

OD – 4, 9, 10, 11, 12, 13, 14

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

ITAT/129/2022
IA NO. GA/1/2022; GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
REETA LAKHMANI

ITAT/127/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
RITIN LAKHMANI

ITAT/128/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
JAIKISHAN LAKHMANI

ITAT/130/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER INCOME TAX 9 KOLOKATA
Versus
PRAVASH KUMAR LAKMANI

ITAT/131/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
RACHIT LAKHMANI

ITAT/132/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
GOPICHAND LAKHMANI

ITAT/133/2022
IA NO. GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX 9 KOLKATA
Versus
RAVISH LAKHMANI

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Dated : NOVEMBER 22, 2022.

Appearance:

Mr. Tilak Mitra, Adv.

...for appellant

Mr. Subhas Agarwal, Adv

...for respondent

The Court :- We have heard learned counsel appearing for the respective parties. We have perused the affidavit filed in support of the petition and found sufficient cause has been shown for condonation of delay.

Accordingly, the application is allowed and the delay in filing the appeal is condoned.

These appeals have been filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) challenging the orders passed by the Income Tax Appellate Tribunal in various assessment years. The details of the appeal numbers, case number before the learned Tribunal and the assessment year under consideration are set out in a tabulated form hereunder :

Sl. No.	ITAT No.	Date of order	Assessment year
1.	ITAT 129/2022	13.11.2020	2014-2015
2.	ITAT 127/2022	13.11.2020	2014-2015
3.	ITAT 128/2022	13.11.2020	2014-2015
4.	ITAT 130/2022	13.11.2020	2014-2015
5.	ITAT 131/2022	13.11.2020	2014-2015
6.	ITAT 132/2022	13.11.2020	2014-2015
7.	ITAT 133/2022	13.11.2020	2014-2015

Since the issue involved in all these cases are identical they have been taken together and are disposed of by this common judgment and order. For the sake of convenience and with the consent of the learned Advocates for the parties ITAT /129/2022 is taken as the lead case. The revenue has raised the following substantial questions of law for consideration:

- “i] Whether the learned Tribunal has erred in law and failed to appreciate that the assessee could not substantiate the genuineness of the transaction to prove that it had not in dubious share transaction meant to account for undisclosed income in the garb of Long Term Capital Gain [LTGC] to claim exemption under section 10[38] of the Act ?
- ii] Whether the learned Tribunal has erred in law while allowing the assessee’s appeal of claim of exemption under section 10[38] without holding that the official transaction of purchase and sale of shares of penny stock companies namely Baviscon Vincom Pvt. Ltd. later amalgamated with Unno Industries Ltd. was adventure in nature of trade, thus same was to be taxed as business income ?
- iii] Whether the learned Tribunal has erred in law in overlooking the documentary evidence in depth and in light of conduct of the assessee and other surrounding circumstances in order to see whether the assessee is liable to the provisions of section 68 or not?”

We have heard Mr. Tilak Mitra, learned standing Counsel for appellant/revenue and Mr. Pranit Bag, learned Advocate assisted by Mr. S. Mukhopadhyay, learned Advocate for the respondent.

The contention advanced before us by the revenue is that the assessee could not establish the genuineness of the transactions to prove that it had not indulged in any

dubious share transactions meant to account for undisclosed income under the garb of long term capital against (LTCG) to claim exemption under Section 10 (38) of the Act.

On going through the order passed by the learned Tribunal we find that the learned Tribunal had granted relief to the assessee on two grounds firstly as to whether the exercise of jurisdiction by the Principal Commissioner of Income Tax under Section 263 was justified and in accordance with law.

This aspect was considered by the learned Tribunal and after going through the facts of the case it was found that the initiation of the proceedings under Section 263 of the Act was based on a proposal given by the assessing officer and not at the behest of the PCIT. It may be true that the PCIT may have information from the assessment file or through other sources. Nevertheless while exercising powers under Section 263 of the Act the PCIT has to bear in mind the twin conditions are to be conjointly fulfilled. Therefore, before exercise of power under Section 263 it is the PCIT who has to apply its mind to the issue and thereafter record reasons as to how the twin conditions are satisfied and then issue a show-cause notice to the assessee. In the cases on hand there is nothing on record to show that such an exercise was done by the PCIT. Therefore, learned Tribunal after noting several decisions on the subject rendered by the Coordinate Benches of the Tribunal had allowed the assessee's appeal and set aside the order passed by the PCIT under Section 263 of the Act. Thereafter, the learned Tribunal has proceeded to examine the merits of the matter and granted relief. It is the submission of Mr. Mitra that so far as the merit of the cases are concerned similar issue was tested by this Court in the case of Principal Commissioner of Income Tax Vs. Swati Bajaj reported in 2022 SCC online page 1572. Though such may be the issue, as pointed out earlier the learned Tribunal had granted relief to the assessee on two grounds the first of which being that the exercise of power under Section 263 of the Act

was not in accordance with law. As could be seen from the substantial questions of law suggested by the revenue, the revenue has not raised any question on the said finding of the Tribunal which goes to show that the revenue had reconciled with the reasoning given by the learned Tribunal in that record. Therefore, a piecemeal challenge to the order passed by the learned Tribunal on one of the grounds on which relief was granted to the assessee is not maintainable.

In more or less identical circumstances in the case of Principal Commissioner of Income Tax, Durgapur Vs. M/s. Sinforte Pvt. Ltd. in ITAT No.104/2019 dated 7.1.2022 the court had dismissed the appeal filed by the revenue on the ground that the PCIT in order to exercise jurisdiction under section 263 of the Act exercised jurisdiction at the instance of the assessing officer which is against the provisions of the law. This decision supports the case of the respondent assessee. Hence, for the above reasons, we are of the view that the order passed by the learned tribunal on the first ground, namely with regard to the correctness of the exercise of power under section 263 of the Act has to be affirmed and, accordingly, the appeal filed by the revenue is dismissed and the substantial questions of law suggested by the revenue are not required to be decided in the instant case.

For the reasons set out by us above and, accordingly, the same are left open.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)