

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S.SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.71/Mds/2015
निर्धारण वर्ष /Assessment Year: 2003-04

M/s.Sundaram Finance Ltd.,
21 Patullos Road,
Chennai-600 002.

Vs. The Asst. Commissioner of
Income Tax, Large Taxpayer
Unit, Chennai-600 101.

[PAN: AAACS 4944 A]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.284/Mds/2015
निर्धारण वर्ष /Assessment Year: 2003-04

The Asst. Commissioner of Income
Tax, Large Taxpayer Unit,
Chennai-600 101.

Vs. M/s.Sundaram Finance Ltd.,
21 Patullos Road,
Chennai-600 002.

[PAN: AAACS 4944 A]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mr.R.Vijayaraghavan, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.B.Koteswara Rao, CIT

सुनवाई की तारीख/Date of Hearing

: 21.02.2017

घोषणा की तारीख /Date of Pronouncement

: 31.03.2017

आदेश / ORDER

PER D.S.SUNDER SINGH, ACCOUNTANT MEMBER:

These are the cross appeals filed by the assessee as well as Revenue against the order dated 14.11.2014 of Commissioner of Income Tax (Appeals), Chennai, in ITA No.8/13-14/LTU(A) for the AY 2003-04. The appeals are heard together and disposed off in a common order for the sake of convenience.

2.0 ITA No.71/Mds/2015

The assessee raised the following grounds in it's appeal:

1. *The Order of the Commissioner of Income Tax (Appeals) is contrary to law, weight of evidence and probabilities of the case.*
2. *The Commissioner of Income Tax (Appeals) erred in including a sum of Rs.25,54,35,808/- being the capital reserve arising on amalgamation of wholly owned subsidiary company in the taxable income.*
 - 2.1 *The Commissioner of Income Tax (Appeals) ought to have appreciated the fact that transaction in the capital field will not attract provisions of section 28(iv). In fact, the transfer of assets in amalgamation of companies would be chargeable under the head Capital Gains but specifically exempted in respect of transfer of assets between the holding and subsidiary companies. Hence, it is not chargeable under the head of Profits and Gains from Business or Profession.*
 - 2.2 *The Commissioner of Income Tax (Appeals) has failed to consider that section 28 of the Act would be applicable only to Revenue transactions carried out by the Appellant in the normal course of its business and any profit or benefit arising out of such business alone shall be taxed under the section. 28(iv) of the Act and not capital transactions like amalgamation which is not the business of the appellant.*
 - 2.3 *The Commissioner of Income Tax (Appeals) ought to have appreciated the fact that the Appellant Company was already the 100% owner of the surplus of the assets over the liabilities of the subsidiary company and value of shares in the subsidiary reflects this surplus. Thus, when the shares of the subsidiary, on amalgamation, replaced by assets and liabilities of the subsidiary company, there is no fresh benefit or amenity accruing to the company to warrant taxability under section 28(iv).*
3. *For the reasons stated above and those that may be adduced at the time of hearing, the Hon'ble Tribunal may be pleased to allow the appeal of the Appellant and grant such relief / reliefs/ considering the facts and circumstances of the case.*

3.0 All the grounds of the appeal of the assessee are related to the addition of Rs.25,54,35,808/- being capital reserve arising on amalgamation of wholly owned subsidiary company. During the assessment proceedings, the AO found from the Schedule-17 of Notes on Accounts that Sundaram Auto Finance Ltd., a joint venture company promoted by the assessee company amalgamated with the assessee company under the "purchase method" as prescribed by accounting standard. The scheme of amalgamation has been given effect to in the accounts and accordingly, the assets and liabilities of the amalgamating company were transferred to and vested with the company w.e.f. 1.4.2002. The excess of assets over liabilities on account of amalgamation of M/s.Sundaram Auto Finance Ltd., to the tune of Rs.2554.235 lakhs was transferred to the capital reserve. The AO was of the view that the amount of excess of assets over liabilities are in the nature of benefit or perquisite arising from business or the excess of profession and required to be taxed u/s 28(iv) of Income tax act. Hence, the AO sought the objections of the assessee and the assessee company submitted their objection stating that it had acquired 51% shareholding held by Fidis S p A, the joint venture partner in Fiat Sundaram Auto Finance Ltd (FISAF) and FISAF became a wholly, owned subsidiary of the company. Subsequent to the acquisition, the name of FISAF, was changed to Sundaram Auto Finance Limited. It was merged with the company with effect from 1.4.2002 in accordance with the order of the Madras High Court. Thus, the assessee company was already the 100% owner of the surplus of the assets over liability of

the subsidiary company and value of the shares in the subsidiary reflects this surplus. Thus, when the shares of subsidiary, on amalgamation, replaced by assets and liabilities of the subsidiary company there is no fresh benefit or amenity accruing to the company. The assessee further submitted before the AO that the transfer of assets in amalgamation of companies would be chargeable under the head "Capital gains" but specifically exempted in respect of transfer of assets between Holding and Subsidiary Companies. Hence, it is not chargeable under the head 'Profits and gains of business'. Section 28(iv) of the Income Tax Act would be applicable to Revenue transactions carried by an assessee in the normal course of the business and any profit or benefit arising out of such business alone shall be taxed under the sub-section 28(iv) of the Income Tax Act. Further transaction in the capital field will not attract provisions of S.28(iv). Hence, S.28(iv) of the Income Tax Act would not be applicable. Not being impressed by the explanation of the assessee company the AO brought to tax the capital reserve u/s. 28(iv) of IT Act.

4.0 Aggrieved by the order of the Assessing Officer (in short 'AO'), the assessee went on appeal before the Learned Commissioner of Income Tax(Appeals) (in short 'Ld.CIT(A)') and the Ld.CIT(A) confirmed the addition made by the AO as per paragraphs No.4.2 of the Ld.CIT(A) order which is extracted as under:

4.2 I have carefully considered the facts of the case and submission of the Ld.AR. I have also gone through the decisions relied on by the Ld.AR. The argument of the Ld.AR of the appellant is that the appellant was already having 100% ownership on Sundaram Auto Finance Ltd., the subsidiary company, before its merger into the appellant company. Therefore, taking over of surplus of assets over liabilities of the subsidiary company into its

reserves after amalgamation of its subsidiary company, has not resulted in any fresh amenity or benefit to the appellant company. Secondly, the amount in the form of surplus of asset over liabilities of the subsidiary company were of capital in nature, therefore, cannot be disallowed u/s.28. I do not agree with the argument of the Ld.AR. After the amalgamation, the existence of the amalgamating company will be non est. All the assets and liabilities of the amalgamating company will be taken away by the amalgamated company and will form part of its own assets and liabilities When there is an excess of assets over liabilities, as in the present case, undisputedly will become the assets of the amalgamated company and the benefit does arises to the amalgamated company i.e., the appellant company in the light of s.28(iv). Therefore, such benefit should suffer tax in the hands of the amalgamated company. The decisions taken by the AO is proper. The decisions relied on by the appellant in this regard are distinguishable on facts. The ground is dismissed.

5.0 Aggrieved by the order of the Ld.CIT(A), the assessee filed appeal before this Tribunal.

Appearing for the assessee, the Learned Authorized Representative (in short 'Ld.AR') argued that Fiat Sundaram Auto Finance Limited was joint venture between the assessee and (49%) Fidis S p A, Italy (51%) share holding and later on, the assessee had acquired the 51% of share holding of Fidis and became the wholly owned subsidiary company of the assessee. Subsequent to the acquisition, the name of the FISAF was changed to Sundaram Auto Finance Ltd., and merged with the company on 01.04.2002, in accordance with the order of the Hon'ble Madras High Court. The Ld.AR further argued that the assessee is already 100% owner of the surplus of the assets over the liabilities of the subsidiary company and the values of the shares in the subsidiary company reflects in the assessee company. Thus, when the shares of subsidiary company on amalgamation replaced by assets and liabilities of subsidiary company, there is no fresh annuity or benefit acquired to the company. The assessee further argued that the transfer of assets on amalgamation of companies would be chargeable under the head capital gains but

specifically exempted in respect of assets between the holding company and subsidiary company. The AO has made addition u/s.28(iv) which would be applicable only to Revenue transactions carried on by the assessee in the normal course of business but not for amalgamation of the assets. On the other hand, the Ld.DR relied on the orders of the lower authorities.

6.0 We heard the rival submissions and perused the material placed on record.

M/s.Sundaram Auto Finance Ltd., was 100% owned subsidiary company of the assessee and the subsidiary company was amalgamated with the assessee company. On amalgamation, there was a surplus representing capital reserve which was taxed by the AO u/s.28(iv) of Income Tax Act. The AO was of the view that the amalgamation resulted in a benefit in the form of surplus of assets over liability of the subsidiary company. As rightly stated by the Ld.AR, the surplus in amalgamation attracts capital gains tax, but the capital gains are specifically exempted by Sec.47 of Income Tax Act. Sec.28(iv) applies to the business profits arising out of normal business transactions. In the case of the assessee, the subsidiary company was amalgamated with the assessee company and there was no business transaction in the amalgamation. Hence, Sec.28(iv) has no application in the assessee's case. The assessee relied on the decision of the Hon'ble jurisdictional High Court in the case of CIT

v. Stads Ltd. (2015) 373 ITR 313 (Mad) dated 11.03.2015. The Hon'ble jurisdictional High Court in the case law cited (supra) held as under:

9. The short point that arises for consideration in this appeal is whether the amalgamation reserve consequent to the merger of four companies would fall within the ambit of profits and gains of business or profession, more particularly under section 28(iv) of the Income-tax Act.

10. Since the issue revolves around section 28(iv) of the Income-tax Act, it is necessary to extract the same herein for better clarity.

"28. Profits and gains of business or profession.—The following income shall be chargeable to income-tax under the head 'Profits and gains of business or profession',—

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession ;"

11. A plain reading of the above said provision makes it clear that the amount reflected in the balance-sheet of the assessee under the head "reserves and surplus" cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post-amalgamation was the amalgamation reserve and it could not be said that it is out of normal transaction of the business. The present transaction is capital in nature arose on account of amalgamation of four companies. Hence, we have no hesitation to hold that the manner in which the Revenue wants to treat this amount is not in consonance with section 28(iv) of the Income-tax Act.

12. In the result, the order of the Tribunal stands confirmed and this tax case (appeal) stands dismissed. No costs.

The case of the assessee squarely covered by the decision of the Hon'ble jurisdictional High Court (supra).

Respectfully following the decision of the Hon'ble jurisdictional High Court, we hold that the surplus on amalgamation is not taxable u/s.28(iv) of Income Tax Act and we set-aside the order of the lower authorities and allow the appeal of the assessee.

7.0 ITA No.284/Mds/2015 (Revenue's appeal)

The Department appeal is relating to indexation benefit on capital gains u/s.48 of Income Tax Act. During the previous year relevant to the Assessment Year, the assessee has sold the government securities and claimed indexation benefit on sale of government securities which resulted

in loss of Rs.3,16,61,933/-. The AO disallowed the indexation benefit claimed by the assessee as per 3rd proviso of Sec.48 of Income Tax Act holding that on sale of government securities, indexation benefit is not allowed. On appeal to the Ld.CIT(A), the Ld.CIT(A) allowed the appeal of the assessee.

8.0 Aggrieved by the Ld.CIT(A)'s Order, the Revenue has filed an appeal before us.

During the appeal, appearing for the Revenue, the Learned Departmental Representative (in short 'Ld.DR') argued that the government securities are covered by third provision to Sec.48 of income tax act and as per the proviso the indexation benefit is not allowable to the assessee. On the other hand, the Ld.AR argued that government securities are capital assets and 3rd proviso to Sec.48 does not specifically include the government securities for indexation benefit. Therefore, the Ld.AR contended that the assessee is entitled for indexation benefit.

9.0 We heard the rival submissions and perused the material placed on record.

The Ld.CIT(A) deleted the addition placing reliance on Explanation-2 to Sec.2(42A) r/w Securities Contracts Regulation Act, 1956. For ready reference, we produce the relevant paragraphs of the Ld.CIT(A) order which is made available in Para No.5.2 as under:

I have carefully considered the facts of the case and submissions of the Ld.AR. The appellant has made certain investments in government securities. The AO has denied

indexation benefit on sale of such government securities holding that the investment in government securities are in the form of bonds and debentures and the indexation benefit is not available for such bonds and debentures as per the third proviso to s.48 of I.T.Act. The AO interpreted that the term bonds used in third proviso to s.48 not only includes bonds of corporate but also that of government. The Ld.AR on the other hand brought to my notice the definition of "security" mentioned at Explanation-2 to s.2(42A). As per this explanation "the expression 'security' shall have the meaning assigned to it in clause (h) of s.2 of the Securities Contract (Regulation) Act, 1956".

In clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956, "securities" is defined so as to include,

- (I) shares, scrips, stock, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;*
- (II) Government Securities;*
 - (iia) such other instruments as may be declared by the Central Government to be securities; and*
 - (iii) rights or interest in securities.*

Section 2(f) of the Government Securities Act, 2006 defines "Government Security" as under:

"Government Security" means a security created and issued by the Government for the purpose of raising a public loan or for any other purpose as may be notified by the Government in the Official Gazette and having one of the forms mentioned in section 3.

5.2.1 In view of the above facts, I am of the opinion that "bonds and debentures" are distinguishable from "Government Securities". Therefore, even though indexation benefit is not available to bonds and debentures it is available to Government Securities as per the third proviso to s.48 of the IT.Act. Therefore, I direct the AO to allow indexation benefit on the Government Securities in which the appellants have made the investments, while working out capital gains on sale of such securities. The ground is allowed.

10.0 The capital asset is defined u/s.2(14) of Income Tax Act as under:

14) ⁴⁹[*"capital asset"*⁵⁰ means—

- (a) property⁵⁰ of any kind held by an assessee, whether or not connected with his business or profession;*
- (b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992),*

but does not include—

- (i) any stock-in-trade [other than the securities referred to in sub-clause (b)], consumable stores or raw materials held for the purposes of his business or profession ;*
- ⁵¹[*(ii) personal effects⁵², that is to say, movable property (including wearing apparel and furniture) held⁵² for personal use⁵² by the assessee or any member of his family dependent on him, but excludes—*
 - (a) jewellery;*
 - (b) archaeological collections;*
 - (c) drawings;*
 - (d) paintings;*
 - (e) sculptures; or*
 - (f) any work of art.*

⁵³[*Explanation 1*].—*For the purposes of this sub-clause, "jewellery" includes—*

- (a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;
- (b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.]

⁵⁴[Explanation 2.—For the purposes of this clause—

- (a) the expression "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to [section 115AD](#);
- (b) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956)⁵⁵.]

⁵⁶[(iii) agricultural land⁵⁷ in India, not being land situate—

- (a) in any area which is comprised within the jurisdiction of a municipality⁵⁷ (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population⁵⁸ of not less than ten thousand ⁵⁹[***] ; or

⁶⁰ in any area within the distance, measured aerially,—

⁶¹[(b)

- (I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or
- (II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or
- (III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;]

⁶²[(iv) 6½ per cent Gold Bonds, 1977, ⁶³[or 7 per cent Gold Bonds, 1980,] ⁶⁴[or National Defence Gold Bonds, 1980,] issued by the Central Government;]

⁶⁵[(v) Special Bearer Bonds, 1991, issued by the Central Government ;]

⁶⁶[(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 ^{66a}[or deposit certificates issued under the Gold Monetisation Scheme, 2015] notified by the Central Government.]

⁶⁷[Explanation.—For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever;]

11.0 From the definition of the capital asset, the government securities are not excluded from the definition of capital asset. Therefore, the government securities are capital assets. As per Sec.2(42A) the expression 'security' shall have the meaning assigned to Clause-11 of

Securities Contracts Regulation Act, 1956 which includes government securities as discussed in the Ld.CIT(A) orders which was extracted above.

In Reserve Bank of India FAQ's Government securities are defined as under:

*A Government security is a tradable instrument issued by the Central Government or the State Governments. It acknowledges the Government's debt obligation. Such securities are short term (usually called treasury bills, with original maturities of less than one year) or long term (usually called Government bonds or dated securities with original maturity of one year or more). In India, the Central Government issues both, treasury bills and bonds or dated securities while the State Governments issue only bonds or dated securities, which are called the State Development Loans (SDLs). Government securities carry practically no risk of default and, hence, are called risk-free gilt-edged instruments. Government of India also issues savings instruments (Savings Bonds, National Saving Certificates (NSCs), etc.) or special securities (oil bonds, Food Corporation of India bonds, fertiliser bonds, power bonds, etc.). They are, usually not fully tradable and are, therefore, not eligible to be SLR securities.(Source: **Government Securities Market in India – A Primer-RBI.**)*

From the above guidance note Bonds and securities distinguishable.

The Bonds are not freely tradable and the securities are freely tradable.

Therefore, the Bonds cannot be equated with the securities. The assessee has made investments in government securities and sold the securities after holding the period of more than 12 months to treat the securities as long term capital assets. The capital gains arising on transfer of long term company assets are entitled for the benefit of indexation as per Sec.48 of Income Tax Act. The AO relied on the third proviso to Sec.48 of Income Tax Act and denied the benefit of indexation. We have gone through the third proviso to Sec.48 of Income Tax Act, which reads as under:

²[**Mode of computation.**

³⁸ **48.** The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration³⁹ received or accruing³⁹ as a result of the transfer of the capital asset the following amounts, namely :—

- (i) expenditure incurred wholly and exclusively in connection with such transfer⁴⁰;
- (ii) the cost of acquisition of the asset and the cost of any improvement⁴⁰thereto:

⁴¹ **Provided** that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received

or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company :

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

⁴²**Provided also** that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset being bond or debenture other than capital indexed bonds issued by the Government :]

12.0 From the plain reading of 3rd proviso section 48 of I.T. Act, government securities are not excluded for indexation benefit only bond or debenture included in the third proviso to Sec.48. Therefore, we do not find any infirmity in the order of the Ld.CIT(A) and the same is upheld.

13.0 In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 31st March, 2017, at Chennai.

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. GANESAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S.SUNDER SINGH)

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 31st March, 2017.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

- | | |
|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 4. आयकर आयुक्त/CIT |
| 2. प्रत्यर्थी/Respondent | 5. विभागीय प्रतिनिधि/DR |
| 3. आयकर आयुक्त (अपील)/CIT(A) | 6. गार्ड फाईल/GF |