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

ITA/138/2010
COMMISSIONER, INCOME TAX, KOLKATA-II, KOLKATA
VS.
M/S. HILLTOP HOLDINGS (I) LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 23rd September, 2022

Appearance :
Mr. Aryak Dutt, Adv.
....for appellant

Mr. J.P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Mr. A.K. Dey, Adv.
... for 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 31st August, 2009, passed by the Income Tax Appellate Tribunal, `A' Bench, Kolkata in ITA No. 699/Kol/2008 for the assessment year 2000-01.

The appeal was admitted on the following substantial questions of law :-

i) Whether in the facts and circumstances of the case, the learned Tribunal was justified in law in treating the notice under section 148 of the Income Tax Act, 1961 as void ab initio though it was issued within the time prescribed under section 149 of the Income Tax Act, 1961 ?

ii) Whether in the facts and circumstances of the case, the learned Tribunal was justified in law in dismissing the appeal without any adjudication in respect of the point raised on the question of loss in trading of shares as deemed speculation and in deleting the disallowance of Rs.48,82,293/- on account of the provisions of non-performing assets and in deleting the disallowance of Rs.82,32,541/- being the provision for diminution in the value of investment ?

We have heard Mr. Aryak Dutt, learned standing Counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior Counsel, assisted by Mr. Pratyush Jhunjhunwalla, learned Counsel appearing for the respondent/assessee.

The first question which is involved in the instant case is whether the notice under section 148 of the Act was validly issued and served on the assessee. The Commissioner of Income Tax (Appeals) came to the conclusion that the notice was not issued within the period of limitation. The correctness of finding was tested by the learned Tribunal and in paragraph 2.2, the following factual finding has been recorded :-

"2.2 After hearing both the sides and perusing the material available on record, we find that in that instant case, the AO was obliged to issue notice u/s. 148 on or before 31.03.2007. The notice though dated 30.03.2007 was served upon the assessee on 19.7.2007 after 111 days from the date of issue. The assessee's contention is that though the date of issue of notice is 30.03.2007 but it was not actually issued within the period of limitation. To save the limitation, the AO has ante dated the notice. We further find that

the Ld. CIT(A) has given a clear cut finding of fact that there is no independent evidence to establish that notice dated 30.3.2007 went out of administrative control of the AO before 31st March, 2007 and ante dating was not possible. This finding of fact has been given by the Ld. CIT(A) after going through the assessment records and has remained uncontroversial at the time of hearing before us. We further find that the assessee's registered office is situated less than 2 Kms. Away from the Income-Tax office and the department's contention is that notice was served by hand and not by post after 111 days of date of issue while other notices were served upon the assessee either on the same day or next day. Therefore, we are of the considered view that the Ld. CIT(A) was justified in holding that notice u/s. 148 was not issued within the time prescribed in section 149 of the Act and, therefore, there was no valid initiation of reassessment proceeding within the prescribed time and, therefore, subsequent order of assessment suffered from incurable infirmity."

The above finding of fact, which is a concurrent finding, that is, both by CIT(A) as well as the Tribunal, cannot be interfered in an appeal under section 260A of the Act. There is nothing on record to dislodge the said conclusion arrived at by the learned Tribunal, wherein the learned Tribunal has clearly pointed out that there is no material to establish that the notice dated 30th March, 2007 went out of the administrative control of the Assessing Officer before 31st March, 2007. Therefore, there is no error in the order passed by the learned Tribunal. Hence, the substantial question of law no.(i) has to be answered against the revenue.

The second substantial question is whether the learned Tribunal was right in not adjudicating the merits of the matter. Once the learned Tribunal was satisfied that notice issued under section 148 was not validly issued, the question of adjudicating into the merits of the matter does not arise. Therefore, the substantial question of law no. (ii) is also answered against the revenue.

In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

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