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ITAT/112/2021
IA No.GA/2/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-1, KOLKATA

-Versus-

SHETH COMMERCIAL CO.

Appearance:
Mr. Vipul Kundalia, Adv.
Mr. Anurag Roy, Adv.
...for the appellant.

Mr. Pratyush Jhunjhunwala, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 8th August, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, is directed against the order dated 12th June, 2020 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in ITA No.1100/Kol/2019 for the assessment year 2014-15.

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

" i) *Whether on the facts and circumstances of the case and in law the Income Tax Appellate Tribunal erred in not appreciating the fact that Pr. Commissioner of Income Tax in this order under section 263 clearly mentioned that the Assessing Officer made no enquiries on the issues mentioned in the order?*

ii) *Whether on the facts and circumstances of the case and in law the Income Tax Appellate Tribunal erred in not appreciating that the assessment records also points out to the fact that the Assessing Officer had made no investigation on the fact of loss on dealing commodities of Rs.41,25,364/- claimed by the assessee as business expenses?*

iii) *Whether on the facts and circumstances of the case and in law the Income Tax Appellate Tribunal erred in not appreciating that the order under section 143(3) of the act dated 02.11.2016 passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue?*

We have heard Mr. Vipul Kundalia, learned standing counsel assisted by Mr. Anurag Roy, learned Advocate for the assessee and Mr. Pratyush Jhunjhunwala, learned Advocate for the respondent/assessee.

The short question which falls for consideration in the instant appeal is whether the Principal Commissioner of Income Tax-14, Kolkata (PCIT) was justified in invoking his power under

Section 263 of the Act and holding that the assessment order dated 2nd November, 2016 under Section 143(3) of the Act was erroneous and prejudicial to the interest of revenue.

Before we examine the factual position, we have to consider as to whether proper procedure had been adopted by the PCIT before passing the order under Section 263 of the Act and as to whether the order is based upon the material facts which formed the basis of the show cause notice issued under Section 263 of the Act. The allegation in the show cause notice is that the assessee had claimed losses on account of commodities to the tune of Rs.41,25,364/- and upon perusal of the assessment records and from the contract notes of M/s. Godavari Exim Pvt. Ltd. that the said loss has occurred on account of currency. Thus, in the opinion of the PCIT, the transaction in question involved settlement otherwise than the actual delivery or transfer of any commodity. In this regard, the provisions of Section 43(3) were referred to and the assessee was informed that their case was not covered by any of the exceptions specified in the proviso to sub-Section (5) of Section 43 and, therefore, proposed that the loss claimed by the assessee was to be considered as a speculation loss and was not to be allowed.

The assessee submitted their reply to the show cause notice firstly pointing out that M/s. Godavari Exim Pvt. Ltd. was a member of MCA Stock Exchange Ltd. In this regard the assessee referred to notification no.46 of 2009 dated 22nd May, 2009 which recognised MCX Stock Exchange Ltd. as an Exchange under clause (ii) of Explanation-2 to clause (d) of the proviso to sub-Section (5) of Section 43 of the Act read with Rule 6DDB of the Income Tax Rules, 1962. The assessee also referred to various decisions of the tribunal to Explanation as to what are the derivatives. In this regard reference was also made to the decision in the case of Rajshree Sugar & Chemicals Ltd. Vs. Axis Bank Ltd., reported in AIR 2011 (Mad) 144 and submitted that as per notification no.46/2009 dated 22nd May, 2005 as well as the decisions which were relied upon, the transaction is not to be treated as a speculative transaction and that the assessing officer did not commit any error while completing the scrutiny assessment. On receipt of the reply, the PCIT has perused the contract note of M/s. Godavari Exim Pvt. Ltd. and also the notification and there is no adverse comment on the validity of the notification by which the assessee seeks to bring the transaction within the ambit of clause (d) of Section 43(5) of the Act. However, the PCIT states that no service tax number is stated and the space is left blank. Thereafter, the PCIT proceeds to refer to a report of the Inspector of Income Tax and comes to the prima facie opinion that the transaction of the assessee with the M/s. Godavari Exim Pvt. Ltd. was not genuine. Thereafter, the PCIT has downloaded certain material from Google and referred to the names of certain directors and concluded that the assessing officer failed to make any enquiries or verification and, therefore, held that the assessment order is erroneous and prejudicial to the interest of the revenue.

Aggrieved by such order, the assessee preferred appeal before the tribunal which was allowed. Firstly, we note that the allegation in the show cause notice is confined to whether the transaction should be treated as a speculation loss or not. Admittedly, documents were placed by the assessee stating that M/s. Godavari Exim Pvt. Ltd. was registered with MCX Stock Exchange Ltd. which is a notified stock exchange. This position could not be disputed by the PCIT and, therefore, proceeded on a different angle which were not the materials based on which show cause notice was issued. Thus, a fundamental error has been committed by the PCIT by proceeding based upon certain alleged facts which were never brought on record at the time of issuance of the show cause notice. When the matter was carried on appeal to the tribunal, the tribunal examined the documents and found that the transaction done by the assessee was an eligible transaction in respect of trading in derivatives and that M/s. Godavari Exim Pvt. Ltd. was registered with MCX Stock Exchange which was a notified stock exchange. Since PCIT had travelled beyond what was the allegation in the show cause notice, the tribunal had to clarify the factual position. Therefore, a query has been raised to the learned Advocate who appeared for the assessee before the tribunal and it was submitted that after passing order under Section 263 of the Act, the learned Advocate had made enquiries in the stock exchange and found that the said M/s. Godavari Exim Pvt. Ltd. had surrendered its membership of MCX Stock Exchange and after surrendering the same it was engaged in transport business. Learned Advocate appearing for the respondent/assessee has produced before us a copy of the circular dated 8th September, 2016 which is a public notification of resignation of membership and the name of the said M/s. Godavari Exim Pvt. Ltd. finds place where they have sought to surrender their membership. Last of the transaction done by the said company was on 30th March, 2016. After issuing the notification and giving sufficient time for any objection to be received, and in the absence of any objection by circular dated 11th January, 2017, the resignation/surrender of membership in the currency derivatives of M/s. Godavari Exim Pvt. Ltd. was accepted and SEBI has also cancelled the certificate of registration for the member and they have ceased to be a member of MCX Stock Exchange. These documents which were noted by the tribunal would also enure in favour of the respondent/assessee.

Thus, in the light of the above factual background, we find that no question of law much less substantial questions of law arise for consideration in this appeal.

Accordingly, the appeal (ITAT/112/2021) fails and is dismissed.

Consequently, the connected application for stay (IA No.GA/2/2021) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Das/As.