

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

ITA/202/2005
PEERLESS SECURITIES LTD.
VS.
COMMISSIONER OF INCOME TAX, KOLKATA-1

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 5th January, 2023

Appearance :
Mr. Gopal Lal Sharma, Adv.
...for the appellant.

Ms. Smita Das De, Adv.
...for the respondent

The Court : This appeal by the assessee filed under Section 260A of the Income Tax, 1961 (the Act, for brevity) is directed against the order dated February 8, 2005 passed by the Income Tax Appellate Tribunal, 'C' Bench, Kolkata (Tribunal) in ITA No. 251/Kol./2000 for the assessment year 1996-97.

The reframed substantial questions of law as suggested by the appellant/assessee are as follows :

- i) Whether the directions of the Tribunal to the Assessing Officer to de novo consider allowance of depreciation on purchase of stock exchange membership card in the sum of Rs. 70,00,000/- being the development fee paid for admission to the Calcutta Stock Exchange under section 32 of the Income Tax Act, 1961 as amended and applicable to the appellant for the Assessment year 1996-97 is perverse ?

- ii) Whether on the facts and circumstances of the case, the Tribunal erred in not allowing depreciation on the Calcutta Stock Exchange membership card which is 'a tool to trade' in the business of share trading and broking business, hence akin to 'a plant' and eligible for depreciation as Plant under section 32(1)(i) of the Act and further in violation of the principles laid down by the Apex Court in case of Elecon Engineering Co. Ltd. (1987) 166 ITR 66 (SC) ?

We have heard Mr. Gopal Lal Sharma, learned counsel appearing for the appellant/assessee and Ms. Smita Das De, learned standing counsel for the respondent/revenue.

The short issue which falls for consideration is whether the amount of expenditure incurred by the assessee to purchase stock exchange membership card is to be considered as a 'tool to trade' in the business of share trading and broking business and hence akin to 'a plant' and eligible for depreciation as Plant under section 32(1)(i) of the Act. The Assessing Officer while completing the assessment had held the expenditure to be of revenue expenditure. Subsequently, the Special Bench of the Tribunal in its order had held that expenditure incurred towards the development fee paid to the Stock Exchange is capital in nature. When the assessee challenged the order of assessment by filing an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], an alternate plea was raised by the assessee contending that without prejudice to the rights to claim the same as revenue expenditure, alternately it was submitted that in case the expenditure is considered as capital by considering that the assessee acquired a permanent right by considering the stock exchange membership card as a capital asset, it should be as "a plant" within the meaning of section 43(3) of the Act. The CIT(A) rejected such contention by order dated

23rd November, 1999. This order was impugned before the Tribunal and by the impugned order the learned Tribunal accepted the stand taken by the assessee and held that the said alternate ground was agitated by the assessee and considered by the Special Bench of the Tribunal and payment of Rs.70 lacs on account of development fee paid by the assessee has been held to be capital in nature and therefore the claim for depreciation has to be considered in accordance with the provisions of the Act. For such reason the issue was restored to the file of the Assessing Officer to verify the claim in the light of the Special Bench decision of the Tribunal considering the same as capital expenditure, which otherwise was disallowed by the authorities below claimed as revenue expenditure by the assessee in the first place. Thus, the matter stood remanded to the Assessing Officer for de novo consideration in accordance with the provisions of the Act.

Learned counsel appearing for the appellant placed reliance on the decision of the High Court of Bombay in the case of Commissioner of Income-tax vs. Kotak Securities Ltd., (2012) 20 taxmann.com 846 (Bombay) and held that the facts were identical for the said case and that also related to the right accrued by virtue of a membership card issued by the Bombay Stock Exchange purchased by the assessee therein during the year 1995-96, which is also the case of the assessee in this appeal. Therefore, it is submitted that prayer for depreciation needs to be allowed. Reliance was also placed on the decision of this Court in the case of Commissioner of Income-tax vs. Integrated Coal Mining Ltd., (2022) 142 taxmann.com 44 (Calcutta).

Ms. Smita Das De, learned standing counsel appearing for the respondent/revenue placed reliance on the decision of the Supreme Court in the case of The Stock Exchange, Ahmedabad vs. Assistant Commissioner of Income

tax, Ahmedabad, (2001) 248 ITR 209 (SC) and also the decision of the High Court of Bombay in the case of Commissioner of Income tax - 4, Mumbai vs. M/s. Techno Shares & Stocks Limited, ITA(L) No.971 of 2006 and ITA No.218 of 2007, dated 11th September, 2009.

These decisions have been relied upon to contend that membership of Stock Exchange is a personal permission from the Exchange to exercise the rights and privileges attached thereto, it is not a private asset. In our considered view, the applicability of these decisions need not be gone into for the simple reason that as against the decision of the Special Bench nor as against the decision of the Tribunal impugned this appeal, revenue had not preferred any appeal. That apart, we note that in the impugned order the learned Tribunal has limited the scope of the direction by directing the plea of depreciation alone to be considered.

In our considered view, the learned Tribunal has given a categorical finding that the claim for depreciation made by the assessee has to be considered and for such purpose the matter has been restored to the file of the Assessing Officer. Admittedly, before the Assessing Officer such a plea was not raised as the assessee contended that the expenditure was revenue in nature. No doubt, before the CIT(A) an alternative plea was raised which was considered and negated but the order of the Special Bench enures in favour of the appellant which has held that the development fee paid to the Stock Exchange is capital in nature.

Therefore, we are of the view that the issue has to be verified by the Assessing Officer in terms of the directions issued by the Tribunal and hence we find there is no substantial question of law arising for the consideration in this appeal. Accordingly, the appeal stands disposed of by affirming the order passed

by the learned Tribunal with a further direction to the Assessing Officer to afford an opportunity of personal hearing to the authorised representative of the appellant, who shall be entitled to place all the decisions which they seek to rely upon. Since the assessment is of the year 1995-96, the Assessing Officer is directed to give an early hearing in the matter and preferably, conclude the proceedings and pass an order within a period of 12(twelve) weeks from the date of receipt of the server copy of this order.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)