

OD-7

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

ITAT/30/2022
IA NO: GA/2/2022, GA/3/2022

PRINCIPAL COMMISSIONER OF INCOME TAX 5, KOLKATA
VS.
ADITYA SARAF HUF

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 2nd January, 2023

Appearance :
Mr. Soumen Bhattacharjee, Adv.
...for appellant.
Mr. Asim Chowdhury, Adv.
Ms. Akshar Shukla, 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 30th April, 2021 passed by the Income Tax Appellate Tribunal, SMC Bench in ITA/2260/Kol/2018 dated 15.8.2019 for the assessment year 2014-15. The revenue has raised the following substantial questions of law for consideration:-

- i) Whether in the facts and circumstances of the case and in law, the ITAT had erred and failed to appreciate that the assessee could not substantiate the genuineness of the transaction to prove that it had not indulged in dubious share transactions meant to account for undisclosed income in the garb of Long Term Capital Gain (LTCG) to claim exemption u/s. 10(38) of the Income Tax Act, 1961 ?
- ii) Whether in the facts and circumstances of the case and in law the ITAT had erred while allowing the assessee's appeal of claim of exemption u/s 10(38) of the Income Tax Act, 1961 without holding that transaction of

sale and purchase of shares of penny stock companies was an adventure in nature of trade, thus, same was to be taxed as business income?

- iii) Whether in the facts and circumstances of the case, the order of the ITAT is perverse in overlooking that it is the duty of the Tribunal to scratch surface and probe documentary evidence in depth in light of-conduct of assessee and other surrounding circumstances in order to see whether the assessee is liable to provisions of section 68 or not ?
- iv) Whether in the facts and circumstances of the case, the ITAT had grossly erred in facts and in law by not appreciating the findings made by the Assessing Officer that the assessee had failed to explain satisfactorily how the investments, in absence of any evidence as to the financials, growth and operations of the company, could earn profit of 3714.30% within a gap just exceeding 12 months ?

We have heard Mr. Soumen Bhattacharjee, learned standing counsel for the appellant and Mr. Asim Chowdhury, learned Advocate for the respondent assessee.

The learned Tribunal by the impugned order had allowed the assessee's appeal and set aside the order passed by the Commissioner of Income Tax (Appeals) 15, Kolkata dated 28.08.2018 and consequently set aside the assessment order dated 20.12.2016. The respondent/assessee has filed an application in GA/3/2022 with a prayer to allow the respondent/assessee to pay only 50% of the disputed tax amount i.e. Rs.2,63,919/- (the disputed amount of tax as per demand notice by the revenue being Rs.5,27,838/-) on the income assessed by the revenue vide assessment order dated 20.12.2016 without including any interest or penalty along with interest received by the petitioner under Section 244A of the Income Tax Act of Rs.89,170/-. The assessment which is the subject matter of consideration in this appeal is of the year 2014-2015. Similar issue arose for the assessment year 2012-2013 and the assessment was completed by rejecting the case of the assessee. Aggrieved by the same, the assessee preferred the appeal before the Commissioner of Income Tax (Appeals), Kolkata

which was allowed. The revenue did not challenge the said order before the learned Tribunal. However, the assessee thought it fit to avail the benefit of *Vivad Se Vishwas Scheme 2020* and an application was filed by the assessee. The said application was accepted and form 5 was issued and the assessee had also remitted the required tax amount in terms of the conditions stipulated under the scheme. As a consequence thereof an order under Section 250 of the Act dated 18.2.2021 was passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre. In the present appeal the respondent/assessee requests for similar prayer to enable them to file an application under the Scheme so that the matter can attain its finality. The revenue had opposed such a prayer by contending that the Scheme is no longer in vogue and, therefore, the respondent/assessee cannot be permitted to avail the benefit of the Scheme or file an application under the Scheme. To be noted that the present appeal was filed with a delay of 958 days and the delay was condoned assigning certain reasons as a consequence of the order passed by this court condoning the delay it is deemed that the appeal was filed well within the period of limitation. If that is so, then the assessee could have very well availed the benefit of the Scheme. In other words, had the appeal been preferred within the period of limitation the assessee could have filed an application well before the time stipulated under the Scheme.

Considering the peculiar facts and circumstances of the case, we are of the view that the assessee should not be non-suited for the default committed by the revenue in not preferring the appeal within the period of limitation. Identical issue arose for consideration before the High Court of Delhi in the case of *I.A. Housing Solution Private Limited vs. Principal Commissioner of Income Tax 4 & Others* in WPC No.3560 of 2022 etc. dated November 2, 2022 and the Hon'ble Division Bench by the said order allowed the writ petition and directed the revenue to accept declaration/application forms in Form 1 and 2 filed by the assessee as valid declaration/application within a time frame and accept the balance disputed amount as stipulated by them under the provisions of the Scheme.

Thus, in the light of the above, the appeal stands disposed of with a direction to the respondent to file the requisite application under the Scheme within a period of ten days from the date of receipt of the server copy of this application and such application shall be deemed to have been presented well before the last date on which the benefit of the Scheme had come to an end and the application shall be processed and the requisite forms be issued so as to enable the respondent/assessee to pay the disputed tax in terms of the conditions contained under the Scheme. Such order shall be passed by the revenue within a period of six weeks from the date on which Forms 1 and 2 are filed by the assessee.

Consequently, the substantial questions of law are left open.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)