

OD-7

ITAT/71/2018
IA No.GA/1/2018 (Old No.GA/692/2018)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

THE COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION & TRANSFER
PRICING), KOLKATA

-Versus-

JOY PARTNERSHIP MINING CENTRE

Appearance:

Mr. Debasis Choudhury, Adv.

Mr. Madhu Jana, Adv.

...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.

Ms. Nilanjana Banerjee Pal, Adv.

...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 15th November, 2021.

The Court : This appeal of revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the order dated 17th October, 2017 passed by the Income Tax Appellate Tribunal, C-Bench, Kolkata (the 'Tribunal') in ITA No.149/Kol/2009 for the assessment year 2005-06.

The revenue has raised the following substantial questions of law for consideration :

“(i) Whether on the facts and circumstances of the case the learned Income Tax Appellate Tribunal has erred in law in not sustaining the order passed by the Assessing Officer who found the creditors to be fictitious as there was no evidence produced by the assessee in spite of demand made by the Assessing Officer ?

(ii) Whether on the facts and circumstances of the case the learned Income Tax Appellate Tribunal has erred in law in upholding the decision of the Commissioner of Income Tax (Appeals) who had admitted additional evidence without giving opportunity to the assessing officer to consider the additional evidence and the same is in violation of the Rule 46A(1) of the Income Tax Rules, 1962 ?”

We have elaborately heard the learned Counsel for the parties and carefully perused the materials placed on record. The first of the two substantial questions of law urged before us by the learned senior standing Counsel for the revenue is with regard to lack of opportunity to the assessing officer to record the additional evidence admitted by the CIT(A), placed before it by the assessee. The other substantial question of law is a mixed question of fact and law and what is required to be examined whether there were enough evidence to show that the creditors were genuine.

When the appeal came up for consideration before the Hon'ble Division Bench on 13th July, 2021, the Hon'ble Division

Bench noted that the tribunal while dismissing the revenue's appeal had taken note of two communications which were letters submitted by the assessee dated 24th December, 2008 and 29th December, 2008 explaining the movement of the creditors as well as the details connected therewith. The Hon'ble Bench directed the assessee to file an additional paper book to indicate as to whether the two communications referred above were part of the paper books submitted before the tribunal. In terms of the directions issued by the Hon'ble Division Bench, a copy of the paper book filed before the tribunal has been placed before us and we find that those two letters referred by the tribunal form part of the paper books. The larger question which would require consideration is whether the assessing officer had adequate opportunity to examine the additional materials placed by the assessee admittedly produced for the first time before the CIT(A) and subsequently before the tribunal. In terms of Rule 46A, there is a procedure prescribed for accepting additional evidence. Sub-rule (1) of Rule 46A says that the appellant shall not be entitled to produce before the Commissioner of Appeals any evidence whether oral or documentary other than the evidence produced before him during the course of the proceedings before the assessing officer except in the circumstances set out in Clauses (a) to (d) under Sub-rule (1). The assessment was completed under Section 143(3) of the Act by order dated 27th December, 2007. Admittedly, the

order of assessment being much prior to the letters dated 24th December, 2008 and 29th December, 2008 the same could not have been considered by the assessing officer. It is not in dispute that these letters were placed before the CIT(A) for the first time. From the observations made in the order passed by the CIT(A) more particularly, in page 14 of the order of the CIT(A), there appears to be an indication that the assessing officer participated in the hearing held by the CIT(A). However, there is no positive finding recorded by the CIT(A) that the assessee was granted liberty to produce additional evidence for the first time before the CIT(A) as the assessee's case fall within one of the clauses namely, (a) to (d) under Rule 46(A)(1). The tribunal has also taken note of the additional documents and has made an observation that the department's representative in his written submission has made a reference to the date-wise order sheet entries which are contained in the additional documents. However, what is required to be seen is whether these documents could have been produced before the CIT(A) for the first time without recording the finding that the assessee was prevented by sufficient cause from producing the evidence which he was called upon to produce before the assessing officer or producing any evidence which is relevant to any grounds of appeal or to adduce evidence relevant to any grounds of appeal. Thus, we find that the assessing officer did not have adequate opportunity to examine the additional documents.

It is submitted by the learned counsel for the respondent/assessee that the term "fictitious" as used by the assessing officer is a misnomer as it gives an impression as if the creditors are non-existent persons when factually the matter is otherwise. In any event, we do not wish to record any finding on facts as we are satisfied that the matter needs to be re-examined by the CIT(A) by providing adequate opportunity to the assessing officer to examine the additional documents placed before the CIT(A) and make his submission and thereafter the CIT(A) to pass fresh orders.

In the result, the appeal is allowed and the orders passed by the tribunal as well as the CIT(A) are set aside on the aforementioned technical ground and the matter is remanded to the CIT(A) for fresh consideration. The CIT(A) is directed to issue notice to the assessee as well as the assessing officer and provide adequate opportunity to the assessing officer to file a report on the additional documents placed by the assessee and after affording sufficient opportunity, pass fresh orders on merits in accordance with law. Consequently, the substantial questions of law are left open.

We make it clear that the orders passed by the CIT(A) and the tribunal have been set aside only on the issue which is subject-matter of the present appeal and this judgment will not have any impact on other issues which are not on appeal.

The connected application being GA/692/2018 accordingly stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

A/s./pa