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

ITAT/296/2024
IA NO: GA/1/2024
PRINCIPAL COMMISSIONER OF INCOME TAX 2, KOLKATA
VS
M/S ALOSHA MARKETING PRIVATE LIMITED

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
DATE : 16th June, 2025.

Mr. Tilak Mitra, Adv.
Mr. Soumen Bhattacharjee, Adv.
Mr. Ankan Das, Adv.
Ms. Shradhya Ghosh, Adv. ...for appellant.

Mr. Pratyush Jhunhunwalla, Adv.
Mr. N. K. Saini, Adv.
Mr. S. Datta, Adv. ...for respondent.

The Court : This appeal by the Income Tax department has been filed under Section 260A of the Income Tax Act, 1961 (the Act) challenging the order passed by the Income Tax Appellate Tribunal "SMC" Bench, Kolkata (the Tribunal) in ITA/356/Kol/2024 for the assessment year 2011-12.

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

"a. Whether the learned ITAT has committed substantial error in law in holding that the reopening is bade in law and hence additions are not sustainable, when the assessing officer has sufficient cause or justification so assume the jurisdiction for re-opening ?

b. Whether the learned ITAT has committed substantial error in law to delete the additions made under section 68 of the said Act to the tune of Rs.29,90,203/-, despite the fact that the identity and creditworthiness of the creditors as well as

genuineness of the transactions could not be established by the assessee relying on the judgment in the matter of PCIT vs. Swati Bajaj 446 ITR 56 (Cal) ?

c. Whether the learned ITAT has committed substantial error in law in giving the verdict in favour of the assessee where the issue of the accommodation entries is the primary ingredient of this case and the same is covered by clause (h) of Exceptions laid down under para 3.1 of the CBDT Circular No.5/2024 vide F.No.279/Misc-142/2007-ITJ(Pt), dated 15th of March, 2024 ?”

We have heard Mr. Tilak Mitra, learned senior standing counsel assisted by Mr. Soumen Bhattacharjee for the appellant/department and Mr. Pratyush Jhunjhunwalla, learned counsel for the respondent/assessee.

The department is aggrieved by the impugned order passed by the Tribunal by which the learned Tribunal allowed the assessee’s appeal and set aside the order passed by the Commissioner of Income Tax (Appeals) [CIT(A)] dated 29.1.2024. By the said order, the CIT(A) dismissed the assessee’s appeal and affirmed the addition made by the assessing officer in the assessment order dated 20.12.2024 under section 143(3) read with section 147 of the Act. The issue which fell for consideration before the Tribunal was whether the reopening of the assessment under section 147 was legally sustainable. After elaborate hearing the learned advocates for the parties and carefully perusing the materials placed on record we find that the reopening was done by issuing notice under section 148 of the Act dated 28.3.2016. The reasons mentioned for reopening as quoted hereunder:

“The Directorate of Income Tax (Inv), Koi had conducted extensive investigation in the matter of tax evasion by some individuals/entities by showing income from LTCG, which is actually bogus, perpetrated through accommodation entry operators. In the entire scenario, it is found that the promoters of the penny stocks, the share brokers and the entry operators are involved in this business of bogus LTCG by rigging the prices.

The assessee is found to have enjoyed bogus LTCG of Rs.547749/- in the FY 2010-11 by transacting in the penny stock, 'JMD Telefilm'. In just reverse procedure, the assessee is learnt to have booked STCL of Rs.3531930/- from the same scrip in the same year.

In view of this, I have reason to believe that an income of Rs.4079679/- chargeable to tax has escaped assessment within the meaning of sec 147."

As could be seen from the above, the first paragraph of the reasons is a general statement wherein the Directorate of Income Tax (Investigation) upon conducting extensive investigation in the matter of tax evasion found that some individuals/entities were showing income from LTCG, which is actually bogus, perpetrated through accommodation entry operators. Further the report states that it is found that promoters of penny stocks, the share brokers and entry operators are involved in this business of bogus LTCG by rigging the prices. Thus, it is evident that in the report of the Directorate of Income Tax (Investigation) the name of the respondent/assessee does not feature. Therefore, we are well justified in holding that the report is a general statement.

In the second paragraph of the reasons for reopening it is mentioned that the assessee found to have enjoyed bogus LTCG by transacting in penny stocks. The word 'bogus' which is found in paragraph 2 of the reasons for reopening should have been used after independently considering the assessee's return of income and other details. This is required to be done because before issuing notice under section 148 of the Act, the assessing officer must have either reasons to believe by reason of omission or failure on the part of the assessee to make a return under section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for any assessment order. This aspect of the matter is conspicuously

absent in the reasons which were recorded for reopening the assessment. The second error committed by the assessing officer is disposing the objection raised by the assessee for the reopening of the assessment and by submitting a reply to the show cause notice dated 28.3.2016.

It is being a mandate under law as held by the Hon'ble Supreme Court, in the case of GKN Driveshaft (India) Ltd. vs. ITO & Ors. ;(2003) 259 ITR 19 (SC) goes to the route of the matter rendering the reopening of the assessment as bad in law. At this juncture it will be beneficial to note the decision of the Hon'ble Supreme Court in the case of Income Tax Officer vs. Lakhmani Mewal Das wherein the Hon'ble Supreme Court held that reasons for formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It was further pointed out that it is to be borne in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched which would warrant the formation of belief relating to escapement of income of the assessee from assessment.

The learned advocate appearing for the respondent/assessee also placed reliance on the decision of this court in the case of Principal Commissioner of Income Tax – 5, Kolkata vs. Shri Sanjay Mehta; 2024(3) TMI – 1014, Principal Commissioner of Income Tax, Asansol vs. Eastern Coalfields Ltd; 2022(1) TMI 1468, and Principal Commissioner of Income Tax-18, Kolkata vs. Prasant Desai; 2025(6) TMI 984.

The above decisions also would support the case of the assessee. That apart, the tribunal has considered the factual position in paragraph 10 of the impugned

order. After going through the computation of income as well as the objections raised by the assessee against initiation of proceedings under section 147 of the Act and observed that the assessee has not earned any long term capital gain during the year. Further, there is no exemption claimed under section 10(38) of the Act at Rs.5,47,749/- in the income tax return. Furthermore, the learned Tribunal perused the profit and loss account, net income from sale of investment and found the same only to be Rs.12,500/-. Further, with regard to short term capital loss which was Rs.35,31,930/-, it was brought to the notice of the tribunal that during the year the assessee purchased 30,000 shares of JMD Telefilm for consideration of Rs.35,36,867/- and the same was sold at Rs.5,46,663/- incurring a loss of Rs.29,90,203/-. Thus, on going through the profit and loss account the tribunal found that assessee has not shown any long term/short term capital gain/loss and purchases and sales of such shares are treated as stock in trade. Hence, the loss in such scrips were claimed as business loss and not capital loss.

Thus, we find that apart from the jurisdictional error which was pointed out by the learned Tribunal, the factual decision has also been discussed by the learned Tribunal. Thus, we find no ground to interfere with the impugned order. Accordingly, the appeal fails and the same is dismissed. The questions of law are answered against the revenue.

Consequently, the application, GA/1/2024 stands disposed of.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)