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ITAT No. 4 of 2015
GA No. 526 of 2015

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction(Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-II
Versus
DOE JONES INVESTMENT AND CONSULTANTS (PVT.) LTD.

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE
AND
The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY

Date : June 19, 2018.

Appearance:
Ms. Asha G. Gutgutia, Adv.

Mr. J.P. Khaitan, Sr. Adv.
Mr. A. Sengupta, Adv.
Ms. R. Anthony, Adv.

The Court : The substantial question of law raised by the Revenue is whether the Appellate Tribunal could have reversed a finding founded on facts in such a terse manner and without dealing with the facts as is evident from paragraph-9 of the order impugned dated August 12, 2014 when both the Assessing Officer and the Commissioner had found that the original figures furnished by the assessee were sought to be modified on the ruse of a clerical error to change a huge profit position to a huge loss position.

The assessee insists that as has been found by the Appellate Tribunal, the net effect qua tax may not be of any great significance. However, the matter is one of principle.

The questions that arise are in the context of Section 73 of the Income Tax Act, 1961 and the speculation loss claimed to have been suffered by the assessee.

There is little dispute on facts and it is best that the assessment order dated March 31, 2004 be noticed in the context. The assessee is a share-broker and filed returns for the assessment year 2001-02 at the end of October, 2001 declaring a loss in excess of Rs.17.22 crore.

The case was selected for scrutiny and a notice was served under Section 143(2) of the Act. A letter of requisition was issued on June 27, 2003 and the assessee sought an adjournment for a month. A further requisition was issued on August 26, 2003 which was served on the assessee on September 8, 2003 fixing September 11, 2003 as the date of hearing. The assessee went unrepresented. A subsequent notice was issued to the assessee on November 21, 2003 for the assessee to be represented before the Assessing Officer and explain the purchases and sales of shares. On the relevant date fixed before the Assessing Officer on November 28, 2003, the assessee went unrepresented again. Another opportunity was afforded to the assessee to be represented on December 10, 2003 at which time, a representative appeared and sought an adjournment. The Assessing Officer fixed January 5, 2004 as the next date. There was a no-show on behalf of the assessee on the adjourned date and no response to the queries raised by a letter of November 19, 2003 issued by the Assessing Officer. On January 22, 2004 certain documents were presented on behalf of the assessee.

On February 17, 2004 the assessee was required to substantiate its claim of share-dealing income to the extent of Rs.50.28 crore. It was pointed out to the assessee that in the absence of any cogent evidence, it could not be accepted that such income was from share-dealing. Till the date of the order of assessment, the assessee did not furnish any evidence to substantiate the share-dealing income to the extent of Rs.50.28 crore. At the request of the assessee the matter was adjourned by the Assessing Officer till March 3, 2004 when the authorised representative of the assessee purported to submit a rectified set of profit and loss accounts together with an auditor's certificate of March 3, 2004. The assessment order of March 31, 2004 has set out a table indicating the figures contained in the original profit and loss accounts as filed and in the purported rectified accounts. What is singularly striking about the figures is that a share-broking firm had claimed that it had mixed up between the value of the shares that it purchased during a financial year with the value of the shares that it sold during such period. Even if there is an element of disbelief being willingly suspended to accept the rectified accounts, there is a figure of Rs.84,74,78,717.36/- which is shown as the share-dealing loss for the relevant year which is difficult to accept without any material in support thereof. It must not be lost sight of that substantial time was taken by the assessee in responding to the queries of the Assessing Officer when the fundamental question raised by the Assessing Officer was regarding the share-dealing income of about Rs.50.28 crore. It is very difficult to accept that the share-dealing profit of Rs.50.28 crore metamorphosed into share-dealing loss of Rs.84.74 crore for the same year upon a query being raised by the Assessing Officer and after several months had been wasted by the assessee.

It is such aspect of the matter that prompted the Assessing Officer to make the order of assessment by disbelieving what the assessee had to show. The Commissioner (Appeals) referred to the figures, the nature of the business conducted by the assessee, the incredible change of tack and the purported rectified accounts.

In the context of such colossal anomalies screaming out of the original profit and loss and purported rectified accounts of the assessee, the Appellate Tribunal was scarcely justified in dealing with the same in the following parsimonious manner at paragraph 9 of the order under appeal:

> "9. We have considered the rival submissions. A perusal of the assessment order clearly shows that the assessee is a share broker. The Profit & Loss A/c. of the assessee clearly shows that the assessee's business is only purchases and sales of shares. The balance-sheet of the assessee shows that the assessee is only doing the business of dealing in shares so also the Director's report. A perusal of the decision of the Hon'ble jurisdictional High Court in the case of CIT –vs.- Arvind Investments Ltd. (supra) shows that the Hon'ble jurisdictional High Court has held in para 26 that *"the business activity which consists of purchase and sale of shares will be treated as speculation business. If the entire business activity of a Company consists of purchase and sale of shares of other companies, then the entire business will be treated as speculation business. But, if apart from purchase and sale of shares, the company has other business activities, then those other activities will not be treated as speculation business".* Thus, as it is noticed that the assessee is having only share trading business and the assessee is a Company which is dealing in shares of other Companies in view of the decision of the Hon'ble jurisdictional High

> Court in the case of Arvind Investments Ltd. (supra), the assessee's business is liable to be treated as speculation business. In these circumstances, the Assessing Officer is directed to treat the assessee's business from share trading as speculation business and allow the assessee benefit of set off of speculation income of Rs.50.28 crores against the speculation loss of Rs.66.40 crores."

The Appellate Tribunal referred to the figures unmindful of the fact that the veracity thereof had been doubted by the Assessing Officer and the Commissioner (Appeals) and the assessee had to cross such hurdle before the manner of treatment of its loss could be gone into.

Ordinary human conduct would have demanded that if there was a mistake in two sets of figures being interchanged in the accounts, the assessee would notice it upon the first query being raised and approaching the Assessing Officer for an immediate correction to be carried out. It is scarcely expected that such matter would take several months for the assessee to discover. Further, the matter did not end with only two sets of figures being interchanged, what was claimed to be the share-dealing income for the relevant year of a figure of no less than Rs.50.28 crore was subsequently sought to be shown as a share-dealing loss for the same period of an amount no less than Rs.84.74 crore. There are several explanations which the Assessing Officer must be waiting to receive from this assessee.

The order impugned dated August 12, 2014 passed by the Appellate Tribunal is exceptionable in the perfunctory manner in which a matter of some importance was dealt with. Such order is set aside. In the light of this, the order of the Commissioner of Income Tax and the original assessment order will also not be given further effect to, subject to a deposit of Rs.25 lakh being made by the assessee within a fortnight from date. In the event such deposit is not made, the order of the Commissioner will be effective. Upon such deposit being made with the Assessing Officer, the Assessing Officer will look into the matter afresh including any explanation that the assessee may have to furnish. The deposit, if made, will be adjusted against any demand for tax or interest or penalty. The Assessing Officer will afford adequate time to the assessee for any explanation, but should complete the exercise of the fresh assessment within a period of two months of the receipt of a copy of this order without granting needless adjournments to the assessee.

ITAT No.4 of 2015 and GA No.526 of 2015 are disposed of.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)

sg/kc.