

OD - 8

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

ITAT/89/2024
IA NO: GA/1/2024
PRINCIPAL COMMISSIONER OF INCOME TAX 9
KOLKATA
VS
KUSUM GUPTA

BEFORE :
THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 17th May, 2024

Appearance :
Mr. Vipul Kundalia, Adv.
Mr. Amit Sharma, Adv.
Mr. Anurag Roy, Adv.
...for Appellant

Mr. S.M. Surana, Sr. Adv.
Mr. Bhaskar Sengupta, 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 22nd August, 2023 passed by the Income Tax Appellant Tribunal, "C" Bench, Kolkata (Tribunal) in ITA No. 234/Kol/2019 for the assessment year 2014-15.

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

- i) Whether the Learned Tribunal has committed substantial error in law in quashing the order under Section 263 of

the Income Tax Act, 1961 when it is apparent from the records that the assessment order is erroneous and prejudicial to the interest of the Revenue in as much as the same had been passed by the assessing officer without making due and proper enquiry and without verification of the aspect of bogus claim of exemption of Long Term Capital Gain by sale of shares of penny stock ?

ii) Whether on the facts and circumstances of the case and in law the Learned Tribunal was justified to ignore the fact that the Assessing Officer did not conduct proper enquiry in light of the report of the Investigation Wing of Department with regard to modus operandi followed by share brokers and assessee to enter into sham transaction to generate LTCG and hence revision of the order under Section 263 of the Income Tax Act, 1961 was justified ?

iii) Whether on the facts and circumstances of the case and in law, the Learned Tribunal was justified to quash the order under Section 263 of the Income Tax Act, 1961 by overlooking the fact that the entire transactions were stage-managed with the object to facilitate the assessee to plough back her unaccounted income in the form of fictitious Long Term Capital Gains of Rs. 5,52,865/- and claim bogus exemption ?

iv) Whether on the facts and circumstances of the case and in law, the order of the Learned Tribunal suffers from perversity as the Learned Tribunal ignored the facts brought on record in revision order under Section 263 of the Income Tax Act, 1961 establishing manipulation of share price of M/s. Kailash Auto Finance Ltd. as part of colourable device to generate fictitious LTCG with the aim to evade taxes ?

v) Whether the Learned Tribunal has substantially erred in not considering the binding ratio and principles laid down in the decisions of the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs. Swati Bajaj [2022] 139 taxmann.com 352 (Cal), Pr. CIT Vs. Hill Queen Investment (P) Ltd. [2023] 152 taxmann.com 335 (Cal) and Pr. CIT Vs. Smt. Usha Modi [2023] 152 taxmann.com 119 (Cal) ?

We have heard Mr. Vipul Kundalia, learned standing counsel appearing for the appellant and Mr. S.M. Surana, learned senior counsel for the respondent.

The learned Tribunal by the impugned order allowed the assessee's appeal and set aside the order passed by the Principal Commissioner of Income Tax-10, Kolkata (PCIT), dated 12th December, 2018 passed under Section 263 of the Act for the assessment year 2014-15. The only ground on which the learned

Tribunal has set aside the order passed under Section 263 is that the PCIT had invoked his jurisdiction solely based upon a proposal received from the Assessing Officer.

The learned Tribunal had placed reliance on the decision of this Court in the case of Principal Commissioner of Income-tax Vs. Sinhotia Metals and Minerals Pvt. Ltd., (2023) 455 ITR 736 and few other decisions on the said point.

Before we examine the applicability of those decisions to the facts of the case, the following has to be taken note of. The assessment was completed under Section 143(3) of the Act by order dated 27.7.2016 accepting the return filed by the assessee and on the ground that the transaction regarding sale of shares has been confirmed by the details filed by the assessee and all transactions made through banking channel, no discrepancy has been found. As similar orders which travelled upto the learned Tribunal was the subject-matter of consideration before this Court in a batch of cases in Principal Commissioner of Income-Tax Vs. Swati Bajaj, (2002) 139 taxmann.com 352 (Cal.). In the said decision the issue regarding the correctness of the order passed by the PCIT under section 263 was also dealt with and it will be useful to refer two paragraphs of the judgment which are as follows :

“98. In a few appeals, the order of the Tribunal has been passed in appeals filed by the assesseees against the

orders passed by the Commissioner invoking the power under section 263 of the Act. The Learned Senior Counsel for the assessee submitted that the assumption of jurisdiction by the Commissioner under section 263 is thoroughly flawed that there has been violation of principles of natural justice in as much as the Commissioner has pre-decided the issue even at the stage of issuance of show cause notice.

99. 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 genuinity 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 have 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 was 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, of the CTT (A) to arrive at a conclusion. The assessees have been harping upon the opinion rendered by the financial experts, professionals in the said field the information which were available in the media etc. All these opinions are at best suggestions to an investor. The assessees cannot state that merely because an expert had issued a buy call or there was news in the media that a particular shares shows an upwards trend and it is good time for buying those shares. They jumped into the fray the assessees are to be reminded of the doctrine of "caveat emptor". The assessees 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 experts advice if the assessee gets into an "web" it is for him to extricate himself from the tangle and he cannot reach out to the expert to bail him out. The assessees 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 assessees 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 no 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 bluechip 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."

It is to be noted that the assessee has also dealt with penny stock and the shares of Kailash Auto, the subject-matter of the transaction which also came to adverse notice of the

department and dealt with in the case of Swati Bajaj (supra). On perusal of the order passed by the PCIT under Section 263 of the Act, no doubt it is true that in paragraph 3 the PCIT states that he has perused the proposal of the assessing officer not stopping you that the PCIT holds that prima facie it appears that the assessing officer has failed to take a logical action on the information available with him and, therefore, the impugned assessment was prima facie erroneous in so far as it was prejudicial to the interest of the revenue. After coming to such conclusion by himself, the PCIT issued show cause notice dated 9.11.2018. The operative portion of the show cause notice has been extracted in the order under Section 263 of the Act which shows that the PCIT has applied its mind and came to the prima facie conclusion that the assessing officer should have treated the entire credit as bogus and added back the same under Section 263 of the Act rejecting the claim for exemption under Section 10(38) of the Act. Therefore, it is not a case where the PCIT solely proceeded based on the report of the assessing officer but on perusal of the report has examined the facts. After taking note of the written submission filed by the assessee on 6.12.2018 the PCIT has examined the entire assessment records and thereafter discussed the above transaction and in Annexure A to the order under Section 263 a

flow chart has been given which shows how some transaction was bogus transaction dealing with penny stock shares. In the case relating to Sinhotia Metals and Minerals Pvt. Ltd. (supra) the facts were entirely different. In the said case the PCIT directed the Joint Commissioner of Income Tax to submit a proposal and to exercise jurisdiction under Section 263 of the Act which was faulted. Therefore, the decision in the case of Sinhotia Metals and Minerals Pvt. Ltd. (supra) cannot be applied to the facts and circumstances of the case. Thus, we find that the learned Tribunal committed a manifest error in allowing the assessee's appeal and setting aside the order passed under Section 263 of the Act.

For the above reasons, the appeal is allowed and the order passed by the learned Tribunal is set aside and order passed by the PCIT dated 12.12.2018 is restored.

In the result, the appeal is disposed of and the connected application [GA/1/2024] is closed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

