High Court delivered in the case of Cadd Centre (383 ITR 258)and it reads as under:

> "*In order to bring a transaction under the ambit of capital gains, it is a must that the receipt or accrual must have originated in a "transfer" within the meaning of section 45(1) read with section 2(47) of the Act. The transfer presumes the existence of both the asset and the transferee, to whom, it is transferred……."*

Considering the undisputed facts of the case,enumerated at paragraph 5.1 of our order,we are of the opinion that the endeavor of the departmental officers to tax the transaction in question as capital gains was not supported by the any legal base.First and foremost there was no transfer of capital asset,which is the basis for invoking the provisions of section 45 of the Act, in the case under consideration.The AO and FAA have tried to build a house without laying down foundation.Without the existence of capital assets they have tried to tax capital gain. They have nowhere mentioned as to which capital asset was transferred by the assessee, during the year under consideration.Secondly,it is also not known as to whom the assets were transferred.As per the balance sheet of the assessee it had sold some vehicles during the year and no other asset was sold.If no asset other than vehicles was sold,then how the capital gain would arise about shares,is beyond our comprehension.

In spite of reading the orders of the AO and FAA many a times carefully,we are not clear as to how the acquisition of shares of SOHM by Actis can be used for determining the alleged taxability of the assessee under the head short term capital gains.Both the entitiesi.e.Actis and SOHM are not located in India.They are fifth generation holding companies and any transaction between them cannot be imported to tax alleged capital gains of the assessee.As stated earlier,the assessee had acquired businesses two Indian entities,namely,RCC and VMPL.By linking purchasing of shares of SOHM by Actis with the shares issued by the

assessee to the Singapore entity, the AO and FAA have taxed the alleged capital gains.But, the basic fact of transfer of capital asset/(s)by the assessee to a transferee was never proved.

5.3. We find that the FAA has mentioned in his order that the assessee had transferred the Interest/(stake)in itself outside India to SSPL.We find that the concept of 'creating of interest in any assets in any manner' and transferring'interest/stake'was not part of the word 'transfer' for the year under consideration and nor it was applicable to that year.First we are reproducing the Section 45 and then provisions of section 2(47) of the Act,as applicable for the year under appeal,would be re-produced:

"Section 45.

(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA. 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

xxx
xxx
xxx"

Section 2(47)

"transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset ; or
(ii) the extinguishment of any rights therein ; or
(iii) the compulsory acquisition thereof under any law ; or
(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
(iva) the maturity or redemption of a zero coupon bond ; or
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property :
Explanation For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.
(48) "zero coupon bond" means a bond-
(a) issued by any infrastructure capital company or infrastructure capital fund or public sector company or scheduled bank on or after the 1st day of June, 2005 ;
(b) in respect of which no payment and benefit is received or receivable before maturity or redemption from infrastructure capital company or infrastructure capital fund or public sector company or scheduled bank ; and
(c) which the Central Government may, by notification in the Official Gazette, specify in this behalf.
Explanation For the purposes of this clause, the expression "scheduled bank" shall have the meaning assigned to it in clause (ii) of the Explanation to sub-clause (c) of clause (viia) of sub-section (1) of section 36."

Explanation 2 to section 2(47)was introduced in the year 2013,whereby the concept of 'creating of interest in any assets in any manner',relied upon by the FAA,was introduced. Explanation 2 reads as under:

"For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally,

voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India ;

Clearly,the FAA has applied the provision that was not part of the statute at the time when the transaction took place.

5.4. As far applicability of Explanation 5 of the section 9 is concerned,it is sufficient to state that the explanation covers the non residents and not a resident entity.There is no doubt that the assessee is a resident company.

5.5. We find that the FAA has observed that the AO had held that a multi layered holding structure was deliberately created to avoid taxes in India and to conceal the information about the ultimate beneficiaries.Having AE.s outside India in itself cannot be held against an assessee.Because of advancement of technology,the globe has become a villge.So,the nature of business has changed a lot.In our humble opinion,assessees are free to decide the manner in which they want to run their businesses.It is said that a citizen is perfectly entitled to exercise his ingenuity so to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee,the Court must give effect to the letter of the taxation law rather than strain that letter against the assessee.The Hon'ble Supreme Court in Azadi Bachao Andolan (263 ITR 706) has observed as under:

"It is open for assessees to arrange their affairs in such a manner that it would not attract the tax liabilities, so far as it can be managed within the permissible limit of the law. Tax management is permissible, if the law authorises so".

In the affidavit filed before the Hon'ble Bombay High court theAO had stated that Malhotra family members were the real beneficiaries. If someone else was the real beneficiary then the he should not have taxed the income in the hands of the assessee.As far as non cooperation of the assessee in providing necessary information is concerned,we would like to mention that for not extending cooperation the assessee should be dealt with relevant provisions of the Act.But,for that tax liability cannot be fastened to it without establishing the basic fact of existence and transfer of capital asset.

Finally,we would also like to state that we agree with the proposition submitted by the assessee that money received by an assessee for issuing shares has to treated a capital receipt and cannot be brought to tax.

Considering the above,we reverse the order of the FAA and decide second effective ground in favour of the assessee.As we have decided the issue on merit,so,we are not adjudicating the issue of validity of assessment i.e.first effective ground of appeal.

As a result, appeal filed by the assessee stands allowed.
फलतःनिर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 1st June, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 1 जून, 2018 को की गई।

Sd/-	Sd/-
(**संदीप गोसांई / Sandeep Gosain**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 01.06.2018.
Jv.Sr.PS.
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.assessee /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**