BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs.

Swastik Rubber Products Ltd

Income-Tax Application No. 124 of 1978

(Madon and Kania, JJ.)

ORDER OF APPELLATE TRIBUNAL

(Pune, April 14, 1978)

Madon , J.

1. These two reference applications are made by the Commissioner of Income-tax, Pune-I, Pune, and they arise out of the Tribunal's order in LT.A. Nos. 458 & 457/PN/75-76 decided on the 28th of May, 1977. In R. A. No. 233/PN/77-78, the following questions have been raised :

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the effective date of amalgamation is July 1, 1971, relying only on clauses (1), (2) & (3) of the scheme of amalgamation without considering the scheme of amalgamation as a whole ?
> 2. Whether, on the facts and in the circumstances of the case, the Tribunal erred in law, in not holding that the effective date of amalgamation is December 31, 1971, ignoring the provisions of clause (15) of the scheme of amalgamation and sanction of the Controller of Capital Issues given on December 31, 1971?
> 3. Whether the Tribunal is correct in holding that the consent from the Controller of Capital Issues is only a formality ?
> 4. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that income earned or accruing or arising after July 1, 1971, to December 31, 1971, is not to be included in the total income of the assessee for the assessment year 1972-73 ?"
> * * *

In our opinion, none of the above questions are questions of law fit to be referred to the hon'ble High Court. Either they are questions of facts or the answers to them are obvious. Accordingly we refuse to draw up a statement of the case and refer it to the hon'ble High Court. Our reasons are as follows.

2. The respondent-assessee to these applications is M/s. Swastik Rubber Products Ltd., successors to M/s. Bank of Maharashtra Ltd., Pune, and it is hereinafter called " the assessee ". The Bank of Maharashtra Ltd. carried on banking business until 19th of July, 1969. By virtue of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, the entire undertaking of the bank including all assets and liabilities was transferred to and became vested in the Bank of Maharashtra, a statutory corporation. The Bank of Maharashtra Ltd., hereinafter called the " Bank ", became entitled to a compensation of Rs. 2.30 crores. Except for a sum of Rs. 12,300, the balance of the compensation was received by the bank in the form of Central Government securities carrying interest at 5/1-2% per annum.

3. The shareholders of the bank in their meeting dated 27th of April, 1971, passed a resolution approving a scheme of amalgamation of the bank with the assessee. The shareholders of the assessee approved the assessee's scheme of amalgamation on the 29th of April, 1971. The petitions of the bank and the assessee to the High Court of judicature at Bombay under Sections 391 and 394 of the Companies Act, 1956, were heard and the High Court passed orders on the petitions by its order dated 27th of September, 1971. The relevant portion of the said order was as under :

> "(1) With effect from 1st day of July, 1971 (hereinafter called 'the appointed date)' the whole of the undertaking and business and the property of the petitioner-company as also the rights, powers, authorities and privileges and all properties, movable and immovable, cash balance, reserves, revenue balances, and investment and all other interest and rights in, or arising out of, such properties shall stand transferred without further act or deed to Swastik Rubber Products Ltd. and the same do vest in Swastik Rubber Products Ltd. free from all the estate and interest of petitioner-company.
> (2) With effect from the said appointed date all and singular existing debts, obligations, and all the liabilities and dues of the petitioner be also transferred without any further act or deed to Swastik Rubber Products Ltd. and accordingly the same shall be and are hereby transferred to and become the debts, obligations, liabilities and duties of Swastik Rubber Products Ltd."

On 3rd of April, 1972, the High Court also passed an order for the dissolution of the Bank of Maharashtra Ltd. without a winding-up.

4. The bank's income-tax assessment for the assessment year 1972-73 was taken up after its dissolution and in accordance with the provisions of Section 170 of the I.T. Act, 1961 (hereinafter called " the Act "). The ITO proceeded against the assessee who was the bank's successor. One of the questions which came up for the consideration in this assessment was, what was the effective date of the amalgamation. The question as to the effective date of the amalgamation arose for the reason that even though in accordance with the order of the Bombay

High Court dated 27th of September, 1971, the date of amalgamation was to be with effect from 1st of July, 1971 (i.e., the appointed date as mentioned in the scheme of amalgamation), there was a clause in the said scheme of amalgamation in accordance with which the assessee was to approach the Controller of Capital Issues for the purpose of sanction of increase in the share capital and the said sanction of the Controller of Capital Issues was received on the 31st of December, 1971. Also in accordance with clause (15) of the scheme of amalgamation it was agreed between the parties that even though the scheme of amalgamation was to be operative from the appointed date, i.e., 1st of July, 1971, it was to take effect finally upon and from the date on which any of the sanctions or orders shall be last obtained. The order of the Controller of Capital Issues for the increase of the assessee's capital as mentioned earlier was obtained on 31st of December, 1971.

5. On the above facts, in the opinion of the ITO, the date of amalgamation was 31st of December, 1971, as the last order in the scheme of amalgamation being the order of the Controller of Capital Issues for the permission to the assessee to increase the share capital was made on that date. This view of the ITO was upheld by the AAC. However, when the matter came to the Tribunal in the second appeal by the assessee the Tribunal gave a factual finding that the date of amalgamation was 1st of July, 1971. The Tribunal's finding was based on the following facts.

6. The, Tribunal in the first instance considered Clauses (1), (2) and (3) of the scheme of amalgamation. (These clauses have been reproduced in paras. 11 & 12 of the Tribunal's order). In accordance with these clauses, the Tribunal found that the entire undertaking of the bank, including the assets as well as liabilities, would be transferred and vested in the assessee with effect from 1st of July, 1971. The Tribunal also found, particularly in view of clause (3), that the bank was to be deemed to have been carrying on all business activities for and on behalf of the assessee with effect from 1st of July, 1971, and any profits accruing to the bank or losses arising or in curred by it after the 1st of July, 1971, were to be treated as the profits or losses of the assessee-company. The Tribunal then considered the orders passed by the High Court dated 27th September, 1971, on the petitions under Section 391 and Section 394 of the Companies Act, 1956, made by the bank as well as by the assessee. The High Court's orders on the petition of the transferor-company were to the effect that with effect from 1st of July, 1971, the whole of the undertaking and the business and the property of the petitioner-company as also the rights, powers, authorities and privileges and all properties, movable and immovable, cash balance, reserves, revenue balances and investment and all other interest and rights in/or arising out of such properties shall stand transferred without further act or deed to Swastik Rubber Products Ltd. and the same to vest in Swastik Rubber Products Ltd. free from all estate and interest of the petitioner-company. Similarly, the orders on the petition of the transferee-company, i.e., the assessee, were to the effect that with effect from 1st day of July, 1971, the whole of the undertaking and all the properties movable and immovable and all other assets of whatsoever nature including all rights and powers of every description of the transferor-company, i.e., the

bank, be and the same are hereby transferred without further act or deed to the assessee-company.

7. Having found as above, the Tribunal in para. 13 of its order gave the following further findings :

> "On a reading of the clauses 1, 2 & 3 of the scheme along with the provisions of Section 391 and Section 394 of the Companies Act, 1956, and the sanctions ordered there under by the Bombay High Court on the petitions of the transferor-company and the transferee-company, relevant portions of which we have reproduced earlier, it is beyond any doubt that with effect from 1st day of July, 1971, the scheme of amalgamation would be binding on both the transferor and the transferee-company and with effect from that date all the undertaking and the assets of the transferor-company would vest in the transferee-company without any further act or deed. So also all the debts, liabilities, dues, obligations, etc., of the transferor-company would be transferred to the transferee-company without any further act or deed with effect from the appointed date. The effect of the court's, orders was, therefore, that the amalgamation was final and conclusive with effect from 1st of July, 1971, without any further act or deed. It is true that the sanction of the Controller of Capital Issues to increase the authorized capital of the transferee-company from Rs. 2.50 crores to Rs. 3.50 crores was given on the 31st of December, 1971. However, that order of the Controller of Capital Issues by itself did not postpone the date of amalgamation to 31st December, 1971, and beyond. That is clear from the following portion of the High Court's order dated 27th of September, 1971, on the transferor's petition :
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> 'This court doth further order that Swastik Rubber Products Ltd. do without further act or application issue and allot equity shares and debentures credited as fully paid to or part thereof as calls received in advance to the shareholders of the petitioner-company who are registered as shareholders in the petitioner-company's books to the extent and in the manner provided in clause 8 of the said scheme of amalgamation being Exhibit 'B' to the petition and Exhibit 1 hereto.'
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> In the face of this specific order of the High Court, the approval of the Controller of Capital Issues to increase the capital of the transferee- company to enable it to allot the required shares to the shareholders of the transferor-company becomes a mere formality and the question of the Controller of Capital Issues refusing permission to the transferee-company to raise its authorized capital does not arise. In view of the High Court's order the Controller of Capital Issues was bound to sanction the increase in the capital. Moreover for the purposes of income-tax, what is crucial is the date on which the assets and liabilities vested in the transferee-company. It is beyond doubt that in view of the High Court's order all the assets and all the liabilities of the transferor-company vested in the transferee- company with effect from 1st July, 1971, without any further act or deed and from that date onwards any income accruing or arising on such assets would be that

of the transferee-company."

8. The Tribunal also considered the implications of Clauses (14) and (15) of the scheme of amalgamation in para. 14 of its order and came to the conclusion that clause (14) was merely a saving clause and with regard to clause (15) the Tribunal held that the approval of the Controller of Capital Issues to raise the assessee's capital was a mere formality in view of the order of the High Court dated 27th of September, 1971, that the amalgamation was to be effective from the appointed date, i. e., 1st of July, 1971.

9. The above are the findings of the Tribunal. On those findings we have to examine as to whether any question of law arises and whether those questions should be referred to the hon'ble High Court. We have reproduced the questions earlier. We will examine them one after the other. The first question is as follows :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the effective date of amalgamation is July 1, 1971, relying only on clauses (1), (2) & (3) of the scheme of amalgamation without considering the scheme of amalgamation as a whole ?"

10. This question proceeds on the basis that the Tribunal concluded that the effective date of amalgamation was 1st of July, 1971, exclusively relying on Clauses (1), (2) & (3) of the scheme of amalgamation and without considering the scheme of amalgamation as a whole. There is absolutely no substance in such a case made out by the Revenue. In fact the Tribunal examined all the relevant clauses of the scheme of amalgamation in para. 4 of its order. In the said paragraph not only the Tribunal took into account Clauses (1), (2) & (3) but also the other clauses of the scheme of amalgamation inclusive of Clauses (13), (14), (15) and (16). It cannot, therefore, be said that the Tribunal concluded that the effective date of amalgamation was 1st of July, 1971, without considering the entire scheme of amalgamation.

11. The second question is as follows :

> "Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in not holding that the effective date of amalgamation is December 31, 1971, ignoring the provisions of clause (15) of the scheme of amalgamation and sanction of the Controller of Capital Issues given on December 31, 1971 ? "

12. In this question a case has been made out that the Tribunal came to the conclusion that the effective date of amalgamation was not 31st of December, 1971, but 1st of July, 1971, ignoring the provisions of clause (15) of the scheme of amalgamation. We must at once say that the Revenue is not justified in making out a case as above. The Tribunal thoroughly examined clause (15) of the scheme of amalgamation in para. 14 of its order. After reproducing the said clause in the said paragraph, the Tribunal observed as follows :

> "With regard to clause (15) which merely stated that even though the scheme was to he operative with effect from 1st of July, 1971, it would take final effect only after the last of the sanctions or approvals needed for that purpose was received, we have already shown earlier that the approval of the Controller of Capital Issues was a mere formality in view of the order of the High Court and did not and could not postpone the date of amalgamation which is the appointed date, i. e., 1st of July, 1971."

13. The third question is as follows :

> "Whether, the Tribunal is correct in holding that the consent from the Controller of Capital Issues is only a formality ? "

14. The Tribunal's finding in this regard is to be found in para. 13 of its order which we have reproduced above. We may reproduce even at the cost of repetition the relevant portion once again :

> "In the face of this specific order of the High Court, the approval of the Controller of Capital Issues to increase the capital of the transferee-company to enable it to allot the required shares to the shareholders of the transferor-company becomes a mere formality and the question of the Controller of Capital Issues refusing permission to the transferee-company to raise its authorized capital does not arise. In view of the High Court's order the Controller of Capital Issues was bound to sanction the increase in the capital. Moreover, for the purposes of income-tax, what is crucial is the date on which the assets and liabilities vested in the transferee-company. It is beyond doubt that in view of the High Court's order all the assets and all the liabilities of the transferor-company vested in the transferee-company with effect from 1st July, 1971, without any further act or deed and from that date onwards any income accruing or arising on such assets would be that of the transferee-company."

It is apparent from the above that what the Tribunal held was that in view of the specific order of the High Court the scheme of amalgamation was to be operative with effect from 1st of July, 1971, and in view of this order of the High Court approving the increase of capital from Rs. 2.50 to Rs. 3.50 crores, the approval of the Controller of Capital Issues for the purpose of the said increase was merely a formality.

15. We have analyzed question Nos. (1), (2) & (3) which have been raised by the applicant. We have pointed out above that the questions in the manner in which they have been raised could not have been raised in view of the specific finding of the Tribunal on each of the issues. Apart from the above, it is not as if that the Tribunal came to the finding that the date of amalgamation was 1st of July, 1971, exclusively relying on Clauses (1), (2) & (3) of the scheme of amalgamation. In

fact the Tribunal held that the date of amalgamation was 1st of July, 1971, in view of the orders of the High Court dated 27th of September, 1971, passed on the petitions of the transferor and the transferee. We have already given earlier the gist of these orders. It is clear therefrom that with effect from 1st of July, 1971, the whole of the undertaking of the bank lock, stock and barrel was to be transferred and was to be amalgamated with the assessee-company.

16. The fourth question is as follows :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that income earned or accruing or arising after July 1, 1971, to December 31, 1971, is not to be included in the total income of the assessee for the assessment year 1972-73 ? "

17. This question is nothing but a corollary to the questions Nos. (1), (2) & (3). When the obvious answer to questions Nos. (1), (2) & (3) is that the effective date of amalgamation is 1st of July, 1971, as a corollary, the answer to question No. (4) would be that the income on or after 1st of July, 1971, would be the income accruing and arising to the assessee-company and not to the bank. Moreover, in answering this question, para. 16 of the Tribunal's order is also relevant. The said paragraph is as follows :

> "In the above connection, clause (3) of the scheme would also play a prominent and effective role. This clause has received the approval of the High Court as one of the clauses of the scheme of amalgamation. Under the said clause with effect from 1st of July, 1971, the transferor-company shall be deemed to have carried on all business and activities for and on account of the transferee-company and profits accruing to the transferor- company or losses arising to or incurred by it after 1st of July, 1971, would for all the purposes be treated as profits or losses of the transferee-company. Hence, even if it is assumed, even though not admitted, that the amalgamation was postponed beyond 1st of July, 1971, any profits or losses accruing or arising on the business or activities carried on by the transferor-company with effect from that date would be the profits and losses of the transferee-company and for the purpose of income-tax the transferee-company would be the assessee in respect of such profits and losses. At best it can be said that with effect from that date, the transferor-company acted as a trustee or agent of the transferred company and nothing more."

18. It is thus obvious from the above finding of the Tribunal that whatever might be the position as regards the amalgamation with effect from 1st July, 1971, income of the undertaking of the bank was to be treated as income of the assessee-company as from 1st of July, 1971.

19. In view of what we have discussed above, in our opinion, none of the four questions raised by the Revenue are questions of law. Certainly none of them are substantial questions of law. Furthermore, even assuming, but not admitting that they involve any question of law, the answer to those questions is obvious. In view of the above, it is our considered opinion that it is not

necessary to draw up a statement of the case and refer it to the hon'ble High Court for its opinion.

In the result, R.A. No. 233/PN/77-78 fails and is dismissed.

JUDGMENT

Kania, J.

20. This is an application, made at the instance of the Commissioner of Income-tax, under Section 256(2) of the I.T. Act, 1961 (hereinafter referred to as " the said Act "), for directing the Income-tax Appellate Tribunal to state a case and to refer to this court for determination of the following questions :

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the effective date of amalgamation is July 1, 1971, relying only on clauses (1), (2) and (3) of the scheme of amalgamation without considering the scheme of amalgamation as a whole ?
> 2. Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in not holding that the effective date of amalgamation is December 31, 1971, ignoring the: provisions of clause (15) of the scheme of amalgamation and sanction of the Controller of Capital Issues given on December 31, 1971 ?
> 3. Whether, the Tribunal is correct in holding that the consent from the Controller of Capital Issues is only a formality ?
> 4. Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that income earned or accruing or arising after July 1, 1971 to December 31, 1971, is not to be included in the total income of the assessee for the assessment year 1972-73?"

As far as question Nos. 1 and 2 are concerned, as the Tribunal has pointed out in its order rejecting the application for making a reference to this court, both these questions are misleading, because the Tribunal has not based its conclusions regarding the effective date of amalgamation merely on the basis of Clauses (1), (2) and (3) of the scheme of amalgamation, but has considered and discussed in detail the provisions of Clauses (14) and (15) of the said scheme on which reliance was placed by the Department. The dispute relates to the effective date of amalgamation. The order of this court sanctioning the scheme of amalgamation, material portions of which have been set out by the Tribunal in its judgment, specifically provides that the whole of the undertaking and business and the property of the Bank of Maharashtra Ltd. as also its rights, powers, authorities and privileges and all its properties, movable and immovable, cash balance and so on would stand transferred to the successor-company, viz., Swastik Rubber Products Ltd., with effect from 1st July, 1971, which was referred to as "the appointed date" in the scheme of amalgamation. Section 394 of the Companies Act, 1956, deals with reconstruction

and amalgamation of companies. Sub-section (2) of that section, inter alia, provides that where an order provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of the transferee-company. In view of this, there can be only one answer to the question as to when the said scheme of amalgamation became effective and that is that the said scheme became effective from 1st July, 1971, as held by the Tribunal. Clause (15) of the scheme of amalgamation, on which reliance was placed by Mr. Joshi, the learned counsel for the petitioner, and which is to the effect that the said scheme would take effect finally upon and from the date on which the last of the sanctions referred to therein was obtained, could not alter the legal effect of the order sanctioning the scheme of amalgamation, passed by this court as aforesaid. Moreover, even as far as the scheme of amalgamation is concerned, clause (3) of the said scheme makes it clear that with effect from the appointed date the transferor-company shall be deemed to have been and to be carrying on all business and activities for and on account of the transferee-company until the effective date referred to in clause (15) thereof.

In view of what has been stated above, we see no reason to direct the Tribunal to state a case and refer the foretasted questions to this court as applied for by Mr. Joshi. The application is, therefore, dismissed and the rule is discharged with costs.

Appeal dismissed.