

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

ITAT/42/2023
IA NO: GA/2/2023

THE PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL) -2, KOLKATA
VS.
SMT. USHA DEVI MODI

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 30th March, 2023

Appearance :
Mr. Soumen Bhattacharjee, Adv.
...for appellant.
Mr. S.M. Surana, Sr. Adv.
...for respondent.

The Court : - This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 [the Act, for brevity] is directed against the order dated 12th January, 2021 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No.874/Kol/2019 for the assessment year 2014-15.

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

- A. Whether the Learned Tribunal has committed substantial error in law by setting aside the order passed under section 263 of the Income Tax Act, 1961 by the Pr. Commissioner of Income Tax without appreciating that the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of revenue ?
- B. Whether the Learned Tribunal has committed substantial error in law exemption cannot be allowed under section 10(38) of the Income Tax Act, 1961 wherein entire transaction is colluded and bogus ?
- C. Whether the Learned Tribunal has committed substantial error in law by holding Long Term Capital Gain amounting to Rs.20,49,788/- as

exempted income under section 10(38) of the Income Tax Act, 1961 ignoring that the script has been established to be a penny stock by the Department and which was widely published throughout the country ?

We have heard learned counsel on either side.

The learned Tribunal in the impugned order has followed its decision in the case of M/s. Gitsh Tikmani (HUF) and Others and other connected matters. The revenue had preferred appeals before this Court against the said decision and other connected matters and the appeal was allowed by this Court in the case of Principal Commissioner of Income Tax-5, Kolkata vs. Swati Bajaj and Ors. reported in 2022 SCC Online Cal 1572.

Learned senior advocate appearing for the respondent submitted that in the instant case, the point is as to whether there was no enquiry conducted by the Assessing Officer warranting exercise of jurisdiction by the Principal Commissioner of Income Tax under Section 263 of the Act. This issue was considered in the above-referred decision at paragraph 100 and the relevant paragraph is quoted hereinbelow :

“100. While proposing to invoke the power under Section 263 of the Act, the question as to whether the Commissioner was justified in invoking the power under Section 263 has to be decided based on facts of each case. The assessee cannot be allowed to contend that the language employed in the orders passed by the Commissioner under Section 263 does not mention about how the assessments order was erroneous in so far as it is prejudicial to the interest of revenue. These words or phrases are contained in Section 263 of the Act. Merely because the Commissioner has not used these words or phrases occurring in Section 263 will not vitiate the assumption of jurisdiction. What is required to be seen is the content of the order and the discussion and findings rendered by the Commissioner. This is because the cardinal principle is that substance over form has to be preferred. The Commissioner while issuing the show cause notice had come to the prima facie conclusion that the assessing officer did not conduct an enquiry as required to justify such prima facie opinion. The Commissioner was required to set out as to why in his opinion the enquiry by the assessing officer was not proper or insufficient. On reading of the orders passed by the Commissioner under Section 263 which are the subject matter in ITAT No. 156 of 2021 and other similar matters, it is seen that the Commissioner has disclosed to the assessee as to why in his case the power under Section 263 has to be invoked. On reading of the orders passed by the Commissioner, we find that the order to be a reasoned order and there is nothing to conclude. The issue was pre-decided. The assessments orders which are subject matter of Section 263 action shows that an enquiry has not been conducted by the assessing officer in the manner it ought to have been conducted. We say so because, the officers of the income tax department were fully aware of the investigation which was done and the report been circulated and therefore at that stage that the officer had to take note of such report to put the assessee on notice and commenced an enquiry by calling upon

the assessee to justify the genuineness of the claim of LTCG/STCL. The assessing officer turned a blind eye to the project investigation which was carried out by the department. The assessing officer lost sight of the fact that the enquiry did not commence from that of the assessee and more particularly the name of the assessee did not feature in the investigation report. Therefore the assessing officer was bound to cause an enquiry by calling upon the assessee to explain and justify the genuineness of the claim for exemption made by them. If the assessee has not established the genuineness at the "other end" the assessing officer would have no other operation except making the addition under Section 68 of the Act. We find that in these cases the assessing officers missed an important point as to what is the nature of enquiry which he is required to do. The assessing officer merely went by the submission that the stock broker is a public sector company. Unfortunately this is not the manner in which the enquiry should have been conducted. The entire case before the department was the genuineness of the claim for LTCG/STCL and the basis was unhealthy and steep rise of the price of the shares of mostly the paper companies though listed before the stock exchanges their shares were very rarely traded and in the background of these facts the enquiry should have been conducted by the assessing officer. Therefore we are of the clear view that the assumption of jurisdiction under Section 263 of the Act by the respective Commissioners was fully justified and are shown to be proper exercise of power. The tribunal while interfering with the orders of the Commissioner once again posed a wrong question to itself and failed to approach the matter in the proper perspective considering the backgrounds in which the power was invoked. The tribunal brushed aside the surrounding circumstances which have led to such assessments or orders under Section 263. The manipulative practice adopted by the stock brokers and entry operators was not even adverted to by the tribunal and the entire matter was dealt with in a very superficial manner without dwelling deep into the core of the issue. The tribunal being the last fact finding authority was required to go deeper into the issue as the matter has manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "players" can never be established by direct evidence and therefore the surrounding circumstances were required to be taken note of by the tribunal which exercise has not been done. We have considered as to whether in such an event, should the matter be remanded to the tribunal for fresh consideration. We have held that there is no such requirement and that is the Court is empowered to examine the findings recorded by the assessing officer, or the CIT (A) to arrive at a conclusion. The assessee has been harping upon the opinion rendered by the financial experts, professionals in the said field the information which was available in the media etc. All these opinions are at best suggestions to an investor. The assessee cannot state that merely because an expert had issued a buy call or there was news in the media that a particular share shows an upwards trend and it is good time for buying those shares. They jumped into the fray the assessee is to be reminded of the doctrine of "caveat emptor". The assessee cannot take shelter under the opinion given by the experts as it is not the expert who has indulged in the transaction but it is the assessee. Therefore by following such expert's advice if the assessee gets into a "web" it is for him to extricate himself from the tangle and he cannot reach out to the expert to bail him out. The assessee cannot be heard to say that they had blindly followed advice of a third party and made the investment. Selection of shares to be purchased is a very complex issue, it requires personal knowledge and expertise as the investment is not in a mutual fund. None of the assessee before us have shown to have made any risk analysis before making their investment in a "penny stock". If according to them they have blindly taken a decision to invest in insignificant companies they having done so at their own peril have to face the consequences. Thus, the conduct of the assessee before us probabilities the

stand taken by the revenue, rightly the mind of the assessee as an investor was taken note to deny the claim for exemption. It is in this background that the human probabilities would assume significance. As observed earlier the doctrine of preponderance of probabilities could very well be applied in cases like the present one. We say human probabilities to be the relevant factor as on account of the fact that the assessee is of individuals or Hindu Undivided Families and the trading has been done in the name of the individual assessee or by the Karta of the HUF. None of the assessee before us have been shown to big time investor. This is evident from the income details of the assessee which has been culled out by the respective assessing officers. Assuming that the assessee is a regular investor as was submitted to us by the learned advocates for the assessee that in any manner cannot improve the situation as the claim for LTCG has been only restricted to the shares which were purchased and sold by the assessee in penny stocks companies. Therefore merely because the assessee had invested in other blue chit companies had earned profit or incurred loss cannot validate the tainted transactions. It has been established by the department that the rise of the prices of the shares was artificially done by the adopting manipulative practices. Consequently whatever resultant benefits which accrue from out of such manipulative practices are also to be treated as tainted. However, the assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee before us. Therefore, the assessing officers were well justified in coming to a conclusion that the so called explanation offered by the assessee was not to their satisfaction. Thus, the assessee having not proved the genuineness of the claim, the creditworthiness of the companies in which they had invested and the identity of the persons to whom the transactions were done, have to necessarily fail. In such factual scenario, the Assessing Officers as well as the CIT(A) have adopted an inferential process which we find to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the CIT (A) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies when the general market trend was admittedly recessive and thereafter arrived at a conclusion which in our opinion is a proper conclusion and in the absence of any satisfactory explanation by the assessee, the Assessing Officers were bound to make addition under Section 68 of the Act. “

In the light of the above, the order passed by the Tribunal calls for interference.

Accordingly, the appeal is allowed and the substantial questions of law are answered in favour of the revenue.

Affidavit of service filed in Court today be kept with the record.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)