O–8

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

ITAT/177/2022
IA No: GA/1/2022
PRINCIPAL COMMISSIONER OF INCOME TAX -1, KOLKATA
VS.
INTELLIGENT INFRASTRUCTURE LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 6th February, 2023

<u>Appearance</u> :
Mr. Prithu Dudhoria, Adv.
....for appellant.

Mr. Ranjit Kr. Murarka, Sr. Adv.
Mr. Vivek Murarka, Adv.
Mr. Dibanath Dey, Adv.
...for the respondent.

The Court : This appeal by the Revenue filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 24th March, 2022 passed by the Income Tax Appellate Tribunal, 'C' Bench, Kolkata (Tribunal) in ITA No.184/Kol/2021 for the assessment year 2016-17. The revenue has raised the following substantial questions of law for consideration :

a) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal has erred in setting aside the order under Section 263 on grounds that Assessing Officer had already conducted inquiry on issues on which order under Section 263 was passed when no such embargo has been put in the language of the section, the intention of the legislature was never such so as to render the revenue remediless against erroneous order of the Assessing Officer nor make the revenue suffer a continuous wrong ?

b) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal has erred in law quashing the order under Section 263 of the Act passed on the issue of interest on service tax, being penal in nature, which should be added to book profit while computing MAT ?

c) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal has erred in law in quashing the 263 order passed by the Ld. Pr. CIT on the issue of fair market value for stamp duty determined by the Addl District Registrar for the purpose of Section 50C of the Act ?

We have heard Mr. Prithu Dudhoria, learned standing counsel appearing for the appellant/revenue and Mr. Ranjit Murarka, learned senior counsel for the respondent/assessee.

The respondent/assessee had filed an affidavit-in-opposition objecting to the entertaining of this appeal in the affidavit dated 4th November, 2022. It is stated that two issues were involved in the appeal filed by the assessee against the order passed by the Commissioner under Section 263 of the Act dated 31st March, 2021. The two issues are quoted hereunder:

"i) Whether the claim of the respondent assessee on payment of interest on service tax of Rs.2,28,88,803/- was to be added to Book profit under Section 115JB for MAT computation under Income Tax Act, 1961.

ii) Whether the market value for stamp duty purposes was taken at lesser value by Rs.2,77,72,000/- which would enhance the assessable income under Section 50C of the Income Tax Act, 1961."

It is contended by the assessee that when both normal tax and MAT computation is involved, both taxes cannot be levied and only the higher of the two would be leviable. It is submitted that either way the tax effect will be less than Rs. 1 Crore. It is submitted that if the normal computation is done the tax effect would be Rs.63,99,764/- and if it is under Section 115JB of the Act, it would be Rs,48,84,836/-. Therefore, it is submitted that the revenue cannot pursue this appeal. The revenue had filed an affidavit-in-reply affirmed on 13th December, 2022 stating that the case would be covered by the exceptional clause laid down in para 10(c) of the CBDT Circular No.203/2018 dated 11.07.2018 by which the case can be pursued by the revenue when there is an audit objection.

In the light of the stand taken by the revenue, we are inclined to take up the matter for consideration on merits.

The respondent/assessee has filed a supplementary affidavit dated 16th January, 2023. This affidavit is to place on record an order passed by the learned Tribunal in ITA No.154/Kol/2022 concerning the very same assessment year challenging an order passed by the Principal Commissioner of Income Tax, Kolkata – 1 under Section 154 of the Act, read with Section 263 of the Act, dated 7th March, 2022. By the said order the PCIT had revised his earlier order dated 31st March, 2021 by amending paragraph 13 of the said order to include two other issues as well. The assessee preferred appeal to the Tribunal against the said order passed under Section 154 of the Act, dated 7th March, 2022 in ITA

No.154/Kol/2022 and the appeal was allowed by order dated 9th November, 2022. The revenue has filed an affidavit-in-opposition to the supplementary affidavit where they seek to question the correctness of the order passed by the Tribunal dated 9th November, 2022 which obviously cannot be done by way of an affidavit-in-opposition as the revenue has not preferred any appeal against the said order before this Court. Therefore, as long as the order passed by the learned Tribunal dated 9th November, 2022 is intact, only two issues can be considered in this appeal which we have quoted hereinabove in the preceding paragraph. Thus, having steered clear of this matter, we proceed to consider as to the correctness of the order passed by the learned Tribunal.

After we have elaborately heard the learned standing counsel for the appellant and the learned senior counsel appearing for the respondent/assessee, we find that the question which was decided by the Tribunal was whether the liability in question was a contingent liability or not. The Tribunal noted that the Commissioner of Service Tax, Kolkata had adjudicated the proceedings and quantified the amount to be paid by the assessee and though the assessee had filed an appeal against the said order before the higher appellate forum, the learned Tribunal rightly held that the execution of the order passed by the Commissioner of Service Tax has not been stayed and the liability should be deemed as contingent. Furthermore, the learned Tribunal rightly observed that it is quite debatable to construe that if an order passed by the competent authority (Service Tax) crystallises the amount payable by the assessee, if challenge in an appeal would lose its executability unless stayed by the appellate authority.

Therefore, the learned Tribunal rightly held that on this issue the PCIT could not have exercised jurisdiction under Section 263 of the Act.

The next issue was with regard to the value of parking space and as to whether it has to be included in the deemed consideration calculated under Section 50C of the Act. The learned Tribunal after noting the factual position held that Section 50C is not applicable as it is common parking space in office premises and the parking space has to be assigned and not to be sold. Taking note of the factual position that if any construction is put up in the parking spaces it would cause problems to the other co-users of the parking space, the learned Tribunal came to the conclusion that the view taken by the Assessing Officer is a plausible view and cannot be subject matter of revision under Section 263 of the Act. The conclusion arrived at by the learned Tribunal cannot be faulted and the learned Tribunal rightly held that the PCIT could not have exercised jurisdiction under Section 263 of the Act.

Thus, for the above reasons, we find no grounds to interfere with the order passed by the learned Tribunal.

Accordingly, the appeal fails and is dismissed and the substantial questions of law are answered against the revenue.

The application for stay being IA No.GA/1/2022 is also dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Pal/SN.