

OD-4

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

ITAT/282/2023
IA NO: GA/2/2023
PRINCIPAL COMMISSIONER OF INCOME TAX CENTRAL 2 NEW DELHI
VS
M/S. AVANTHA REALTY LTD.

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : 19TH JUNE, 2024.

Appearance :
Ms. Smita Das De, Adv.
Mr. Prithu Dudhoria, Adv.
...for appellant.
Mr. Abhratosh Majumder, Sr. Adv.
Mr. Pramit Kr. Bag, Adv.
Mr. A.K. Dey, Adv.
...for 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 June 09, 2023 passed by the Income Tax Appellate Tribunal, Delhi Bench "A", New Delhi in ITA/1333/Del/ 2022 and ITA/1196/Del/2022 for the assessment year 2004-2005.

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 was justified in law by not considering the exchange rate losses amounting to Rs.16,06,000/- was incidental to the nature of business of the assessee by not considering that the facts of the instant case is similar to the case of

The Commissioner of Income Tax [IT] -4 v/s. M/s Siemens Nixdorf Information Systemse GmbH, wherein Hon'ble Bombay High Court held that a loss arising on the assignment of a loan granted by a foreign parent company to its Indian subsidiary is a capital loss within the meaning of section 2[14] of the Income Tax Act, 1961 ?

- b. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law by not considering the decision of Hon'ble Apex Court in the case of Bestobell [India], wherein the Hon'ble Apex Court had made distinction between exchange rate losses on capital account and revenue account ?
- c. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law by allowing the Insurance and Audit fees expense, amounting to Rs.96,609/- by erroneously stating that the agreement between the assessee and the Ballarpur Industries Limited did not cover the said expenses ?
- d. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law by deleting the disallowance of Rs.11,16,14,637/- made under Section 14A by placing reliance on the judgment of Hon'ble Delhi High Court in the matter of PCIT vs. Era Infrastructure Ltd., wherein the Hon'ble High Court ruled that the disallowance under Section 14A cannot exceed exempt income ?
- e. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law by

ignoring the CBDT circular no.5/2014 dated 11.02.2014 which has clarified that the disallowance for any assessment year may not be limited to the exempt income for the said assessment year ?

- f. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law by deleting the addition of Rs.4,36,52,375/- by holding that since the liabilities shown in 'Provision for doubtful loans & advances', are 'certain' in nature, therefore no upward adjustment u/s 115JB[2][c] can be made in this regard, by ignoring the provisions contained in Explanation [1][c] to the section 115JB[2] which provides that amount set aside to provisions made for meeting liabilities, other than ascertained liabilities has to be increased for the purpose of computing book profit ?

We have heard Ms. Smita Das De, learned standing Counsel along with Mr. Prithu Dudhuria, learned standing Counsel and Mr. Abhratosh Majumder, Learned Senior Advocate assisted by Mr. Pranit Kumar Bag, learned Advocate.

So far as the first two substantial questions are concerned, on going through the facts and circumstances of the case we find that the learned Tribunal rightly affirmed the order passed by the Commissioner of Income Tax (Appeals) which followed the decision in the case of Commissioner of Income Tax Vs. V.S.Dempo & Co. (P.) Ltd. (1994) 206 ITR 291 (Bom).

It is not in dispute that the assessee is an NBFC and suffered loss on account of foreign exchange fluctuation on receipt of repayment of loan to a foreign company. The revenue sought to place the decision in the case of Bestobell [India] Vs. CIT, [1979], 117 ITR 289 (Kol) as rightly pointed out by the

learned Senior Advocate appearing for the respondent assessee that in the said case it was not contended that it had incurred extra expenditure in order to secure the loan and it is at the point of repayment that the assessee had to provide extra amount of rupees by reason of devaluation on the relevant date. Furthermore, it was not the case of a financial company. The revenue also placed reliance on the decision in the case of Commissioner of Income Tax (IT)- 4 Vs. M/s. Siemens Nixdorf Information Systemse GmbH, [2013] 150 taxmann.com 383 (SC).

In the said decision the Hon'ble Supreme Court affirmed the interpretation given by the learned Tribunal as well as the High Court as it related to one particular transaction. Therefore, the Court did not go into the other aspects of the mater. Therefore, both the decisions relied on by the revenue will not be of any assistance to their case.

In the result, the substantial questions of law Nos. A and B are answered against the revenue.

So far the substantial question of law No. "C" is concerned, this pertains to allowing the insurance and audit fees expenses amounting to Rs.96,609/- on the ground that the agreement between assessee and Ballarpur Industries did not cover the said expenses. We have gone through the factual findings recorded both by the CIT(A) as well as by the Tribunal and we find that the factual position has not been shown to be wrong. Therefore, we find that no substantial question of law arises as suggested by the revenue in question No. "C".

Substantial questions Nos. D & E pertain to the deletion of the disallowance made under Section 14A of the Act. The learned Tribunal took

note of the decision of the High Court of Delhi in *PCIT Vs. Era Infrastructure Ltd.* [2022] 141 taxman.com 289 (Del), which had taken note of the decision in the case of *Cheminvest Ltd. Vs. CIT* wherein it was held that amendment by the Finance Act, 2022 of Section 14A of the Act by inserting a non-obstante clause and explanation we take effect from 01.04.22 and cannot be presumed to have retrospective effect and, therefore, on facts the amendment cannot be applied to the assessment year under consideration. We find no error in such conclusion arrived at by the learned Tribunal.

Accordingly, substantial questions of law No. D & E are decided against the revenue.

So far as the ground “F” is concerned, the learned Tribunal has recorded the following finding:-

“19. On careful consideration of above rival submissions and findings recorded by the Assessing Officer as well as learned CIT(A) at the very outset, from the assessment order we note that the Assessing Officer has not given any reason for making upward adjustment u/s.115JB while calculating the books profit for MAT purpose and despite this fact the ld. CIT(A) presume that Assessing Officer might have invoked provisions of section 115JB (2)(c) of the Act by treating the loans and advances which are actually return of as doubtful. However, the assessee consistently submitting that the impugned loss is real and such loss has been debited to the P&L account under the head provision for doubtful loans and advances. It was further submitted that from the perusal of audited account it is clear that the same was return of in the account as irrecoverable though the nomenclature was used as provision. On being asked by the bench the ld. Senior DR could not show us any factual matrix which may lead us to take a view that the impugned amount was not certain and was merely a provision. Thus the ld.

CIT(A) keeping in view the judgment of Hon'ble Supreme Court in the case of Vijaya Bank vs. CIT 231 CTR 209 (SC) held that the impugned amount was certain in nature and therefore, upward adjustment as per clause (c) of explanation 1 to section 115JB (2) of the Act cannot be made as per provisions of the Act. Therefore, we are unable to see any valid reason to interfere with the findings arrived by the ld. CIT(A) on this issue and hence we uphold the same. Accordingly, ground no. 6 of revenue is also dismissed."

The submissions by the revenue before the learned Tribunal was that the order passed by the first Appellate Authority should be set aside. The Tribunal in the above paragraph has noted that the department could not show any factual matrix which may lead the Tribunal to take a view that impugned amount was not certain and was merely a provision. Thus, we find the matter being factual and substantial questions of law arise for consideration as suggested by the revenue in question no. F above.

For the above reasons, the appeal stands dismissed.

The application also stands dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)