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ITAT/124/2021
IA No.GA/2/2021

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

PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL-1), KOLKATA

-Versus-

M/S. HIMADRI CHEMICALS & INDUSTRIES LTD.

Appearance:
Mr. Prithu Dudheria, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Saumya Kejriwal, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 20th July, 2022.

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 5th September, 2018 passed by the Income Tax Appellate Tribunal, Kolkata, "B" Bench, Kolkata in ITA No.813/Kol/2018 for the assessment years 20125-13.

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

i) Whether the learned ITAT erred in not considering that in the present case, the assessing officer *did not consider the issues while deciding to allow the deduction of amount of Rs.27,46,16,665/- in his assessment order u/s 143(3) of the Act dated 01.02.2016 which was claimed by the assessee-company on account of foreign exchange fluctuation loss on O/S ECB loan in the computation of income made as per provision of Income Tax Act and as the Assessing Officer did not make any necessary enquiry and verification on this issue hence the order u/s 143(3) of the Act dated 01.02.2016 passed by the assessing officer was erroneous and in so far was prejudicial to the interest of revenue ?*

ii) Whether on the facts and in law involved in this case Learned ITAT has erred in terming the Marked to Market Loss on foreign currency swaps is a "ascertained liability" which is contrary to facts and law in view of clause 17(k) of the Tax Audit Report, the auditor the company mentioned the provision for Marked to Market Losses under the head particulars of any liability of contingent nature and on the basis of the report of the tax auditor, the amount was also added to the income under normal provision of the Act ?"

We have heard Mr. Prithu Dudheria, learned standing counsel for the appellant/revenue and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Saumya Kejriwal, learned Advocate for the respondent/assessee.

It is not disputed before the revenue that the substantial questions of law which have been suggested by the revenue were considered by this Court in the case of *Principal Commissioner of Income Tax-I, Kolkata vs. PriceWaterhouse Coopers Pvt. Ltd.* in ITAT/269/2017 dated 17th December, 2021 and the questions were decided against the revenue and in favour of the assessee. The operative portion of the said decision is as follows:

> *"The assessee apart from placing materials from the paper book before the Tribunal placed reliance on the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Woodward Governor India [P] Ltd. & Ors., [2007] 210 CTR [Del] 354 [SC]. The revenue resisted the plea raised by the assessee by contending that the Tribunal's circular issued by the CBDT in instruction no.3 of 2010 dated 23.03.2010 was issued after the decision in Woodward Governor India [P] Ltd. & Ors. case which was rendered on 08.04.2009 and, therefore, contended that the circular would bind the authorities. The Tribunal after hearing the parties has recorded the finding that the facts in the case are not in dispute and the loss has arisen in respect of forward contracts, which had not expired on the last day of the accounting year. Further, the Tribunal noted that the Assessing Officer did not dispute the fact that the assessee was following the mercantile system of accounting which requires to account for all expenses in the profit and loss on accrual basis. Therefore, the*

Tribunal concluded that the assessee is illegible for deduction on the loss recorded by them. The Tribunal relied upon the decision in Woodward Governor India [P] Ltd. & Ors.., and after taking note of the relevant paragraph of the judgement the Tribunal has recorded that the facts of the assessee's case is identical to that of the facts of the case in Woodward Governor India [P] Ltd. & Ors. Thus, the assessee was granted relief and the appeal was allowed. The revenue is before us challenging the same as contended before the Tribunal. The revenue before us has also placed the instruction issued by CBDT circular no.3 of 2010 dated 23.03.2010 contending that the said instruction was issued post the decision in Woodward Governor India [P] Ltd. & Ors. In our considered view, the circular instruction issued by the Board may bind the authority but it would not bind the Court more so when the law has been laid down by the Hon'ble Supreme Court as rightly pointed out by the Tribunal the facts are not in dispute and the revenue did not dispute that the loss is arising in respect of forward contract, which have been expired on the last day of the accounting year and it was also not disputed by the revenue that the assessee was following the mercantile system of accounting.

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The learned senior counsel for the respondent pointed out that identical issue was considered in the case of Principal Commissioner of Income Tax vs. Suzlon Energy Ltd., 2018 [2] TMI 1789 [Gujarat] and the Court held that the decision of the

Tribunal in so far as deleting the disallowance being notional loss on outstanding foreign derivative contracts was approved by holding that the decision is in-conformity with the decision of the Hon'ble Supreme Court in Woodward Governor India [P] Ltd. & Ors. The revenue had filed a Special Leave Petition in Special Leave to Appeal [C] No[s].1422/2019 which was dismissed by order dated 17.01.2020. In the case of the same assessee, namely Suzlon Energy Limited, the Hon'ble Supreme Court in Principal Commissioner of Income Tax vs. Suzlon Energy Ltd. [2020] 121 taxmann.com 137[SC] approved the decision of the High Court upholding the order of the Tribunal allowing the assessee's claim of foreign exchange fluctuation loss on mark to market basis."

Following the above decision, the appeal filed by the revenue (ITAT/124/2021) is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (GA/2/2021) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)

A.Sadhukhan/S.Das
AR(CR)