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

ITAT/148/2022
IA No.GA/1/2022; GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX, -5, KOLKATA
Vs
VASUDHA JAIN

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 31st October 2022.

<u>Appearance</u> :
Mr. Tilak Mita, Adv.
..for appellant
Mr. Pranit Bag , Adv.
...for respondent

<u>RE: GA/1/2022</u>

The Court:- Heard Mr. Tilak Mitra, learned Advocate for the appellant and Mr. Pranit Bag, learned Advocate for the respondent.

There is a delay of 1113 days in filing the appeal. Though the reasons given in the affidavit are not convincing the issues involved in the appeal had been decided by this court in earlier matters, this court exercises discretion and condone the delay in filing the appeal. Accordingly, the application is allowed.

<u>ITAT/148/2022</u>

This appeal filed by the revenue under section 260A of the Income Tax Act, 1961 [the Act] is directed against the order dated 15.2.2019 passed by the Income Tax Appellate Tribunal "A[SMC]" Bench in ITA No.1018/Kol/2018 for the assessment year 2015-16 the revenue has raised the following substantial question of law for consideration :

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal erred in law in holding that the

scripts of M/s. Sulabh Engineers & Services Limited were not bogus and the claim of LTCG amounting to Rs.9,31,615/- on the sale of such scrips was allowable for Long Term Capital Gain sailing against the findings of the Assessing Officer as well as the CIT [Appeals] giving rise to perversity of facts ?

2. Whether in the facts and circumstances of the case, the impugned order of the Appellate Tribunal is perverse for granting Long Term capital Gain benefit to the assessee ?

3. Whether the Assessee is entitled to tax exemption u/s. 10[38] when the records and material indicates that the alleged income shown as Long Term Capital Gain is result of manipulated practice of an organised tax evasion ?

We have heard Mr. Tilak Mitra, learned Advocate for the appellant and Mr. Pranit Kumar Bag, learned Counsel for the respondent.

It is not disputed before us that the issue involved in this appeal was decided by this Court in an earlier matter in the case of *Principal Commissioner of Income Tax (1) Kolkata Vs. Rakesh Kumar Khemuka* in ITAT No. 163 of 2021 and ITAT No. 172 of 2021 dated 20th July, 2022 and the appeal filed by the revenue was dismissed. The said decision was followed in the case of *Principal Commissioner of Income Tax, Central – 2, Kolkata, Vs. Giridhar Lal Goenka* in ITAT 34 OF 2022 dated 25th July, 2022. The operative portion for the order reads as follows :-

"*The learned tribunal had dismissed the appeal filed by the revenue by noting the fact that the appeal is less than the monetary limit of Rs.50 lakhs fixed by the CBDT. The revenue is* *on appeal contesting the matter on merits. We had an occasion to consider similar issued in the case of Principal Commissioner of Income Tax –1, Kolkata vs. Rakesh Kumar Khemuka in ITAT No.163 of 2021 and ITAT No.172 of 2021 and by a judgment dated 20th July, 2022 the appeal filed by the revenue was dismissed. The operative portion of the said judgment reads as follows:*

> *"We have heard Mr. Soumen Bhattacharjee, learned standing Counsel appearing for the appellant and Mr. Abhratosh Majumder, learned Senior Counsel appearing for the respondent assessee.*
>
> *On 19th February, 2022 we had passed the following order:*
>
> *"The Court : We have heard Mr. Soumen Bhattacharjee, learned Standing Counsel, appearing for the appellant/revenue and Mr. Abhratosh Majumder, learned Senior Counsel, assisted by Mr. Avra Majumder, learned Counsel for the respondent/assessee.*
>
> *An important issue is raised in this appeal as regards the applicability of the Circular issued by the CBDT in Circular no.23, dated 6th September, 2019 and the effect of the Office Memorandum dated 16th September, 2019. The High Court of Gujarat in Principal Commissioner of Income-tax vs. Denisha Rajendra Keshwani, reported in (2022)134 taxmann.com 249 (Gujarat) and Principal Commissioner of Income-tax, (Central), Ahmedabad vs. Anand Natwarlal Sharda, reported in (2021)128 taxmann.com 376 (Gujarat) have held that the Office Memorandum dated 16th September, 2019 has to be read along with the Circular No.23, dated 6th September, 2019 and can only have prospective effect.*
>
> *Learned Senior Counsel appearing for the respondent/assessee submitted that the decisions referred above laid down the correct legal principal and identical question was considered by the High Court of*

Chattisgarh in the decision reported in (2021) 130 taxmann.com 291 and a Special Leave Petition filed by the revenue was dismissed by the Hon'ble Supreme Court as reported in (2021) 130 taxmann.com 292 (SC).

We find that the order impugned before us has been passed by the Tribunal in a batch of cases. That apart, we also take note of the fact that in several cases revenue has filed appeals with inordinate delay citing the Office Memorandum dated 16th September, 2019. Thus we have to examine as to the effect of the office memorandum as to whether it can be given retrospective effect or not. Since the issue has a larger ramification, appropriate assistance should be given to the learned standing Counsel.

Therefore, we direct the Commissioner of Income tax (Judicial), Kolkata to render the required assistance to the standing Counsel appearing for the Department, supply adequate material and also notes on submission, which can be considered by us on the next hearing date.

List the matter on 21st February, 2022."

In terms of the above direction the Principal Commissioner of Income Tax (Judicial), Kolkata has addressed the learned Standing Counsel for the appellant by letter dated 3rd March, 2022. Along with the said letter, notes on submission dated 7th March, 2022 has been appended. The said notes of submission reads as follows:

"Notes on Submissions

1. *The issue before the Hon'ble High Court is seen to be the retrospective or prospective applicability of Central Board of Direct Taxes Circular No. 23 dated 06.09.2019 and Central Board of Direct Taxes OM dated 16.09.2019 by which exception to the tax effect was allowed for filing appeals in Long Term Capital Gain/Penny Stock in ITAT in respect of appeals which were dismissed by ITAT.*

2. *I am therefore to submit that in view of the facts of the impugned matter, the exception to penny stock cases from the stipulation of monetary limit would be indeed operable from 16.09.2019 that is only in the cases where appeal was filed on or after 16.09.2019."*

In the light of the stand taken by the Department, the monetary limit would be operable from 16th September, 2019, that is, only in cases where appeal was filed on or after 16th September, 2019."

Mr. Soumen Bhattacharyya, learned standing counsel for the appellant/revenue would submit that though in the instant case the appeal before the tribunal was filed in the year 2019, as on the date when the circular was issued to take effect from 16.9.2019, the appeal was pending before the tribunal. It is submitted that in the case of Rakesh Kumar Khemuka, the department had given specific instruction. In our considered view, the department having taken a decision and a circular having been issued on 6.9.2019 followed by official memorandum of 16.9.2019 taking a decision that the stipulation of monetary limit would be operable from 16.9.2019, it is of no significance as to whether the appeal was pending on the said date and whether the tribunal was hearing the matter. This is so because the cut off date fixed under the circular is that it will apply to cases where appeals are filed on or before 16.9.2019. In the instant case, admittedly, the appeal has been filed much prior to the said date.

For the above reason, we find that the order passed by the learned tribunal dismissing the appeal does not call for any interference. Accordingly, the appeal filed by the revenue (ITAT/34/2022) stands dismissed. Since the substantial questions *of law raised in this appeal do not arise for consideration, they are left open*."

Following the above decision the appeal filed by the revenue is dismissed and the substantial question of law which have been raised does not arise for consideration.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH.