

OD-3

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/62/2017
IA NO: GA/2/2017 (OLD NO. GA/620/2017)

PRINCIPAL COMMISSIONER OF INCOME TAX – 14, KOLKATA
Vs
M/S. PKS HOLDINGS

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 3rd August, 2022.

Appearance:
Mr. Tilak Mitra, Adv.
...for the appellant.

Mr. Ranjeet Kumar Murarka, Sr. Adv.
Mr. Vivek Murarka, Adv.
Mr. Dibanath Dey, Adv.
...for the respondent.

The Court:- This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 1st June, 2016 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the Tribunal) in ITA No. 1677/Kol/2011 for the assessment year 2007-08.

The revenue has framed the following substantial question of law for consideration :-

- i) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law in upholding the order of the CIT(A) in deleting the additions on the issue of loss on derivative to the tune of Rs.3,19,76,907/- on the issue of loss in shares and*

securities amounting to Rs.37,95,659/- and the issue of Coordination charges to the tune of Rs.51,00,000/-?

We have heard Mr. Tilak Mitra, learned standing counsel for the appellant/revenue and Mr. Ranjeet Kumar Murarka, learned senior counsel, assisted by Mr. Vivek Murarka, learned Advocate for the respondent/assessee.

The revenue has suggested the above substantial question of law in a composite form. The question involves three issues, namely, (i) loss on derivative to the tune of Rs.3,19,76,907/-; (ii) loss in shares and securities to the tune of Rs.37,95,659; and (iii) coordination charges to the tune of Rs.51,00,000/-

In order to answer the substantial question of law, we proceed to deal with the three issues in seriatim.

The assessee filed its return of income on 15th November, 2007 disclosing a total income of Rs.10,58,28,346/-. The case was processed under Section 143(1) of the Act and, subsequently, the case was selected for scrutiny. Notices were issued under Section 143(2) and Section 142(1) of the Act. In response to such notices, the assessee's authorised representative appeared before the Assessing Officer. With regard to the first issue, namely, the loss on derivative, the assessee claimed the loss arising from future option, loss on transaction entered on National Stock Exchange (NSE) as appeared in Form 10DB. As per the content of the said Form, the value of the transaction was Rs.99,25,113,859/- on which STT of Rs.1,68,727/- was paid. The assessee had set off this loss of the profit earned from the sale of the land along with the development rights which was sold at a price of Rs.30 Crore. The Assessing Officer called upon the assessee to substantiate the loss. In response to the

same, the ledger copy of the stock broker namely, M/s. Silpa Stock Broker Private Limited and Form 10DB was filed to substantiate the same.

On considering the materials placed before the Assessing Officer, it was pointed out that on 27th November, 2006 the assessee sold its land and earned profits to the tune of several crores and immediately on 29th November, 2006 and 30th November, 2006 the entire amount of sale proceeds was transferred to partner or their related concerns. From 27th February, 2007 the assessee started transactions through the stock broker which has led to the derivative loss. The Assessing Officer noted that the transactions started on 27th February, 2007 and ended on 31st March, 2007, which has resulted in entire loss. Further, it was noted that each and every transaction entered in the 30 days period was purchased on the same day and sold on the same day and each and every transaction resulted in loss. The Assessing Officer stated that margin requirement as per SEBI to be paid to stock broker was not followed and rules have been violated; losses were in odd figures, however, the assessee paid the broker in round figure as per the broker ledger for the period from 1.1.2000 to 15.4.2009 and for the entire period of nine years. It was seen that the assessee had entered into transaction only from 27th February, 2007 to 31st March, 2007. Further, no return of the assessee was filed for the assessment years 2008-09 and 2009-10. Thus, noting these facts the Assessing Officer came to the conclusion that the loss on derivative is an arranged one and the loss was planned by the assessee immediately after realisation of the profits from the sale of the land along with the development rights and the conduct of the assessee was also taken note of to the effect that except for the 30 days period the assessee had no transactions through the said stock broker.

Thus, considering the normal human behaviour and applying the test of probabilities, the Assessing Officer came to the conclusion that the entire transaction is sham leading to a bogus loss. After taking note of decisions of the Hon'ble Supreme Court, the Assessing Officer held that the transactions with the said stock broker during the year under consideration are nothing but a make-believe affair and arranged one in collusion with the assessee resulting in tax evasion. Ultimately, it was held that the bonafides and genuineness of the transactions have not been satisfactorily and properly proved by the assessee and they have not discharged the onus cast upon them. Further, the transactions are not bonafide commercial transactions but are sham, bogus, collusive and an artificial arrangement. In the light of the same, the entire amount of Rs.3,19,76,907/- was disallowed.

Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income tax (Appeals)-XXXVI, Kolkata [CIT(A)]. Though at the first blush it appears that the order passed by the CIT(A) is a well reasoned and elaborate order, on a closure scrutiny we find that substantial part of the order is verbatim extract of the assessment order, written submissions of the authorised representative of the assessee, a truncated portion of the Remand report submitted by the Assessing Officer, the rejoinder filed by the assessee to the Remand report and the arguments which were advanced by the authorised representative at the time when the appeal was heard and the contention of the assessee as to how the decisions referred by the Assessing Officer are distinguishable. The finding recorded by the CIT(A) in paragraph 4.4.3 is quoted hereunder :-

“4.4.3. In view of the forgoing, I find that the AO has not refuted any of the documents filed by the AR even during remand proceedings but

disallowed loss on derivatives on the basis of doubts and suspiciousness. However, the AO failed to substantiate and convert his doubts into a strong and foolproof case to deny the claim of the appellant. The doubt is a thought which needs to work upon and evaluated with strong reasoning based on findings to be a conviction. The AO has not brought in any evidence to establish that the loss booked by the appellant as alleged was received back by the appellant in some or other forms subsequently. In absence of same a mere doubt cannot be taken as fact. In view of the submissions filed by the AIR of the appellant with evidences, I am of the opinion that the AO has not made out any case for such disallowance of loss, as his observations are based on mere suspicions and improper interpretation of certain judicial pronouncements. The AO is therefore, directed to allow loss from Future & Option transactions. **The Addition of Rs.3,19,76,907/- is therefore, deleted.”**

It was the endeavour of Mr. Murarka to convince us that the order passed by the CIT(A) is a well-reasoned order. However, as pointed out earlier, the so called reasons are contained only in paragraph 4.4.3 of the order and all the preceding paragraphs are extracts of the Assessing Officer's observations, the argument of the authorised representative or etc.

In the above paragraph, the CIT(A) holds that the Assessing Officer has not refuted any documents filed by the authorised representative even during the Remand proceedings. Unfortunately, the CIT(A) posed a wrong question to himself leading to a wrong answer. He said so because the Assessing Officer from the very inception has noted that the transactions were through Stock Exchange and the stock broker was also involved but he has proceeded to examine the conduct of the assessee by applying the test of probabilities and after taking note of the modus adopted has held the transactions to be sham and the loss to be a

bogus loss. Thus, if the CIT(A) has to set aside such a finding, there should have been some semblance of discussion on the said aspect. The CIT(A) states that the Assessing Officer has not brought any evidence to establish that the loss booked by the appellant as alleged was received back by the appellant in some other forms subsequently. It is not clear as to on what basis such an observation was made by the CIT(A). It was not the allegation that moneys came back to the assessee in some other form. Therefore, we are of the view that the CIT(A) was not justified in stating that the Assessing Officer was not justified in disallowing the loss. Ultimately, the CIT(A) deleted the addition.

Aggrieved by the same, the revenue filed appeal before the Tribunal.

Once again we face the same problem of going through the order passed by the Tribunal giving it an impression as if it is a detailed and reasoned order as we find that substantial portions of the order are extracts of what has been done by the CIT(A) while granting relief to the assessee. The discussion on the said issue is in paragraph 15 of the order passed by the Tribunal. Once again the Tribunal committed an error of observing that the Assessing Officer did not doubt the genuineness of the transactions carried out by the assessee which resulted in the loss. Precisely, the Assessing Officer has doubted the genuineness by examining the conduct of the assessee. The modus adopted and applied the test of human probabilities and then arrived at a conclusion. Further, the Tribunal holds that the Assessing Officer has accepted the veracity of the documents filed by the assessee. This, in our considered view, is a wrong reading of the observations made by the Assessing Officer.

Thus, we have no hesitation to hold that both the orders passed by the CIT(A) as well as the Tribunal are perverse and there is absolutely no case made

out by the assessee for deleting the addition of Rs.3,19,76,907/-. Therefore, the first issue is answered in favour of the revenue and against the assessee and consequently, the order passed by the Tribunal as well as the CIT(A) are set aside and the order of the Assessing Officer is restored.

The second issue is with regard to loss in shares and securities amounting to Rs.37,95,659/-. The Assessing Officer on examining the materials placed noted that the assessee had claimed the said loss as business loss and when the case was discussed with the authorised representative of the assessee, they were called upon to produce documents in support of the transactions.

On perusal of the bills of settlement received by the stock broker, the Assessing Officer found that the transactions of purchase and sale have been made on the same date, no delivery of share were taken place and the transactions were intra-day share speculation and this is also established by the settlement number of the sale and purchase of shares. All the transaction of sales and purchase were the same settlement number. Therefore, the Assessing Officer came to the conclusion that the loss should be treated as a speculative loss under Section 43(5) of the Act and accordingly, disallowed the same. Further, the Assessing Officer observed that the transactions made through the stock broker had been held to be sham transactions when the Assessing Officer dealt with the issue relating to derivative loss and those findings will also be equally applicable to the issue relating to the loss in shares and securities.

Aggrieved by such order of the Assessing Officer, appeal was preferred to the CIT(A). The finding recorded by the CIT(A) is in paragraph 5.2 of the order. The CIT(A) states that the Assessing Officer upon verification of the transactions

treated the loss as speculative loss as the transactions were intra-day and no delivery of shares were taken place. Further, the CIT(A) records that the assessee has admitted the said findings that the loss was speculative in nature. Therefore, the CIT(A) affirms the order passed by the Assessing Officer that the loss from share transactions of Rs. 37,95,659/- is taken as speculative loss. However, whether the revenue preferred appeal before the Tribunal on the said issue, it appears that appeal was preferred because the revenue was of the opinion that the CIT(A) has treated the transaction not to be bogus. However, on reading of paragraph 5.2 of the order, passed by the CIT(A), we find that no such finding recorded except to confirm the finding of the assessing officer that it is a speculative loss. In fact, in the written submission filed by the assessee before the CIT(A), they have not pressed the said ground. Therefore, in our view, no appeal need to have been preferred as against the said finding as the finding rendered by the Assessing Officer stands confirmed by the CIT(A). Nevertheless when such a ground was raised, the assessee took benefit of such challenge and sought to justify that the transactions were genuine and real. The tribunal embarked upon an exercise to consider the correctness of the same and held that the CIT(A) was fully justified in his conclusion that the loss cannot be regarded as sham. We once again reiterate that CIT(A) has never recorded any such finding with regard to the nature of the transaction all that he has done is to confirm of the finding of the assessing officer and the loss was a speculative loss. Therefore, the finding of the tribunal in paragraph 19 is absolutely perverse. Thus, for the above reason we are of the considered view that the finding of the tribunal needs to be set aside and accordingly set aside. The order passed by the CIT(A) on the said issue stands confirmed and it shall be deemed

that the confirmation is in its entirety with regard to the finding recorded by the assessing officer in paragraph 2 of the order wherein apart from treating the loss as a speculative loss, he has also held that the transaction to be sham. For such reason, the second issue is decided in favour of the revenue and against the assessee.

The third issue is with regard to the co-ordination charges to the tune of Rs.51,00,000/-. The assessing officer noted that such co-ordination charges was stated to have been paid to M/s. Onkar Management Pvt. Ltd. who issued a bill dated 14th December, 2006. The assessing officer pointed out that the co-ordination charges is for procurement of property and the person rendering the service for the purchase of the property which was purchased by the assessee was much before than the service rendered by the said party. The assessing officer pointed out the only evidence the assessee filed to justify the claim was the copy of the bill and TDS certificate and no evidence was brought on record to establish rendering of service by the party. The Inspector attached to the department was directed to conduct an enquiry, who reported that there was no such concern ever existed in the said premises. Therefore, in absence of any evidence regarding rendering of service, the expenditure claimed was disallowed. Apart from that the assessing officer also pointed out that the same cannot be allowed under Section 40A(ia) of the Act. Aggrieved by such finding, the assessee preferred appeal before the CIT(A), before whom the assessee is stated to have produced certain documents and other evidence. A remand report was called for from the assessing officer on such documents who, on considering the same, stated that the charges claimed by the assessee are bogus. He further stated that a letter dated 16th August, 2010 was sent to M/s. Onkar

Management Pvt. Ltd. to verify the authenticity of the agreement submitted for the first time before the CIT(A) and the letter was returned by the postal authorities as 'unserved'. It appears that the authorised representative filed a letter dated 10th September, 2010 giving a complete postal address of M/s. Onkar Management Pvt. Ltd. and a letter was issued to the said company to confirm the said document and reply was received confirming the payment of coordination charges. Further, the assessing officer stated that a letter dated 17th August, 2010 was also sent by the Inspector to Shri P. K. Dutta, Notary Public, for confirmation of the agreement and the inspector, in his report confirms the entry in the register. After having said so, the assessing officer reiterates his earlier finding that the claim is bogus. The assessee filed a rejoinder to the remand report. The CIT(A) in paragraph 7.4.1 of his order accepted the submission of the assessee in its entirety and has observed that the assessee has filed documentary proof and sworn affidavit of M/s. Onkar Management Pvt. Ltd. about its existence and also justified the transaction and, accordingly held that payment of Rs.51,00,000/- cannot be disallowed either under Section 37(10) nor under 40A(ia) of the Act.

Aggrieved by same, the revenue preferred appeal before the tribunal. The tribunal took into consideration the fact that certain documents were placed for the first time before the CIT(A) and after stating about what are irrelevant considerations held that evidence regarding the nature of service rendered by the recipient of commission, namely, M/s. Onkar Management Pvt. Ltd. has not been placed on record by the assessee. Therefore, thought fit to set aside the finding of the CIT(A) and remanded the matter to the assessing officer for fresh consideration, making it clear that the burden will be on the assessee to prove

the nature of services rendered and all the observations contained in paragraph 23 of the order will apply to this issue as well. We find that such an observation is irrelevant because paragraph 23 deals with the finding recorded by the assessing officer. Therefore, we are of the view that the remand should be an open remand leaving all issues open to the assessing officer to be considered in accordance with law and the assessee to establish the same as the burden is on the assessee to prove the nature of services rendered. Therefore, we are not inclined to interfere with the finding the tribunal on the third issue as there is no substantial question of law arising for consideration. However, we delete the following portion in the last sentence in paragraph 27 of the order namely, “and all observations in paragraph 23 of this order will apply to this ground of appeal of revenue also.”

In the result, the appeal is partly allowed and the question nos.1 and 2 are answered in favour of the revenue. With regard to the third question, since the matter has been remanded to the assessee, no question of law arises for consideration.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)