GA No. 3117 of 2017
ITAT No. 326 of 2017
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMM. OF I.T.-5, KOL.

Versus

M/S. IVORY CONSULTANTS PVT. LTD.

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE AMITABHA CHATTERJEE

Date : 10th July, 2018.

Appearance:
Mr. Aniket Mitra, Adv.

Mr. Moloy Dhar, Adv.
Mr. B. Sengupta, Adv.

The Court : The Revenue has come in appeal against a decision of the Income Tax Appellate Tribunal treating certain loss suffered by the assessee for the assessment year 2011-12 on account of their trading in derivatives as business loss. Such loss was allowed to be set off against the assessee's business profits, which were general in nature. This set off was allowed by the Assessing Officer at the first instance. The matter was taken up in exercise of revisional jurisdiction by the Commissioner under Section 263 of the Income Tax Act, 1961.

In the order passed under the aforesaid provision, the revisional authority opined that setting of loss by the Assessing Officer ought not to have been allowed in respect of speculation profit in the absence of specific finding by the Assessing Officer on that count. The revisional authority held and directed ÷

> "The issue arising for determination in the instant proceedng is whether the A.O. had made the enquiries which were prudent to be made in the given facts and circumstances of the case before accepting the claim of the assessee. On going through the assessment records, I find that no enquiry was conducted by the A.O. to determine as to the nature of the transactions giving rise to the loss of Rs.2,44,55,975/- and whether deduction of the same was allowable against various income shown by the assessee in its return of income. That the enquiries were required to be made yet no such enquiry was made is further established from the fact that the assessee in its letter dt. 26.10.2015 has made elaborate submissions and argument but none of these submissions or argument were either called for by the A.O. during the assessment proceeding or furnished by the assessee before the A.O. it is therefore, clear that the relevant facts were never determined or considered by the A.O. before allowing the claim of the assessee. The assessment order was therefore erroneous in so far as prejudicial interest of revenue this required to be cancelled.
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> In view of above discussion and considering carefully the relevant facts as also the submissions made by the assessee in response to notice dt.03.09.2015 I cancel the assessment order dt.26.03.2014 passed u/s.143(3) for the A.Y. 2011-12 for fresh assessment after giving assesse proper opportunity. While doing so the A.O. shall also examine whether the decision in the case of CIT Vs KILF Commercial Developers Limited (ITA 94/2013) of Delhi Hon'ble High Court would be applicable in the instant case or not."

The assessee went up in appeal before the Tribunal and was successful. The Tribunal found that inquiry was conducted in a proper manner and observed in its decision under appeal ÷

“During the course of assessment proceedings u/s 143(3) of the Act the AO issued notice dated 28.02.2014 in which the AO specifically called upon the assessee to furnish the details of the loss from derivative trading of Rs. 2,44,55,976/-. The assessee vide its reply to the aforesaid notice furnished the ledger of loss from derivative besides contract notes in respect of transactions in derivatives carried out by the assessee. The details so filed by the assessee are at pages-55 to 57 of the assessee’s paper book. The assessee filed the aforesaid details before the AO and in the order sheet entry of the AO on the date of hearing 04.03.2014, the AO has recorded the fact that the assessee had filed all these details before the AO And the case was accordingly adjourned to 25.03.2014 before the AO. On 19.03.2014 the AO issued notice u/s. 133(6) of the Act to M/s. Ashika Stock Broking Ltd through whom derivative trading transaction had been carried out by the assessee. On 24.03.2014 the AO has recorded the fact that reply to the notice u/s 133(6) of the Act was received and the same is filed. Thereafter on 25.03.2014 the AO has recorded the fact that the AR of the assessee appeared and produced books of accounts which were examined and returned. The case was finally discussed and heard. On 26.03.2014 the AO passed order of assessment u/s. 143(3) in which the AO accepted the loss declared by the assessee.”

The Tribunal ultimately held ÷

“8. We have heard the submissions of the Ld. Counsel for the assessee and the ld. DR. The ld. Counsel for the assessee drew our attention to various enquiries made by the AO before concluding the assessment u/s 143(3) of the Act which we have already referred in the earlier part of this order. He further submitted that the Hon'ble Calcutta High Court in the case of Asian Financial Services Ltd. Vs. CIT in GA No. 3250 of 2015 dated 09.03.2016 has taken a view in the context of section 43(5) of the Act that loss in derivatives trading was not a speculation loss. The following were the relevant observations of the Hon'ble High Court:

> "11. It would appear that the activities appearing in Clauses (a) to (c) are not to be deemed to be speculative transactions. Therefore, this comes within the category of deemed business which is however distinct and separate from any other business. Now, the question is, whether loss arising out of such deemed business can be set off against the profit arising out of other business or businesses which may for clarity be called proper business. Under section 70 of the Act, the assessee is entitled to have the loss set off against his income from any other source under the same head unless otherwise provided. Therefore answer to the question is that the assessee is entitled to have the loss arising out of deemed business set off against the income arising out of business proper unless otherwise provided. The question however remains whether the explanation to Sub-Section (4) of Section 73 relied upon by Mr. Lodh provides otherwise. A plain reading of the explanation quoted above cannot be said to have provided otherwise. In that case the irresistible conclusion is that the assessee is entitled to set off such loss arising out of deemed business against the income arising out of business proper".

9. The Hon'ble Calcutta High Court also did not agree with the view taken by the Hon'ble Delhi Court in the case of CIT Vs. DLF Commercial Developers Ltd. 35 Taxman.com 280 (Del) referred to by the CIT in the impugned order. It was therefore submitted by him that even on merits, the order of AO cannot be termed as erroneous and prejudicial to the interest of the revenue.

10. The ld. DR while relying on the order of the CIT further placed reliance on the decision of ITAT, Kolkata in the case of Cd Equuisearch Pvt. Ltd. In ITA No. 559/Kol/2012 for A. Y. 2007-08 order dated 30.12.2013. In the aforesaid decision on an identical issue in an appeal against an order u/s 263 of the Act, the Tribunal came to the conclusion that the AO before concluding the assessment did not make proper enquiries on the loss from derivative shown by the assessee which was claimed as normal business loss in the return of income. He drew our attention to the relevant findings of the tribunal which contained in para-11 and 12 of the aforesaid order. According to him therefore the enquiries made by the AO in the present case ought to have been carried by the AO to a logical conclusion by holding that the loss in question was a speculative loss and his failure to do so rendered his order erroneous and prejudicial to the interest of the revenue in the light of the decision of the Hon'ble Delhi High Court in the case of DLF Commercial Developers Ltd. (supra).

"11. We have given a very careful consideration to the rival submissions. it is clear from the impugned order of the CIT that the ground on which he has come to the conclusion that the order of AO was erroneous and prejudicial to the interest of the revenue was the failure on the part of the

> AO to make proper enquiries on the derivative loss claimed as a business loss by the assessee in the return of income. In this regard we have already pointed out that in the earlier part of this order the enquiries made by the AO with regard to the derivative loss declared by the assessee. It cannot be said that the AO was not conscious of the fact that the assessee was a company and that loss trading in derivatives had to be looked at from the point of Explanation to section 73 of the Act. AO was fully satisfied that the loss from derivative was a genuine loss and had to be allowed as a normal business loss. No adverse facts came to our knowledge on the enquiries made by him with regard to the genuineness of the derivative loss. Secondly, the derivative loss was a normal business loss and it fell within the ambit of Exception to section 43(5) of the Act. In this scenario we are of the view that the enquiries made by the AO were adequate and proper and the conclusions to the contrary in the impugned order of the CIT cannot be sustained."

This is the decision which Mr. Mitra, learned counsel appearing for Revenue, assails before us. In the revisional authority's order, there is no specific discussion on the question as to whether the assessee comes within the ambit of Section 70 of the 1961 Act or not and the revisional authority appears to have proceeded on the basis of that the assessee's case is covered by Section 73 of the Act. The main reasoning of the Commissioner exercising his jurisdiction under Section 263 of the Act for remanding the matter to the Assessing Officer was that the records did not reveal any inquiry being conducted by the Assessing Officer. The Tribunal, however, found on fact that such inquiry was made and this appears from the above quoted passages of the decision of the Tribunal. In course of hearing Mr. Mitra contended that the fact that such inquiry was made did not appear from the assessment order and hence, there was no error in the decision of the Commissioner. But that is not the specific factor which had persuaded the Commissioner to remand the matter. As we have already observed, the Commissioner's view was that no inquiry was made. The Tribunal found otherwise. In the event such inquiry was made, we do not think it was necessary that the nature and scope of such inquiry ought to have been clearly spelt out in the assessment order. On considering the records, the Tribunal has come to a finding that the Assessing Officer did make sufficient inquiry and on law also, the Tribunal has given its finding.

We do not find the decision of the Tribunal to be erroneous. We, accordingly, dismiss the appeal and the stay petition.

There will be no order as to costs.

(ANIRUDDHA BOSE, J.)

(AMITABHA CHATTERJEE, J.)

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