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

ITAT/56/2014
IA No.GA/1/2014 (Old No.GA/1660/2014)
RE.: CALCUTTA UROLOGY RESEARCH CENTRE PVT. LTD.
VS.
COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 7th November, 2022

Appearance :
Mr. J.P. Khaitan, Sr. Adv.
Mr. Sanjoy Bhowmik, Adv.
Mr. Indranil Banerjee, Adv.
...for the appellant.

Mr. Soumen Bhattacharjee, Adv.
...for the respondent.

The Court : This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated January 17, 2014 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (Tribunal) in I.T.(SS) A. Nos.35 to 39/Kol/2013 for the assessment years 2004-05 to 2008-09.

During the pendency of this appeal, the name of the assessee company has been changed to Lim Real Estate Pvt. Ltd., as certified by the Registrar of Companies, Kolkata vide a certificate dated 29th September, 2020. Accordingly,

in the cause title below, the name of the assessee the new name of the company be shown.

We have heard Mr. J.P. Khaitan, learned senior Counsel appearing for the appellant and Mr. Soumen Bhattacharjee, learned standing Counsel for the respondent.

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

“Whether and in the event the answer to the first question is in the affirmative, the Tribunal should have directed the application of the net profit rate estimated by it to the entire receipts of the appellant, both disclosed and undisclosed, ruling out any separate addition of the gross amount of undisclosed receipts to the taxable income and its order not doing so is arbitrary, unreasonable and perverse?”

The assessee was on appeal against the order passed by the Commissioner of Income Tax (Appeals), Kolkata [CIT(A)] dated 28th March, 2013 contending that the CIT(A) erred in law in confirming the Assessing Officer's order in estimating the assessee's profit. Once he has made an addition as per seized documents and no evidence or document having been found in search suggesting that the appellant has earned more income than discovered in course of search and seizure documents and thereby making an addition of Rs.23,56,877/- as profit, alleged to have been earned at 35% of the turnover disclosed, which rate is based on subsequent year's rate of profit earned by the assessee.

The learned tribunal after considering the submissions made before it held that the percentage of profit cannot be higher in the initial year and there cannot be any thumb rule that a particular enterprise will earn profit at a

particular rate. Further, the tribunal noted that in the subsequent year the assessee might have earned profit but in the initial year there are number of teething problems as the assessee would take time to establish its name in the market. Thus, keeping in view all these facts the profit was estimated by the learned tribunal and it was held that the profit for the assessment year if estimated at 10%, for the assessment year 2004-05 at 10%, for the assessment year 2005-06 at 12.5%, for the assessment year 2006-07 at 15%, for the assessment year 2007-08 at 20% and for the assessment year 2008-09 at 25%. It would not only protect the interest of the revenue but also that of the assessee. The assessee carried the matter on appeal before this court contending that the tribunal should have directed the application of net profit rate estimated by it with entire receipts, both disclosed and undisclosed and having not done so, the order of the tribunal was arbitrary and perverse. During the pendency of the appeal, the assessee thought fit to move the tribunal by way of an application for rectification so that the error, according to the appellant/assessee could not be rectified by the tribunal itself. For such purpose leave was sought for from this Court and the Hon'ble Division Bench, by order dated 6th August, 2014, granted liberty to the appellant/assessee to make appropriate miscellaneous application before the tribunal with regard to the apparent omission. Accordingly, miscellaneous application nos.43-47/Kol/2014 was filed before the tribunal. In those application it was contended that there is an apparent omission in the impugned order passed by the tribunal dated January 17, 2014 and the same may be rectified by directing that the net profit determined by the tribunal be applied to the entire receipts of the assessee both disclosed and undisclosed and the separate addition of the gross amount of

undisclosed receipts to the assessee's taxable income for each of the assessment years 2004-05 to 2008-09 be deleted. Therefore, the assessee contended that paragraph 7 of the main order passed by the tribunal (impugned in this appeal) dated January 17, 2014 be clarified in this regard. The tribunal dismissed the miscellaneous applications by a common order dated 20th February, 2015. The operative portion of the order reads as follows:

5. We have considered the rival submissions. A perusal of the order of the Tribunal more so in para 7 at page 6 clearly says as follows :

"In view of this fact, in our opinion, this will meet the canons of justice to both the parties, if profit for the assessment year is estimated @ 10%, for the assessment year 2005-06 @ 12.5%, for the assessment year 2006-07 @ 15%, for the assessment year 2007-08 @ 20% and for the assessment year 2008-09 @ 25%".

The words used in the order are clearly profit for the assessment year. Having specifically adjudicated the issue of the profit for the assessment year, now the claim of the assessee for further clarifications is nothing but review of the order. Obviously when profit for the assessment year is mentioned, the profit has to be decided for the turnover in its entirety. In these circumstances, as it is noticed that the Miscellaneous Applications filed by the assessee are only in regard to seeking of clarification as is evident from para 4 of the Miscellaneous Applications and as no error has been pointed out in the order of the Tribunal, the Miscellaneous Applications as filed by the assessee stand dismissed.

6. In the result, the Miscellaneous Applications filed by the assessee are dismissed.

Order pronounced in the open Court on 20th day of February, 2015.

The appellant/assessee, with a view to bring on record the order passed by the tribunal, dismissing the miscellaneous applications vide order dated 20th February, 2015, has filed miscellaneous application being GA

No.1660 of 2014 and has raised certain grounds as to the correctness of the said order.

The learned senior standing counsel appearing for the respondent/revenue would contend that the order passed in the miscellaneous applications by the learned tribunal dated 20th February, 2015 gives rise to a separate cause of action and the same cannot be put to challenge in the present appeal. We are not agreeable with the said submission for more than one reasons. Firstly, the miscellaneous applications were filed before the learned tribunal for clarification/rectification of the main order passed by the tribunal dated 17th January, 2014 which is impugned in this appeal. Secondly, the assessee before filing the applications before the learned tribunal sought leave from this Court to file such application which leave was granted by order dated 6th August, 2014. Therefore, the order passed by the learned tribunal in the miscellaneous applications dated 20th February, 2015 merges with the main order passed by the tribunal dated 17th January, 2014 which is impugned in this appeal. Therefore, the objection raised by the revenue cannot be sustained. Accordingly, GA No.1660 of 2014 is allowed.

Thus, we are required to test the correctness of the order passed by the learned tribunal dated 17th January, 2014 together with the order passed in the miscellaneous application dated 20th February, 2014. In the previous paragraph we have extracted the operative portion of the order passed by the learned tribunal dated 20th February, 2015. On perusal of the said order we find that the learned tribunal agreed with the assessee by stating that when profit for assessment year is mentioned, the profit has to be decided for the turn-over in its entirety. Though the learned tribunal had held so, for reasons best known,

the application stood dismissed probably on the ground that by virtue of seeking a clarification, the assessee seeks for a review of an order which is impermissible. In any event, the learned tribunal, in the main order dated 17th January, 2014 had granted relief to the assessee by estimating profit on slab rates ranging from 10% to 25% for each of the assessment years. Thus, the only question was whether it should be applied uniformly and whether the assessing officer was justified in applying the order passed by the tribunal only in respect of the disclosed income. As mentioned above, the manner in which the order of the tribunal is to be interpreted has been rightly interpreted by the learned tribunal in its order dated 20th February, 2015 by observing that profit has to be decided for turn-over in its entirety. If that be the case, then the contention raised by the appellant needs to be accepted. As could be seen from the giving effect to order passed by the assessing officer dated 18th March, 2014, the assessing officer had given effect to the order of the tribunal by understanding as if the tribunal directed the net profit estimation only in respect of the disclosed income. The tribunal having clarified that the profit has to be estimated in its entirety, the view taken by the assessing officer in its order dated 18th March, 2014 is incorrect.

Thus, for the above reasons, the assessee is entitled to succeed. In the result, the appeal is allowed and the substantial question of law is answered in favour of the assessee and the assessing officer is directed to apply the net profit rate as ordered by the tribunal in its order dated 17th January, 2014 in paragraph 7 therein to the entire receipts of the appellant/assessee both disclosed and undisclosed and such order be passed within a period of four weeks from the date of receipt of a server copy of this order.

Accordingly, the appeal (ITAT/56/2014) stands allowed.

The connected application for stay (IA No.GA/1/2014) also stands disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)