

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

ITAT/232/2022
IA No. GA/1/2022, GA/2/2022

PRINCIPAL COMMISSIONER OF INCOME TAX 2, KOLKATA
VS.
M/S. KESORAM INDUSTRIES LIMITED

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 5th December, 2022

Appearance :
Mr. Smarajit Roychowdhury, Adv.
Mr. Soumen Bhattacharya, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee Pal, Adv.
...for the respondent.

The Court : We have heard Mr. Smarajit Roychowdhury, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior counsel assisted by Ms. Nilanjana Banerjee Pal, learned advocate for the respondent/assessee.

There is a delay of 545 days in filing the appeal. We have perused the affidavit filed in support of the condone delay petition and we find sufficient causes have been shown for not being able to file the appeal within the

prescribed time limit. Accordingly, the delay in filing the appeal is condoned and the application for condonation of delay being IA No.GA/1/2022 is allowed.

This appeal filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is against the order dated 21st October, 2020 passed by the Income Tax Appellate Tribunal, 'Virtual Court-A' Bench, Kolkata (Tribunal) in ITA Nos.1195 & 1776/Kol/2019 for the assessment year 2011-12.

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

- i) Whether on the facts and circumstances of the case and in law the Learned Income Tax Appellate Tribunal is erred in deleting the disallowance on account of foreign exchange fluctuation loss (mark to market) wherein the loss being provisions for future is notional in nature ?
- ii) Whether the order of the Income Tax Appellate Tribunal in deleting the disallowance/addition made by the Assessing Officer was perverse having regard to the evidence and materials on record ?

We have heard Mr. Smarajit Roychowdhury, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior counsel assisted by Ms. Nilanjana Banerjee Pal, learned advocate for the respondent/assessee.

It is not disputed by the revenue that questions involved in this case were considered by this Court in the case of Principal Commissioner of Income Tax-1, Kolkata -vs.- M/s. Pricewaterhouse Coopers Pvt. Ltd. in ITAT/269/2017 dated 17th December, 2021. The operative portion of the decision reads as follows:

“XXXXX	XXXXX	XXXXX	XXXXX
XXXXX	XXXXX	XXXXX	XXXXX

The assessee before us is a company engaged in consultancy business and the assessee in their computation of income for the relevant assessment year claimed a loss on account of foreign exchange fluctuation. The Assessing Officer held that fees receivable in foreign exchange have been duly hedged by way of taking forward contract and such loss claimed by the assessee is a notional loss and contingent in nature. Accordingly, the Assessing Officer treated the same as notional loss and placed reliance on CBDT instruction no.3 of 2010 dated 23.3.2010.

Aggrieved by the same the assessee preferred appeal before the Commissioner of Income Tax [Appeals] – XX, Kolkata [CIT(A)]. The assessee contended that it has been following the mercantile system of accounting on regular basis and the loss was recognised in its books of accounts, which is deductible under Section 37[1] of the Act. Further, the assessee contended that the loss was recognised in the books of accounts pursuance of the stipulations in accounting standard no.11 whereunder it is compulsory to give effect to foreign currency transaction as per the foreign exchange rates as on the date of the balance sheet. Alternate submission was made before the CIT[A] contending that if such loss is not allowable on accrual basis then the effect of such loss arisen in subsequent year on maturity of contract should be allowed. The CIT[A] by order dated 27.02.2014 allowed the alternate submissions made by the assessee. Aggrieved by the same, the assessee preferred appeal to the Tribunal. 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.

Further, on perusal of the circular, we find that it is not a possible direction by the Board to the Assessing Officer rather Board under law cannot issue any such possible direction as the settled legal principle. The Assessing Officer is an independent authority and none can dictate him as to how and in what manner he is to complete the assessment. Conscious of this legal position, the Board in the instruction dated 23.3.2010 had stated that the Assessing Officer may follow the guidelines given in the said instruction. This is one more indication to say that the Assessing Officer is not bound over the instruction given by the Board.

Thus, the only contention of the revenue appears to be based upon instruction issued by the CBDT which cannot override a decision of the Hon'ble Supreme Court. Therefore, we are of the considered view that there is no error in the order passed by the Tribunal. That apart, it is rather doubtful as to whether such instruction given by CBDT dated 23.03.2010 can have a retrospective effect thereby negativity the effect of the judgement.

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.

In the light of the above, we find no grounds to interfere with the order passed by the Tribunal. Accordingly, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue."

The learned counsel appearing for the respondent/assessee also placed before us the decision of the Hon'ble Division Bench of this Court in the case of Principal Commissioner of Income Tax-4, Kolkata –vs.- Hindustan Gum and Chemicals Ltd. in ITAT/40/2020 dated 13th January, 2021.

In the light of the above, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the application for stay being IA No.GA/2/2022 also is dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

s.pal/SN.