THE HON'BLE SRI JUSTICE P.SAM KOSHY

AND

THE HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY

WRIT PETITION Nos.46510 and 46467 of 2022

COMMON ORDER: (per the Hon'ble Sri Justice **P.SAM KOSHY**)

Since the grounds of challenge being the same and the question of law to be decided also being the same, both the writ petitions are taken up and decided by this common order. For convenience, W.P.No.46510 of 2022 is being taken as the lead case, so far as the facts are concerned.

2. The instant writ petition i.e. W.P.No.46510 of 2022 is filed seeking issuance of writ of mandamus declaring the initiation and continuation of proceedings dated 14.12.2022, issued by the respondent No.1/Principal Commissioner of Income Tax (Central) vide DIN & Letter No:ITBA/COM/F/17/2022-23/1047994899(1), for the assessment year 2019-2020, under Section 144BA of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) and all consequent proceedings thereto as illegal, arbitrary, ultra vires the Income Tax Act, lacking in subject jurisdiction and to set aside the same and further direct the respondents not to take any coercive steps or action against the petitioner.

3. Heard Mr. S.Ganesh, learned Senior Counsel appearing along with Ms. Rubaina S. Khatoon, learned counsel for the

petitioner and Mr. N.Venkataraman, learned Additional Solicitor General of India along with Ms. Mamata, learned counsel for the respondent-Department.

4. The whole issue revolves around the issuance of bonus shares to the shareholder firm namely Ramky Estate and Farms Limited (for short "REFL"). The petitioner sold the shares of REFL to Advisory Services Pvt. Ltd (for short "ADR"). Prior to the aforesaid sale of shares to ADR, REFL had issued bonus shares to its shareholders in the ratio of 5:1. Owing to the issuance of bonus shares, the face value of each share of REFL got reduced to 1/6th of its value. The sale of REFL shares to ADR resulted in a short term capital loss to the petitioner as per the provisions of the Act.

5. The petitioner set-off the short term capital loss incurred on the sale of shares of REFL against the long term gains made on another transaction of sale of shares in Ramky Enviro Engineers Limited (for short "REEL").

6. For the assessment year 2019-2020, the petitioner filed his income tax return reporting the income under the head 'Capital Gains' arising out of the sale of shares of REEL after adjusting the capital loss incurred on the sale of REFL shares and paid the requisite income tax.

7. According to the learned Senior Counsel appearing for the petitioner, the transactions undertaken by the petitioner were one which was covered by Section 94(8) of the Act, which is primarily enacted to prevent the avoidance of tax. However, respondent No.2 in the course of the assessment of income for the year 2019-2020, sought to treat the transactions as impermissible avoidance arrangement as per the General Anti-Avoidance Rules (for short "GAAR") under chapter X-A starting from Section 95-102 of the Act. In the process, notice dated 02.08.2022 was issued by the respondent No.2 i.e. Reference Notice under Rule 10UB(1) of the Income Tax Rules, 1962, and sought for objections from the petitioner under Section 144BA(1) of the Act.

8. The petitioner immediately submitted his response to the said notice on 16.08.2022 rebutting the entire allegations. The petitioner also questioned the validity of the said reference notice issued by respondent No.2. It is thereafter that the respondent No.1 has issued the impugned notice on 14.12.2022 stating that the transactions undertaken by the petitioner qualifies as a "Impermissible Avoidance Arrangement (for short "IAA") under chapter X-A of the Act and objections were again called from the petitioner. According to the learned Senior Counsel, initiation of proceedings under chapter X-A of the Act is illegal and uncalled for.

9. It was the contention of the learned Senior Counsel that the entire transactions in question; are all transactions which are covered under Chapter 'X' the provisions of the Specific Anti-Avoidance Rules (for short "SAAR"). Chapter X-A was made as a special provision relating to avoidance of tax, the provisions of chapter X-A containing the General Anti-Avoidance Rules (for short "GAAR") thereafter cannot be made applicable to the said transactions. It is this issuance of notice under Section 144BA invoking chapter X-A of the Act which is under challenge in the present writ petitions. The challenge primarily is on the applicability of the said provision and hence without jurisdiction and unsustainable in the eyes of law.

10. According to the learned Senior Counsel, chapter X-A of the Act was enacted specifically as GAAR. The chapter itself contains a set of general provisions for identifying tax avoidance arrangement and for levying tax thereon. It is further submitted that since the transactions undertaken by the petitioner is one which falls under chapter X of the Act dealing with SAAR, hence, the provisions under chapter X-A cannot be invoked. It is here that the respondent No.1 has committed an error in law while issuing notice invoking Section 96 of the Act, which is the provision otherwise, referred as GAAR which would not be attracted to the facts of the petitioner.

11. It is further submitted that the relevant provision of law to be taken note of in the present writ petition is Section 94(8) of the Act which specifically deals with buying and acquiring of any units. The explanation to the said provision specifically enumerates that units referred to in the Section shall have the meaning assigned to it in clause B of the explanation to Section 115AB. Further, when we read clause B to the explanation to Section 115AB, it would clearly indicate that the Parliament while enacting the law meant units to be units of a mutual fund specified under clause 23(D) of Section 10.

12. According to the learned Senior Counsel, the entire provision of law under Section 94(8) is with an intention to curb tax avoidance in relation to the bonus stripping. It was specifically contended that the loss arising on purchase/acquire and sale of units of mutual fund is to be ignored for computation of income chargeable to tax subject to satisfying the conditions stipulated under the provisions. The Parliament while enacting Section 94(8) never had the intention of including shares and security within the scope of bonus tripping. If the Parliament would had intended the same, they would have included it within the rigors of Section 94(8) of the Act.

13. Contending the same, the learned Senior Counsel submitted that what has been specifically excluded from the provisions curbing bonus stripping by way of SAAR cannot be indirectly curbed by applying GAAR. This in the opinion of the learned Senior Counsel was nothing but expansion of the scope of a specific provision in the Income Tax Act which is otherwise impermissible under the law.

14. In the instant case, the transactions undertaken by the petitioner involved subscription and sale of shares and not units of mutual fund. According to the learned Senior Counsel for attracting or for invocation of Section 94(8) it was the pre-requisite to have buying and acquiring of units of mutual fund. Else, the provision of Section 94(8) would not get attracted. Hence, the petitioner was entitled to set-off of short term capital loss sustained on sale of shares. It was submitted that the transactions of bonus stripping are subject to the specific provisions of Section 94(8) of the Act, which is a SAAR enabling provision. It was further submitted that any loss incurred on account of the purchase and sale of shares, there upon, resulting in bonus stripping is required to be computed as per Section 94(8) and the respondents cannot be permitted to resort to the provision under Section 96 of the Act.

15. It was also the contention of the learned Senior Counsel that the provision of Section 94(8) being a specific provision, therefore impliedly excludes the application of the general provision i.e. Section 96. It was strongly contended that the respondent No.1 in the given factual backdrop ignoring the applicability of Section 94(8), straightway proceeded to treat the subscription and sale of shares by bringing them under the ambit of Section 96 of the Act. This according to the learned Senior Counsel applying Section 96 was without appreciating the specific and applicable provisions relating to bonus stripping and it was Section 94(8) which was required to be applied at the first instance.

16. According to the learned Senior Counsel, there were guidelines issued in the year 2012 by an expert committee on GAAR, known as Shom Committee which was constituted to undertake stakeholders' consultations and finalize the guidelines for GAAR. The said committee is said to have recommended that where SAAR is applicable to a particular transaction, then GAAR should not be invoked to look into that element. The Shom Committee's recommendation was by and large accepted by the Central Government. According to the petitioner, this in other words means that where the provisions of chapter X gets attracted, the provisions of chapter X-A dealing with GAAR by implications stands excluded. Thus, the impugned proceedings initiated deserve

to be held as contrary to law, in excess of jurisdiction and thus liable to be set aside/quashed.

17. In support of his contention, learned Senior Counsel referring to the book of Principles of Statutory Interpretation by GP Singh, contended that in order to avoid inconsistency and repugnancy, harmonious construction of the provision was required to have been followed by the respondents. In addition to this, the learned Senior Counsel relied upon the judgments of the Hon'ble Supreme Court of India in the case of **Union of India vs. Shiv Dayal Soin & Sons (P) ltd. And Others[1], Commercial Tax Officer, Rajasthan vs. Binami Cements Limited and Another[2]** and **R.S. Raghunath vs. State of Karnataka and another[3]**.

18. *Per contra*, learned Additional Solicitor General of India, appearing for the respondent-Department, referring to the impugned show cause notice contended that the case itself at the first instance is not maintainable for the reason that it is the show cause notice which is under challenge; and that the writ jurisdiction is not meant to assail a show cause proceedings unless there is patent illegality on the ground of jurisdiction. In the instant case, according to the learned ASG appearing for the

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[1] 2003 Volume 4 SCC 695
[2] 2014 8 SCC 319
[3] 1992 1 SCC 335

respondent-Department, there has been no specific material available to entertain the writ petitions where the challenge primarily is to the show cause proceedings.

19. According to the learned ASG, the petitioner can very well enter appearance before the authorities concerned and take all the relevant objections in support of his contentions. That the authorities concerned shall duly consider all the contentions that the petitioner will raise in his response. Thus, no strong case for interfering with the impugned show cause notice at this juncture is made out.

20. It was further contended vide order dated 05.02.2019, the Board of Directors had sanctioned inter corporate deposit of Rs.350 crores to related entity i.e. REFL. The mischief played by the petitioner was that all the ledgers reflected the writing of the loan to the tune of Rs.288.50 crores during the month of March, 2019, and further the said amount was claimed as business loss and set off against the capital gains.

21. Drawing the attention to the events that had transpired within a short span of time, learned ASG contended that in the AGM that was held on 27.02.2019, the share capital of REFL was increased of its authorized share capital to Rs.1130,00,00,000/- comprising of equal number of shares. The AGM further decided to

allot 7,64,40,100 shares on a private placement basis to Shri Alla Ayodhya Rami Reddy and 5,56,52,175 shares on a private placement basis to M/s.Oxford Ayyapa Consulting Services Private Limited.

22. Immediately thereafter, in a short span of time, the petitioner/assessee purchased the aforementioned 5,56,52,175/- of REFL. Subsequently, on 04.03.2019, REFL declared bonus shares in the ratio of 1:5. As a consequence of bonus shares declaration, the value of the shares got declined from Rs.115/- per share previously to Rs.19.20/- per share. On 14.03.2019, the petitioner/assessee in turn further sold Rs.5,56,521/- shares to another firm i.e. ADR on the rate of Rs.19.20/- per share, thereby, resulting in a business loss of approximately Rs.462 crores.

23. Immediately thereafter, the petitioner/assessee transferred the newly issued shares of REFL purchased at the rate of Rs.19.20/- per share to another related entity i.e. ADR which again is without any business purpose. The so called purchaser i.e. ADR did not even have sufficient sources of funds to buy the shares of REFL. Funds in this regard were provided by M/s.Oxford Ayyapa Consulting Services India Private Limited to ADR. Thus, the money which was funded by M/s.Oxford Ayyapa Consulting Services India Private Limited were returned by way of rotation of funds from

within the group itself in the form of transfer from one group concerned to another. This entire exercise has been carried out with a sole motive of evading tax. Thus, the aforesaid transaction is nothing but round stripping of funds with no commercial substance. Moreover, the entire exercise has been done only with a mala fide intention of avoiding the payment of tax by creating losses. The entire transaction was made in the creation of a loss to the tune of Rs.462 crores without any economic, rational and commercial substance.

24. Likewise, the sanctioning of inter corporate deposit of Rs.350 crores on 05.02.2019 to M/s.Ramky Infrastructe Limited repayable in sixty (60) months with a moratorium period of two (2) years, wherein in the books, the disbursement is reflected in the month of February and March, 2019. Whereas, the ledger reflects writing off of the loan to the tune of Rs.288.50 crores in the month of March, 2019. Further, the disbursement made during the same month clearly establishes the non-genuineness of the inter corporate deposit and the motive or object exclusively being claiming of business loss against taxable gains. It is in this context that the learned ASG appearing for the respondent-Department submits that in the given factual backdrop, the proceedings had to be initiated under Chapter X-A of the Act.

25. In the light of the contentions put forth on either side, for proper appreciation of the dispute, it would be relevant at this juncture to take note of the provisions of chapter X and chapter X-A. Chapter X deals with the special provisions relating to avoidance of tax. Chapter X-A at the same time is brought by way of an amendment to the Income Tax Act, 1961, consequent to the Finance Act, 2013, with effect from 01.04.2016.

26. What is also required to be seen is that the learned Senior Counsel appearing for the petitioner contends that since there is a special provision relating to avoidance of tax envisaged under the Act, under the said circumstances, the general provision of law of anti-avoidance cannot be applied and the respondents are required to scrutinize the case of the petitioner strictly within the four corners of the provisions of chapter X i.e. SAAR and chapter X-A i.e. GAAR cannot be invoked.

27. It is worth taking note of the fact that here is a situation where the special provision of law was already there in the Act when the general provision of law has been subsequently enacted by way of an amendment. Normally it is the vice-versa, i.e., where the general provision of law already being in force, the special provision of law is subsequently enacted. It is in those said circumstances, the Hon'ble Supreme Court of India as also the

various High Courts have repeatedly held that when a special provision of law stands enacted, then the general provision of law would not and cannot be invoked. In the instant case chapter X-A has been only brought into force with effect from 01.04.2016 in terms of the Finance Act, 2013. Thus the said contention of the learned Senior Counsel appearing for the petitioner cannot be accepted.

28. What next to be appreciated is the fact that chapter X-A begins with a non-obstante clause, where in Section 95(1) dealing with the applicability of the General Anti-Avoidance Rules, it has been held that, notwithstanding anything contained in the Act if the Assessing Authority finds that an arrangement entered into by the Assessee is an impermissible avoidance arrangement, the determination has to be done in respect of the consequential tax arising there from and shall be subject to the provisions of chapter X-A. This in other words means that by virtue of the aforesaid non-obstante clause, the provisions of chapter X-A gets an overriding effect over and above the other existing provisions of law.

29. So far as the contention of the learned Senior Counsel appearing for the petitioner that the case of the petitioner is one which should have otherwise fallen under Section 94(8) of the Act, it would be relevant also to take note of the said provision of

Section 94(8). As is known to all, Section 94 deals with avoidance of tax by certain transactions in securities. Securities can be of different natures like stocks, mutual funds, derivatives of non-recognized stock exchanges and the case of the petitioner is that the transactions of the petitioner is one which would fall under Section 94(8). At the relevant point of time sub-section 8 of Section 94 dealt with only buying and acquiring of units within a period of three (3) months prior to the record date. The explanation to the said Section provides for definitions of certain terminologies used in the said sub-section which includes the definition of securities and the definition of units. For ready reference both, the definition of securities as also the definition of units provided under clause B and clause D to the explanation of Section 94 is being reproduced herein under:

> *"(b) "securities" includes stocks and shares;*
>
> *(d) "unit" shall mean, --*
>
> *(i) a unit of a business trust defined in clause (13A) of section 2;*
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> *(ii) a unit defined in clause (b) of the Explanation to section 115AB; or*
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> *(iii) beneficial interest of an investor in an Alternative Investment Fund, defined in clause (b) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992), and shall include shares or partnership interests.*

30. Before the formal codification of the General Anti Avoidance Rules (GAAR) into law in 2018, the judicial system had already established its own set of rules known as the Judicial Anti-Avoidance Rules (JAAR). The JAAR operated under the principle of 'substance over form', essentially seeking to uncover misleading structures or transactional arrangements that lacked real commercial substance. These rules weren't arbitrary but were carefully crafted tools designed to scrutinize transactions and financial arrangements that might otherwise escape tax obligations through legal loopholes. These anti-avoidance rules, therefore, were used to ensure that all transactions were conducted transparently and within the spirit of the law. The legal amendments that followed were driven by the judiciary's firm commitment to uphold these anti-avoidance principles, using the power of law to enforce it. As a result, a new chapter, Chapter X-A, was added to the Act. This chapter, which comprises Sections 95 to 102, provides a detailed account of various types of transactions that could be potentially viewed as illegal tax avoidance arrangements. This chapter doesn't just list out these transactions, but also provides an extensive definition of conditions that render a transaction or arrangement devoid of commercial substance. Additionally, it lays out the potential consequences that such arrangements could face. Furthermore, Section 100 of this chapter clarifies that this Chapter is applicable in addition to or as a substitute for any other existing method of determining tax liability. This provision emphasizes the

legislative intention that the GAAR provisions should act as an all-encompassing safety net. It's designed to capture all illicit arrangements, ensuring that tax on these arrangements is calculated using the provisions of this Chapter.

31. In the present case, the petitioner puts forth an argument rooted in the belief that the Specific Anti Avoidance Rules (SAAR), particularly Section 94(8), should take precedence over the General Anti Avoidance Rule (GAAR). This contention, however, is fundamentally flawed and lacks consistency .The reason being the Petitioner's own previous assertion that Section 94(8) is not applicable to shares during the relevant time frame. This inherent contradiction in the Petitioner's stance significantly weakens the overall credibility of their argument.

32. As per the Revenue's perspective, given the multiple transactions that the taxpayer has undertaken, the case should be, one which should fall under the umbrella of Chapter X-A and not Chapter X. Section 94(8) might be relevant in a simple, isolated case of the issuance of bonus shares, provided such issuance has an underlying commercial substance. However, this provision does not apply to the current case, as issuance of bonus shares here is evidently an artificial avoidance arrangement that lacks any logical or practical justification. It is clear that this arrangement was primarily

designed to sidestep tax obligations, in direct contravention of the principles of the Act.

33. As far as the petitioner's reliance on the 2012 Shome Committee Report is concerned, in the given factual backdrop, the same is totally misplaced and misconstrued. Even the contention of the petitioner that the aforementioned Report with regard to SAAR under Section 94 would override the GAAR in Chapter X-A, is unacceptable. The Committee's stance that SAAR should generally supersede GAAR mainly pertains to international agreements, not domestic cases such as this. This stand, as per the report is further substantiated by the Finance Minister's declaration, made on January 14, 2013. During this announcement, the Minister stated that the applicability of either GAAR or SAAR would be determined on a case-by-case basis.

34. What further weakens the petitioner's argument is the subsequent introduction of a Rule under Section 95 and Section 100. This provision indicates that Chapter X-A could be used in conjunction with, or as a substitute for, other Sections of the Act. This development again highlighted the selective and misinterpreted use of legal provisions by the Petitioner.

35. Further, the Finance Bill, 2013, only incorporated some of the expert committee’s recommendations and CBDT also clarifies that both GAAR and SAAR would be applied depending upon the specifics

of each case. However, Petitioner's assertion is that the facts of the case are irrelevant in determining the application of a general law is also fundamentally flawed. This stance was already addressed and refuted by the Supreme Court in the case of **The Commissioner of Income-Tax (Central), New Delhi vs. M/s. S. Zoraster and Company**[4]. The Court, in its wisdom, stated that laws must be interpreted based on the specific facts of each case. The Petitioner's argument, thus, is not only inconsistent but also contradicts the well-established legal principles.

36. The current arrangement is being scrutinized as it is considered devoid of commercial substance as per Section 97. It is perceived as a deliberate misuse of the Act's provisions, going beyond the intended use of the law, and manipulating it to one's advantage. It creates extraordinary rights and obligations that seem to be conducted not in good faith. These unusual rights and obligations are not in line with the general principles of fair dealing, leading to the conclusion that it's an impermissible avoidance agreement under Section 96. Consequently, the arrangement falls under the purview of Chapter X-A. Given these circumstances, procedures were set in motion to apply the rules and regulations of Chapter X-A to this arrangement.

37. The Vodafone judgment provides crucial insight into this issue. The judgment implies that the business intent behind a transaction

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[4] (1972) 4 Supreme Court Cases 15

could serve as a strong piece of evidence that the transaction isn't a deceptive or artificial arrangement. The commercial motive behind a transaction often reveals the true nature of the transaction. However, the judgment also places the burden of proof on the Revenue to prove any fiscal misconduct. This means, the Revenue needs to provide sufficient evidence of any alleged wrongdoing. In stark contrast, Section 96(2) places this responsibility on the taxpayer. It requires the taxpayer to disprove the presumption of a tax avoidance scheme. This is a significant shift in responsibility. In this particular case, there is clear and convincing evidence to suggest that the entire arrangement was intricately designed with the sole intent of evading tax. The Petitioner, on their part, hasn't been able to provide substantial and persuasive proof to counter this claim.

38. Section 144AB outlines the procedure for applying the rules in Chapter X-A. This section ensures that transactions are thoroughly evaluated at multiple levels and from various perspectives before determining any connected outcomes. This involves a comprehensive examination of all the elements of the transaction, upholding the principles of fairness at each step. It ensures that the process is thorough, fair, and just. However, the Petitioner has chosen to seek this court's intervention instead of following the process set out under Section 144AB. This circumvention of the process raises questions about the Petitioner's motives.

39. The Hon'ble Apex Court in the case of **M/s. S. Zoraster and Company (supra),** held at paragraph Nos.17 to 20 as under, viz.,

> ***"17.*** *As we have already pointed out the certificate has been granted by the learned Judges on the basis that the general question whether a presumption under Section 114, Illustration (f) of the Evidence Act can be raised is of great importance and that it is likely to arise in many future cases, not restricted to income tax. It should be remembered that this Court should not be invited to decide any question of law much less the substantial question of law purely in the abstract. Such question of law must reasonably arise on the basis of the material on record. Further, the substantial question of law, in order to be certified as fit to be decided by this Court must arise on the facts of a particular case. With great respect to the learned Judges who dealt with the applications for grant of certificate, we are constrained to remark that they have ignored the finding of fact recorded by the Appellate Tribunal in its supplementary statement, dated March 18, 1961, that the Revenue has placed no materials to prove that the cheques were posted at Delhi. It should be remembered that when the reference was made in the first instance, the Punjab High Court felt that the Appellate Tribunal had not given any finding as to whether the cheques in question were sent to the assessee by post and whether the assessee had given any direction in that regard to the Government of India. In view of the absence of such a finding, the High Court, by its order, dated March 24, 1955, called for a supplementary statement from the Appellate Tribunal under Section 66(4) of the Act. This order was challenged before this Court by the assessee unsuccessfully. The purpose of seeking a supplementary statement was to focus the attention of the Appellate Tribunal to this aspect, namely, the posting of cheques claimed to have been done at Delhi by the Government of India. That the Revenue miserably failed to establish the fact of posting of cheques at Delhi, is clear from the finding recorded by the Appellate Tribunal in its supplementary statement, which finding*

has been accepted by the High Court in its judgment, dated February 21, 1967, when answering the reference. The High Court has also then recorded a finding that the Revenue has failed to place any material before the Appellate Tribunal to prove that the cheques in question were being sent by the Government of India through post. Unfortunately, all these aspects have been missed by the learned Judges when dealing with the applications filed by the Revenue for the grant of certificates.

18. *On the above findings recorded by the Appellate Tribunal and confirmed by the High Court, no question of applying any presumption under Section 114 of the Evidence Act arises for consideration. The learned Judges, dealing with the applications for grant of certificates, had no jurisdiction to go behind the finding recorded in the original judgment disposing of the reference. In our opinion, the entire discussion on this aspect of posting of the cheques at Delhi by the learned Judges is beside the point, as that question no longer was available to the Revenue, in view of the finding recorded against it, to which we have made a reference earlier.*

19. *When once the question of a presumption under Section 114, Illustration (f) of the Evidence Act does not fall to be considered in these proceedings, in view of the specific finding recorded by the Appellate Tribunal against the Revenue, and accepted by the High Court, in our opinion, the High Court was not justified in certifying on this ground, that the cases are fit for appeal to this Court.*

20. *As the issue of certificates by the High Court is not proper, the only course open to us is to cancel the certificates and set aside the order of the High Court granting them. The result is that the above appeals have become unsustainable, as they have been brought to this Court on the basis of certificates, which, as held by us, have not been properly granted."*

40. Further, the Hon'ble Apex Court in the case of **McDowell & Co. Ltd. v. CTO**[5] held at paragraph Nos.17 and 18 as under, viz.,

> ***"17.*** *We think that time has come for us to depart from the Westminster [1936 AC 1 : 1935 All ER Rep 259] principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a Welfare State like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of black-money, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Wheatcroft [18 Modern Law Review 209]) by some of the best brains in the country being invloved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers, and accountants on one side and the tax-gatherer and his perhaps not so skilful, advisers on the other side. Then again there is the "sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it". Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guideless, good citizens from those of the "artful dodgers". It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization". But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a Welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other*

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[5] (1985) 3 SCC 230

welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in Wood Polymer Ltd. and Bengal Hotels Limited, In re [47 Com Cas 597 (Guj HC)] where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.

18. *It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation (sic as) was done in Ramsay [1982 AC 300 : (1981) 1 All ER 865] , Burmah Oil [1982 STC 30] and Dawson [(1984) 1 All ER 530] , to expose the devices for what they really are and to refuse to give judicial benediction."*

41. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

42. Accordingly, we are of the considered opinion that the Revenue has persuasively and convincingly shown that the transactions in the instant case are not permissible tax avoidance arrangements. The evidence points towards the fact that these transactions do not qualify as permissible under the tax laws. Therefore, the provisions of Chapter X-A would become applicable. Therefore, the current writ petitions lack merit, as they fail to make a case so far as the application of Chapter X-A in the present facts of the case.

43. Accordingly, the Writ Petitions are dismissed. The respondents are allowed to proceed further with the process under Section 144AB. No costs.

44. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

P.SAM KOSHY, J

LAXMI NARAYANA ALISHETTY, J

Date: 07.06.2024
GSD