

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

ITAT/120/2023
IA NO: GA/2/2023
PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL 2 KOLKATA
VS
M/S. SALARPURIA PROPERTIES PVT. LTD.

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 22nd November, 2023

Appearance :
Mr. Amit Sharma, Adv.
led by Mr. Vipul Kundalia, Adv.
...for appellant

Mr. J.P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Ms. Sretapa Sinha, Adv.
...for respondent

The Court : - This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 17th May, 2022 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (Tribunal) in ITA No. 67/Kol/2020 for the assessment year 2011-12.

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

- i) Whether the Learned Tribunal has committed substantial error in law in allowing deduction under Section 80IB(10) of the Income Tax Act and dismissing the appeal of the Revenue on this ground ?

- ii) Whether the Learned Tribunal has committed substantial error in law in allowing deduction under Section 80IB(10) of the Income Tax Act by failing to consider that in Section 80IB(10) there is no provision for claim of proportionate deduction if the assessee has complied with the clause (e) and (f) of Section 80IB to some extent in one residential unit and further that Section 80IB lays down certain conditions which are required to be fulfilled for claiming deduction under the said Section. Clause (e) of sub-section 10 states that any person other than an individual can be allotted only one residential project and if more than one is allotted to such person, then the deduction under Section 80IB in respect of an undertaking, developing and building housing projects pre-approved, shall not be available, and all the conditions mentioned are independent of each other and are equally important and violation of any one of the conditions would lead to denial of deduction under this Section but in the instant case the respondent has failed to fulfill the conditions of Section 80IB(10) of the said Act and thus it is not eligible for such deduction ?
- iii) Whether the Learned Tribunal has substantially erred in law by deleting the additions made under Section 68 of the said Act when the respondent failed to give proper details to show identity of share applicants and to prove genuineness of transactions and credit worthiness of the share applicants along with other detail and not allotting the same and moreover the respondent had

Rs.19,18,30,000/- outstanding as share application money as on 31.03.2010 and the same was refunded back during the financial year under assessment and at the same time the respondent had further received fresh application money of Rs.17,90,15,000/-during the F.Y. 2010-11 which clearly indicates that the respondent had no intention of allotting shares to such share applicants and it has devised a plan and using this route to bring its own unaccounted money by rotating such transactions in order to change the identity of the share applicants as evident from outstanding in capital suspense account as on 31.03.,2010 and 31.03.2011?

- iv) Whether the Learned Tribunal has substantially erred in law in allowing disallowing addition made under Section 68 of the Income Tax Act, 1961 by failing to consider that the respondent failed to provide any explanation regarding share application money remaining in the Capital Suspense Account which clearly shows that these share applications are not genuine transactions but a mechanism to bring in the books the respondent's unaccounted money through the route of share application under the guise of changing the names of the share applicants ?
- v) Whether the Learned Tribunal has substantially erred in law by deleting the additions made under Section 14 of the Income Tax Act, 1961 read with Rule 8D of the Income Tax Rules by ignoring the settled position of law as laid down by the Learned Kolkata Tribunal in the case of ACIT Vs. Champion Commercial Pvt. Ltd. and by the

Learned Chennai Tribunal passed in Southern Petro Chemical Industries Vs. DCIT as well as ignoring the CBDT's Circular No.5/2014 dated 11.02.2014, in view of which disallowance under Section 14A and Rule 8D can also be made in cases where the corresponding exempt income has not been earned in the previous year ?

- vi) Whether the Learned Tribunal has substantially erred in law in deleting the additions of interest paid/debited on account of borrowed money part of which was utilized for providing interest free loans and advances under Section 3691)(iii) of the Income Tax Act, 1961 inasmuch as from the details of interest free loans and advances at the end of financial year in comparison to the opening balance of financial year, it is palpable that some parts of the funds were utilized for the purpose of providing 'interest free loan and advances' and thus the interest on borrowed monies which was routed to provide 'Interest Free Loans & Advances' is not allowable as business expenses of the respondent ?
- vii) Whether the Learned Tribunal has substantially erred in law and facts in deleting the additions of interest paid on service tax and TDS which is penal in nature under Section 37 of the Income Tax Act, 1961?
- viii) Whether the Learned Tribunal has substantially erred in law in failing to appreciate that interest on Service Tax and interest on TDS are not allowable as per provisions of Section 37(1) of the said Act

and the said legal position has been settled in the case of Shree Pipes Vs. DCIT reported in 4 TMI 97 wherein it was held that interest on sales tax is penal in nature and the same should be disallowed in computing taxable income ?

- ix) Whether the Learned Tribunal has substantially erred in law by deleting the additions of Sundry Balances and Stock Written Off under Section 37 of the Income Tax Act, 1961?
- x) Whether the Learned Tribunal has substantially erred in law in failing to appreciate that the write off claimed by the respondent is capital in nature and such claim is not in consonance with the provisions contained in Section 37(1) of the said Act as well as law laid down in the case of Hashimara Industries Ltd.-Vs.-CIT [200 ITR 654 (CAL)]?

We have heard Mr. Amit Sharma, led by Mr. Vipul Kundalia, learned standing Counsel appearing for the appellant and Mr. J.P. Khaitan, learned senior counsel appearing with Mr. Pratyush Jhunjhunwala, Advocate for the respondent.

The substantial questions of law which have been raised for consideration can be clubbed under six broad heads and a decision on those six broad heads will enable us to answer the substantial questions of law which have been raised by the revenue.

The first issue pertains to Section 80IB. The Assessing Officer considered the deduction claimed by the assessee for deduction under section 80IB(10) of the Act in respect of one of its projects called "*Salarpuria Serenity*". The assessee

claimed that the project was approved on 31st December, 2007 and completed on 8th December, 2009. The Assessing Officer disallowed the said deduction on the ground that it is impossible to complete the said project within the said time. The assessee carried the matter in appeal before Commissioner of Income Tax (Appeals) – 6 Kolkata [CIT](A), who has passed an order dated 21st October, 2019. The assessee placed before the CIT(A) the commencement certificate dated December 31, 2007 and the completion certificate dated December 8, 2009, issued by the local authority. It examined the genuineness of those certificates and accepted the same. The Tribunal in the impugned order confirmed the findings rendered by the CIT(A). As long as the completion certificate has not been accepted by the department, the question of disallowing the deduction claimed under Section 10IB(10) of the Act does not arise and, therefore, the CIT(A) as well as the Tribunal were justified in their approach and deciding the issue in favour of the assessee. In respect of the same project in respect of two of the flats sold to two persons namely, husband and wife, those transactions were prior to the insertion of clauses (e) and (f) of Section 80IB(10) with effect from April 1, 2010. The CIT(A) took into consideration the facts of the case and noted that except the two residential units which were sold no other flats were sold in violation of Clause (e), (f) of Section 80IB(10) and therefore granted partial relief to the assessee. The CIT(A) rightly took note of the decision of this Court in the case of CIT Vs. Bengal Ambuja Housing Development Ltd., reported in ITA/453/2006, dated 5th January, 2017. This order passed by the CIT(A) was affirmed by the Tribunal wherein the Tribunal took note of the decision of this Court in CIT Vs. Martin Burn Limited, reported in ITAT/94/2013 dated July 19,

2018. Thus, we find that CIT(A) and the Tribunal rightly decided the issue in favour of the assessee. Therefore, the impugned order passed by the Tribunal does not call for any interference on this aspect.

The second issue is with regard to the applicability of Section 68 in respect of share capital. The CIT(A) held that only and when all the three ingredients as required under Section 68 are met, the assessee would be entitled to relief namely, the identity, creditworthiness and genuineness. This, in the opinion of the Assessing Officer, were not established. When the matter travelled on appeal to the CIT(A), a remand report was called for and once again the Assessing Officer stated that the three ingredients are missing. Therefore, the CIT(A) embarked upon an exercise to examine the facts and after taking note of the documents filed by the assessee in the form of a paper book, in paragraph 8.2 of this order dated 21st August, 2019, the facts have been elaborately discussed and more importantly the CIT(A) noted that the four groups are group companies who have pledged their funds with the appellant/assessee, more particularly, when the profit of the appellant/assessee was consistently substantial and the relevant figures for the years ended 31.03.2008, 31.3.2009, 31.3.2010 and 31.3.2011 were referred to. Thus, it was held that assessee had established the identity, creditworthiness and genuineness of the transaction. This finding was affirmed by the Tribunal and we find no grounds to take a different view. Therefore, the order passed by the Tribunal on this issue stands affirmed.

The next issue is with regard to the applicability of Section 14A of the Act, read with Rule 8(D)(2)(ii). The CIT(A) rightly took note of the various decisions wherein it has been held that Section 14A will not apply if no exempt income is

received during the assessment year under consideration. The CIT(A) placed reliance on the decision of this Court in the case of CITA Vs. Ashika Global Securities Limited, ITAT/100/2014, dated 11th June 2018 and also the decision of the Hon'ble Supreme Court in CIT Vs. Chettinad Logistics (P) Ltd., (2018) 95 taxmann.com 250(SC). This finding of the CIT(A) was, in our opinion, rightly approved by the Tribunal and therefore, the order passed by the Tribunal does not call for any interference and the same is affirmed.

The next issue is with regard to disallowance of interest under Section 36(4)(iii) of the Act. The CIT(A) took note of the facts and particularly noted that the assessee had sufficient funds of its own as was established by the assessee by producing the audited accounts for the relevant assessment years as well as the preceding two years and therefore, held that finding of the Assessing Officer was merely an assumption without appreciating the factual position. This issue was considered by the Tribunal and the factual position was re-appraised and the Tribunal affirmed the finding of the CIT(A) and we find no good grounds to interfere with the same. Accordingly, the order of the Tribunal on this issue stands affirmed.

The next issue is with regard to the disallowance of the expenses towards interest of service tax in the profit and loss account and TDS. The CIT(A), in our view, rightly took note of the decision of the Hon'ble Supreme Court in LachmandasMathuradas v. CIT (2002) 254 ITR 799 (SC), wherein it was held that the interest paid to the Sales Tax authority on arrears of the sales tax is an admissible deduction under Section 37 of the Act being compensatory in nature. This order passed by the CIT(A) was considered for its correctness and the

Tribunal after noting the findings recorded by the CIT(A) also noted the decision in the case of Mahaluxmi Sugar Mills Company Vs. CIT, (1980) 123 ITR 429 (SC).

Thus, we find no grounds to interfere with order passed by the Tribunal and the findings of the Tribunal on the said aspect is affirmed.

The last issue is with regard to the claim of the appellant who have written off on account of sundry balance and stock claiming it as a business loss and to be considered under Section 37(1) of the Act. The Assessing Officer rejected such claim. On appeal, the assessee had contended that the Assessing Officer has merely mentioned the write off so made as capital in nature and held that the assessee's claim cannot be allowed under Section 37(1) of the Act. The assessee pointed out that out of the sum of Rs.73,55,162/- pertaining to and included in the assessment year 2011-12 was towards the abandoned SEZ and has to be allowed. The assessee placed reliance on the decision of this Court in Binani Cement Limited v. CIT (2015) 380 ITR (CAL). The CIT(A) took note of the facts and also the decision of this Court as well as the decision in the case of CIT Vs. Britannia Industries Ltd. (2015) 376 ITR 299 (Kol) and granted relief to the assessee. The matter was carried in appeal before the Tribunal and the Tribunal affirmed the finding and while doing so took note of the decision of the Hon'ble Supreme Court in CIT Vs. TRF Ltd. 323 ITR 500 (SC) and allowed the claim of the assessee for writing off the stock being in the nature of business loss. Further, the Tribunal also affirmed the order passed by the CIT(A) and allowed the claim of bad debts as they were sales/rental made in the past accorded as revenue but being not realisable and therefore was claimed as bad debts in the

regular books of accounts. In this regard, the learned Tribunal quoted the decision in the case of CIT Vs. TRF Limited and rejected the appeal filed by the revenue. We find that the Tribunal was fully justified in affirming the findings of the CIT(A).

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

The stay application IA No : GA/2/2023 is also dismissed.

(T.S. SIVAGNANAM, CJ.)

(SUPRATIM BHATTACHARYA, J.)