OD-23

ITAT/205/2017
IA NO: GA/2/2017(Old No.GA/1801/2017)
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA
VERSUS
APEX ENTERPRISES (I) LIMITED

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 7th March, 2021

Appearance:-

Mr. S.N. Dutta, Adv.
Mr. Soumen Bhattacharya, Adv.
... For Appellant
Mr. R.K. Murarka, Adv.
Ms. Sutapa Roychowdhury, Adv.
Ms. Aratrika Roy, Adv.
... For Respondent

The Court : This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the composite order dated 18th March, 2016, passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (Tribunal) in ITA No.1796/Kol/2008 and ITA No.285/Kol/2008 for assessment year 2001-02. The revenue has raised the following questions of law for consideration :-

I. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in facts as well as in law in holding that the principal business of the assessee is granting of loans and not trading in shares and therefore explanation to section 73 of the Income Tax Act will not apply in the facts of the instant case?

II. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law and in facts in dismissing the appeal filed by the revenue in not treating the interest of Rs.3,04,18,767/- receivable by the assessee for the Assessment year 2001-02 as income following the mercantile system of accounting when interest payable by the assessee has been claimed and allowed under the system on accrual basis and not on actual basis?

We have heard Mr. S.N. Dutta, learned standing Counsel appearing for the appellant and Mr. R.K. Murarka, learned Counsel appearing for the respondent/assessee.

Learned Counsel for the respondent/assessee submitted that the present appeal cannot be pursued by the revenue on the ground of low tax effect. In this regard, the learned Counsel has drawn our attention to the order of assessment dated 31st March, 2004, the order of re-assessment dated 11th October, 2006 and the findings rendered by the Commissioner of Income Tax (Appeals)-IV, Kolkata [CIT(A)] to show that the tax effect is nil.

Mr. S.N. Dutta, learned standing counsel appearing for the appellant/revenue submitted that he has been instructed by the department to state that the notional tax effect is Rs.3,20,14,745/-. It was not clear as to why the authorities have mentioned the overall tax effect to be notional. Therefore, we heard the matter in detail and we find that the CIT(A) as well as the Tribunal granted relief to the assessee upon examining the total facts. In this regard, it is worthwhile to note the following finding recorded by the CIT(A):

> "On these facts therefore, I find force in submissions of the A/R that the debtors did not ever accept their liability to pay interest and what was accounted in assessee's books was a hypothetical income being unilateral claim for interest. I also note that in Return for A.Y. 2007-08 the assessee did not claim deductions for bad debts as assessee is agitating the assessment of such income in appeal for A.Y.2001-02. Considering the totality of the facts, I am therefore inclined to accept submissions of the A/R that Rs.3,04,18,767/- did not represent assessee's real income and therefore not chargeable to tax in A.Y 2001-02. The AO is accordingly directed to exclude interest of Rs.3,04,18,767/- from assessee's total income. Ground Nos. 3 to 6 allowed."

The correctness of the above factual finding was examined by the Tribunal and the Tribunal concurred with the CIT(A) and also took note of the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax –versus- Vasisth Chay Vyapar Ltd., reported in (2018) 90 taxmann.com 365 (SC) and by which the decision in the case of Commissioner of Income Tax –versus- Vasisth Chay Vyapar Ltd., reported in (2011) 330 ITR 440 (Delhi) was affirmed. The finding rendered by the Tribunal on the said issue is as follows:

> "From the above discussion, we understand that assessee has shown interest income in its books of account but while framing

> of assessment before AO requested to exclude the income from assessment on the ground that it was never realized by assessee. From the submission of Ld. AR we find that assessee was able to recover the principal amount during financial year in which loan was given to above parties concerned. But AO did not agree with the plea taken by assessee and AO added it to the total income of assessee. In our considered view there has to be real income before charging the tax. In the present case the ld. DR has not brought anything on record to controvert the findings of the ld. CIT(A). The AO has not taken the confirmation by exercising his power under section 133(6) of the Act from the loan parties."

Thus, we find that both the CIT(A) and the Tribunal after considering the factual position granted relief to the assessee and we find that no questions of law, much less substantial questions of law, have arisen for consideration in this appeal.

Accordingly, the appeal stands dismissed.

With the dismissal of the appeal, the application for stay, being IA No. GA/2/2017(Old No.GA/1801/2017), stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

s.pal/SN
AR(CR)