IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.Nos.15128 and 15130 of 2021
and
W.M.P.Nos.16030 and 16032 of 2021

M/s LNV Technology Private Ltd.,
Rep. By its Director V.Chandrasekhara Rao,
18/3, Sigapi Achi Building,
5th Floor, Rukmanilakshmipathi Salai,
Egmore, Chennai 600 008.
PAN: AAACL 6394H ... Petitioner in both petitions

v.

1.The Assistant Commissioner of Income Tax,
Corporate Circle – 4(1), Chennai
Income Tax Department
Room No.428, 4th Floor, Main Building,
121, Nungambakkam High Road,
Nungambakkam, Chennai 600 034.

2.The Principal Commissioner of Income Tax,
Chennai 4.
Income Tax Department,
121, Nungambakkam High Road,
Nungambakkam, Chennai 600 034. ... Respondents in both petitions

Prayer in W.P.No.15128 of 2021: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus calling for the records of the writ petitioner company on the file of the 1st respondent to quash the impugned order dated 20.04.2021 passed for the Assessment Year 2012-13 DIN ITBA/COM/S/124/2021-22/1032546037(1) and consequently direct the 1st respondent to complete the fresh assessment for the

Assessment Year 2012-13 after granting reasonable / sufficient opportunity of hearing.

Prayer in W.P.No.15130 of 2021: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus calling for the records of the writ petitioner company on the file of the 1st respondent to quash the impugned order dated 10.06.2021 passed for the Assessment Year 2013-14 DIN ITBA/GEA/M/254/2021-22/1033449239(1) and consequently direct the 1st respondent to complete the fresh assessment for the Assessment Year 2013-14 after granting reasonable / sufficient opportunity of hearing.

For Petitioner in both petitions : Mr.A.S.Sriraman

For Respondents in both petitions : Mr.V.Mahalingam,
Senior Standing Counsel

COMMON ORDER

These two writ petitions are filed challenging the orders of the 1st respondent dated 20.04.2021 and 10.06.2021 for the assessment years 2012-13 and 2013-14 respectively in DIN ITBA/COM/S/124/2021-22/1032546037(1) and DIN ITBA/GEA/M/254/2021-22/1033449239(1) to quash the same and consequently direct the the 1st respondent to complete the fresh assessment for the Assessment Years 2012-13 and 2013-14 after granting reasonable / sufficient opportunity of hearing.

2. The impugned orders of assessment are passed purusant to the orders of the tribunal in ITA No. 1979 & 1970/Chny/2018 dated 07.01.2021 wherein the revenue had filed appeal challenging the orders of the first appellate

authority with regard to forward contract loss and claim of deduction under section 14A of the Act. The challenge is on the premise that the impugned orders are passed on a gross misconception as to the nature/scope of the order/directions of the tribunal with regard to forward contract loss. It is submitted that while the tribunal had with regard to the claim on loss on forward contracts remitted the matter to the assessing authority for fresh examination on the basis of the evidence/material to be laid. The impugned orders of assessment looks to the submission of the revenue recorded by the tribunal and disallows the claim of the petitioner. The following extracts from the impugned orders and that of the tribunal would make the above position clear.

Impugned orders in relation to forward contract loss for the AY 12-13

> *"The Ld. DR inviting our attention to the relevant portion of the assessment orders submitted that the assessee entered into forward contract from September 2011 and the first contract was entered into on 09.09.2011 with USD 25,35,027/- and the delivery period was in October 2011. The total sales made by the assessee up to September, 2011 was only USD 4,26,865-. Thus, the value of the first contract entered itself is almost 5 times of the total sales made fill the date of entering into the contract. All the contracts entered with State Bank of Hyderabad were entered on the same date i.e., 09.09.2011 and the total value on contract is USD 1,44,02,863/-. However, the total sales made upto September 2011 was for USD 4,26,865/- only and the total sales made by the assessee for the whole year was for USD 75,79,618.59/- only. If the assessee's intention was to enter these contracts to safeguard against the loss through future price*

fluctuation, then it would have taken contracts to the value of sales made or the amount realizable. The value of contract entered with State Bank of Hyderabad alone was almost twice the total sales made for the whole year. The period of contract entered was for short durations, therefore, the assessee could not have fulfilled the contract even when the full sales were realized. Not even one single contract was honoured by the assessee during the year. Therefore, the AO recorded a finding that the assessee had entered into contract only on speculative basis. All the contracts are not entered to safeguard against the loss through future price fluctuations. Therefore, the disallowance made by the Assessing Officer for assessment year 2012-13 is correct."

Order of the Tribunal :

"5. We heard the rival submissions and gone through the relevant material. The assessee claims that it has entered contract with State Bank of Hyderabad and City Bank for foreign currency rates for future period. Such contracts were entered against the total export order against the overseas clients and hence the loss incurred by it should be treated as business loss and not as a speculative loss. On the other hand, the Revenue contends that if the total value of transactions entered for the future contract is more than the total export turnover of the assessee then the loss suffered by it in respect of that portion in excess of transactions are to be considered as speculative loss only as the excess transaction has no proximity with the export turnover. The total sales made by the assessee up to September, 2011 was USD 4,26,865/- only and the total sales made for the whole year is at USD 75,79,618/-. This being so, the assessee's contention that the contracts entered by it for USD 1,44,02,863/- which were to safeguard against the loss through future price fluctuations needs to examined with the facts and circumstances of the assessee's nature of business with relevant documents of the transactions on which the assessee claims the loss in this case. It is seen from the assessment orders that the AO has taken general view. It is mentioned that the assessee's nature of

business is fabricators of machineries/EPC engineers. However, it is not known what are the products or commodity sold, with whom and when the contracts were entered, whether the contractual conditions are reasonable from the perspective of a business person, the facts and circumstances associated with non-actual delivery etc. The Ld. CIT(A) also merely extracted the submissions of the assessee and allowed the appeals without examining the relevant aspects. Therefore, we are of the view that this issue requires proper examination as to whether the impugned loss is business loss or speculative loss etc. Hence we remit the issues back to the AO for a fresh examination. The assessee shall lay relevant evidence/materials in support of its contention as to why and how the impugned losses claimed by it are business loss before the AO and comply with the requirements of the AO in accordance with law. The AO is free to conduct appropriate enquiry as deemed fit, but he shall furnish adequate opportunity to the assesssee on the material etc' to be used against it and decide the matter in accordance with law. In the result, the Revenue's appeals on this issues are treated as partly allowed for statistical purposes."

(emphasis supplied)

3. It is thus clear that the assessing authority has grossly misdirected itself in looking to the portions of the tribunal recording the submission of the revenue and disregarding the directions of the tribunal to reconsider the matter afresh. In view of the above misconception as to the scope of the order/direction of the tribunal, the impugned order suffers from error apparent on the face of the record. The above infirmity which is fatal to the validity of the impugned order is not seriously objected to by the counsel for the respondent. Thus, the impugned order in W.P. No. 15128 of 2021 for the Assessment Year 2012-2013

DIN ITBA / COM / S / 124 / 2021 -22/ 1032546037 (1) dated 20.04.2021 is set aside. It is open to the respondents to redo the entire exercise a fresh within a period of 12 weeks from the date of receipt of a copy of this order after affording the petitioner a reasonable opportunity of hearing.

Assessment Year 2013-14:

4. In so far as the Assessment Year 2013-14 is concerned, the Tribunal dealt with two issues viz., forward contract losses and disallowance under 14A of the Act. The tribunal was pleased to remit the matter back granting liberty to the petitioner to submit the relevant documents in respect of their claim.

5. The assessing officer pursuant to the above order of the Tribunal directed the petitioner to furnish the documents vide letter dated 16.04.2021 on or before 22.04.2021. Thereafter, impugned order has been passed on the basis of the documents submitted by the petitioners, without affording an opportunity of explaining the genuineness of the documents which was questioned. It is thus submitted that the impugned orders are contrary to the directions of the Tribunal which requires the assessing officer to resolve the issue after affording petitioner an adequate opportunity to the petitioner. The relevant portion is extract below:-

> *“5 ..... The assessee shall lay relevant evidence/materials in support of*

its contention as to why and how the impugned losses claimed by it are business loss before the AO and comply with the requirements of the AO in accordance with law. The AO is free to conduct appropriate enquiry as deemed fit, but he shall furnish adequate opportunity to the assesssee on the material etc' to be used against it and decide the matter in accordance with law."

5.1. Pursuant to the above order the tribunal a notice was issued by the first respondent calling upon the petitioner to submit relevant and satisfactory details and documentary evidence to substantiate the claim of loss. The Petitioner in response to the notice filed its detailed objections on 25.03.2021, while also submitting documentary evidence in the form of contract copy *interlia* highlighting the following;

"We would summarise the facts for your immediate reference as under:

1. *The assesse is a project engineering company, having been in business for over 20 years till date.*
2. *The assesse is not a dealer in foreign exchange, but only deals in industrial equipment's for the purpose of installation and commissioning in various industries*
3. *The Contract was for supplying 1950 TPD Plant on a design, engineering, manufacture, supply and supervision of erection and commissioning basis.*
4. *As such the contract was genuine, existing and involved supply of merchandise.*
5. *The forward contract with Citi bank were entered into in the normal course of business and was incidental to the regular business backed by a firm contract.*
6. *The Customer Contract itself was in US Dollars, in the amount of USD 26,000,000 and the forward contract was also taken for sale in USD and not in any other currency.*
7. *The Assessee has taken forward contracts only in relation to the value of orders on hand to safeguard against loss through forex fluctuations and there was no intention to speculate.*
8. *The cover itself was taken as per RBI regulations that do not permit*

speculator transactions."

6. Importantly, the exports contracts was also submitted along with the reply and foreign exchange contract information and cancellation. The assessing authority proceeded to issue yet another notice 16.04.2021 wherein reference was made to the letters dated 08.03.2021, 28.03.2021 and 13.04.2021 submitted by the petitioner, wherein it was submitted that the onus is on the petitioner to substantiate that the forward contract was entered to hedge the receivables of a contract executed at Nepal. It was further stated that the copy of the agreement is self serving and does not posses evidentiary value and called upon the petitioner to file its submission on or before 22.04.2021. The petitioner submitted its objection on 22.04.2021 wherein the role and relationship of the petitioner with its customer in Nepal was set out in detail while also explaining as to how the genuineness of the contract is being doubted without any basis. The petitioner also proceeded to set out vagaries of foreign exchange market and how the CG-PALPA Nepal had no role in the forward contract between the assessee and its banker. To demonstrate the bonafide of the contract the technical terms of the contract was also enclosed along with the geological survey of the site at PALPA, along with the reply following documents were submitted by the petitioner:

i. Letter by the petitioner to Citi Bank dated 18.10.2011,

ii. E-mail by the petitioner for cancellation of forward contract dated 29.06.2012,

iii. Foreign exchange contract confirmation issued to petitioner dated 25.10.2011,

iv. FX Contract Cancellation confirmation sent by Citi Bank dated 30.12.2011,

v. Foreign exchange contract confirmation issued to petitioner dated 25.10.2011,

vi. FX Contract cancellation confirmation sent by Citi Bank dated 27.01.2012,

vii. Foreign exchange contract confirmation issued to petitioner dated 25.10.2011,

ix. FX Contract cancellation confirmation sent by Citi Bank dated 28.06.2012,

x. Letter by petitioner regarding compensation for cancellation of forward contract loss for supply of 1950-TPD Integrated Cement Plant at Palpa-Nepal dated 05.07.2012,

xi. e-mail sent by the petitioner for cancellation of forward contract dated 31.12.2011,

xii. e-mail sent by the petitioner for booking of forward contracts for CF

Cements Palpa Project dated 31.12.2011,

xiii. Internal work dated of the petitioner,

xiv. Contract for supply of 1950-TPD Integrated Cement Plant at Palpa-Nepal dated 16.09.2021

xv. Electrical & Instrumental Package for CG Palpa Cement Plant, Nepal Technical Proposal dated 16.09.2011 by the Petitioner with CG Companies.

7. However, the impugned order was passed rejecting the claim of the petitioner by stating that the entire set of documents produced by the assessee on 22.04.2021 is one-sided and self serving as could be seen from the following extracts.

> *"8. The entire set of documents produced by the assessee on 22.04.2021 is one-sided. As stated earlier, but for the agreement, which is self-serving, none of the other documents have been replied or acknowledged by the contractee. The assessee has provided additional correspondence to substantiate that there was indeed a proposal to execute the EPC Contract at Nepal, but not a single document in it proves that;*
>
> *a) There was indeed a proposal, the price for which was negotiated and finally concluded at USD 26 Million by the contractee and contractor.*
>
> *b) That the letters of intent was issued by the contractee after negotiation.*
>
> *c) Such is a huge contract will not be sanctioned without deliberations, bu correspondence in relation to such activity is missing.*
>
> *d) In a contract of such magnitude, the terms and conditions will not get concluded in one sifting and in one agreement. It has to be a systematic,*

regular, to & fro correspondence and such documents are missing.

For a contract of such amplitude, there has to be certain replies or mail communications received from CG Palpa, Nepal. But as stated earlier, all the documents submitted by the assessee, have emanated from its side and not a single one from the opposite side.

9. Further, the authenticity of the agreement itself is in doubt because the certain essential clauses are missing. Though clause No.8 of the agreement speaks about payment of Advance being 10% of the contract price within seven days of singing the contract (signed on 16.09.2011) against submission of advance bank guarantee, nothing of that sort has happened, which denotes that the authenticity of the agreement is doubtful.

10.Under the circumstances, it appears that this contract agreement is "make belief" documentation and hence the credibility is not acceptable. It has been substantiated beyond doubt that the exercise to enter into forward contract was not on account of any business compulsion or connection. The forward contract was essentially undertaken without any actual receivables and hence partakes the character of a speculative contract. As per Explanation 2 to section 28, Income or loss from speculative income shall be deemed to be distinct and separate from other business income. Further as per section 73, loss from speculation business shall not be set off except against profits and gains, if any, of another speculation business. Hence, the treatment adopted in the assessment order does not call for any interference and hence the claim of loss on cancellation of Forward Contract is not allowed as expenditure."

8. It is submitted that the petitioner were not put on notice of the reasons for doubting the genuineness of the document as set out in paragraph 9 of the impugned order to enable the petitioner to respond. It was submitted that the impugned order is contrary to the direction of the tribunal which require the

assessing officer to furnish adequate opportunity on the material to be used against and would thus request that the impugned order may be set aside and they may be permitted to submit their response to the reasons set out in the impugned order which has not been disclosed or raised earlier. This court finds that there is merit in the submission of the learned counsel for the petitioner inasmuch as if there are new grounds different from the show cause notice it is necessary that the noticee must be put on notice to enable them to respond failing which the order would be bad for violation of principles of natural justice and thus unsustainable, which was not seriously resisted by the learned counsel for the respondent.

9. In the circumstances, this Court is inclined to set aside the impugned orders and to remand the matter back to the 1st Respondent to re-do the assessment after affording the petitioner a reasonable opportunity to put forth their contentions / objection including on the aspect of genuineness of the document. The 1st respondent is directed to complete the above exercise in accordance with law after granting the petitioner reasonable opportunity within a period of 4 months from the date of receipt of a copy of this order.

6. In view of the above, the Writ Petitions stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

30.08.2023

Index: Yes/No
Internet: Yes/No
Speaking order/Non Speaking order

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To

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Corporate Circle – 4(1), Chennai
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MOHAMMED SHAFFIQ,J.

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