OD-7

ITAT/27/2023
IA No.GA/1/2023

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

PRINCIPAL COMMISSIONER OF
INCOME TAX, ASANSOL

-Versus-

MANINDRA MOHAN MAZUMDAR

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 15th March, 2023

Appearance :
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 28th July, 2022 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the Tribunal) in ITA No.200/Kol/2022 for the assessment year 2017-18.

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

(i) Whether the Learned Tribunal has committed substantial error in law in not taking into consideration Explanation-2 to Section 263(1) which tantamount to violation of question of law ?

(ii) *Whether the learned Tribunal has committed substantial error in law in not considering the case laws as mentioned in the order under Section 263 of the I.T.Act, 1961 dated 26.03.2022 and relevant provisions of the Act which empowers the PCIT to exercise his revision jurisdiction under Section 263 in this case when the assessment order passed by the Assessing Officer without making enquiries or verification and therefore the assessment order became erroneous in so far as it is prejudicial to the interest of revenue ?*

(iii) *Whether the learned Tribunal has committed substantial error in law in accepting the assessee's submission that there is no bar under the Act for setting off of derivative loss against business income. As per Section 73(1) derivative loss being speculative loss shall not be entitled to set off against any business income other than income from speculative business ?*

We have heard Mr. Soumen Bhattacharjee, learned standing counsel for the appellant/revenue. Though the respondent has been served and affidavit of service has been filed, none appears for the respondent.

The order which was impugned before the Tribunal was passed by the Principal Commissioner of Income Tax, Asansol under Section 263 of the Act. The learned Tribunal has allowed the appeal filed by the assessee solely on the ground that certain records were placed before Tribunal which were examined by the Tribunal and in the opinion of the learned Tribunal that those documents clearly show that the issue was discussed by the Assessing Officer and he was satisfied with the reply given by the assessee. Therefore, the Tribunal came to the conclusion that the PCIT could not have assumed jurisdiction under Section 263 of the Act. That apart, the learned Tribunal recorded the submission of the learned Advocate for the assessee that even otherwise there is no bar under the Income Tax Act for setting off of derivative loss against business income. Though such submission was recorded, the learned Tribunal has not given any finding as to the correctness of such submission but proceeds to record that the Department could not have reverted the contention of the learned Advocate for the assessee. Ultimately, the Tribunal has come to the conclusion that there is no justification on the part of the PCIT to exercise his revisional jurisdiction under Section 263 of the Act. On perusal of the order passed by the PCIT dated 26th March, 2022, it is seen that the assessee did not appear before the PCIT though they were granted opportunity of personal hearing on two occasions. Thus, the record which was examined by the learned Tribunal was not placed before the PCIT for consideration so as to take a decision on merits. Furthermore, we find that the learned Tribunal has not given a specific finding as to how there is no bar under the Income Tax

Act for setting off of derivative loss against business income in the facts and circumstances of the case. Therefore, we are of the view that the matter has to be freshly decided by the PCIT and, therefore, we are inclined to remand the matter back to the PCIT for fresh consideration.

In the result, the appeal filed by the revenue (ITAT/27/2023) is allowed and the order passed by the learned Tribunal as well as the PCIT dated 26th March, 2022 are set aside and the matter is remanded to the PCIT for fresh consideration, who shall take note of the documents. The assessee is directed to appear before the PCIT on the dates to be fixed for personal hearing and place the paper book which was placed before the learned Tribunal and after considering all the documents and hearing the assessee, a fresh decision shall be taken in accordance with law.

In the result, the substantial questions of law are left open.

Consequently, the connected application for stay (IA No.GA/1/2023) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

As./AKG.