

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

ITANo. 195 of 2014

AGAINST THE ORDER IN ITA 654/2013 of I.T.A.TRIBUNAL, COCHIN BENCH DATED 11-04-2014

APPELLANT/RESPONDENT/REVENUE :

THE COMMISSIONER OF INCOME TAX
TRICHUR.

BY ADV. SRI.P.K.R.MENON, SC FOR INCOME TAX
ADV.SRI.JOSE JOSEPH, SC FOR INCOME TAX

RESPONDENT/APPELLANT/ASSESSEE :

M/S.KERALA SPONGE IRON LTD.
XV/D NO.810, MANTHURUTHY, KANJIKODE WEST P.O.
PALAKKAD, KERALA-678 623.

R1 BY ADV. SRI.JOBY JACOB PULICKEKUDY
R1 BY ADV. SRI.ANIL GEORGE

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: TRUE COPY OF THE ASSESSMENT ORDER DATED 28/3/2013.

ANNEXURE B: TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 19-7-2013.

ANNEXURE C: TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 11.4.2014.

ANNEXURE D: TRUE COPY OF THE ORDER OF THE HIGH COURT OF PUNJAB AND HARYANA IN ITA NO.189 OF 2012 DATED 10.09.2013, REPORTED IN 38 TAXMANN.COM 390 (2013).

// TRUE COPY //

P.A.TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A. No.195 of 2014

Dated this the 19th day of August, 2015

JUDGMENT

Antony Dominic, J.

This appeal is filed by the Revenue challenging the order passed by the Income Tax Appellate Tribunal, Cochin Bench, in ITA 654/13 concerning the assessment year 2010-2011. The only issue that was raised before us was in relation to the assessment of profit from commodity trading as cash credit under Section 68 of the Income Tax Act. The assessment order itself show that it was found from the Profit and Loss Account that a sum of Rs.5,13,55,093/- was found credited in the books of accounts of the assessee as commodity trading profit allegedly received from M/S Vatika Merchants Private Limited. The said income was adjusted/set off by the assessee against business losses for the year in question. In response to the request of the Assessing Officer for production of confirmation, the assessee vide letter dated 21.1.2013 filed a copy of accounts of M/S Vatika Merchants Private Limited for the financial year relevant to the assessment year 2010-2011. This was examined by the

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Assessing Officer who also ascertained from M/S National Multi Commodity Exchange of India that M/S Vatika Merchants Private Limited was expelled by the exchange on the ground of issuing fraudulent contract to its clients. It was also confirmed that the assessee is a non existent client under any member of the exchange. Based on this, the Assessing Officer found that the transactions showing generation of commodity trading profit of 5,13,55,093/- was a sham and bogus one. On that basis, the Assessing Officer treated the commodity trading profit shown by the assessee as unexplained cash credit and accordingly added the same as unexplained cash credit under Section 68 of the Income Tax Act. This was confirmed by the First Appellate Authority. In the appeal filed before the Tribunal, the Tribunal passed the impugned order. After referring to the relevant portion of the assessment order and also attendant facts which were taken into account by the Assessing Officer, the Tribunal thus held:

“7.3 However, we notice that the assessee has not furnished any material to controvert the finding reached by the assessing officer that the profit from commodity trading declared by the assessee was a sham or bogus transaction. We notice that the assessing officer has

given the above said finding after making necessary enquiries with the Commodity exchange. Hence, we do not find any reason to interfere with his decision on this issue and accordingly hold that the claim of receipt of profit from commodity trading is a sham or bogus one. Further as per Sec.68 of the Act, it is the responsibility of the assessee to explain about the "Nature and source" of any sum found credited in the books of accounts. Hence we are of the view that the assessing officer has rightly assessed the same as cash credit u/s 68 of the Act."

2. After holding so, the Tribunal examined the illegality of the rejection of the claim of the assessee to set off of business loss and carry forward business loss/depreciation. Thereafter, distinguishing the case of Fakir Mohmed Haji Hassam v. CIT (2001) 247 ITR 290 relied on by the Assessing Officer to deny this claim and relying on the judgment of the Calcutta High Court in Daulatram Rawat Mull v. CIT (64 ITR 593), the Tribunal held thus:

"8.6 In the instant case, the contention of the assessee is that it has no other source of income other than business income. The said contention was not controverted by the tax authorities. The assessee has credited the loan amount of Rs.18.00 lakhs and the profit from commodity trading of Rs.5.13 crores in its books of account. In fact the profit from Commodity trading was credited in the Profit and Loss Account and offered as business income. Since the assessee could not explain to the satisfaction of the assessing officer about the nature and source of loan

amount as well as the profit from commodity trading, the assessing officer has treated them as deemed income, i.e., as unexplained cash credits u/s 68 of the Act. While dealing with the issue relating to the disallowance of interest, the assessing officer has pointed out that the assessee has a loan liability of Rs.21.56 crores and claimed interest expenditure of Rs.3.33 crores. The AO has allowed depreciation of Rs.2.63 crores. All these figures throw light on the magnitude of operations of the Company. Under these set of facts, we are of the view that it may not be unreasonable to treat the loan receipts and profit from commodity trading assessed u/s 68 of the Act as the receipts from the business activity of the assessee. Accordingly, we are of the view that the assessee is entitled to claim set off of current year loss and also brought forward loss/unabsorbed depreciation against the same in accordance with the relevant provisions of the Act.”

3. On that basis the Tribunal set aside the order of the First Appellate Authority and directed the Assessing Officer to allow the set off of current years business loss as well as brought forward losses/unabsorbed depreciation against the income assessed in accordance with the provisions of the Income Tax Act. It is aggrieved by this order of the Tribunal that the Revenue has filed this appeal. The main question of law raised by the Revenue is whether on the facts and circumstances of the case, since the income determined under Section

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68 does not fall under any head in Section 14 is not such an income beyond Section 70 which deals with set off?

4. We heard the Senior Counsel for the Revenue and also the learned counsel appearing for the assessee.

5. As we have already noticed in paragraph 7.3 of its order, the Tribunal has confirmed the order passed by the Assessing Officer treating the commodity profit shown by the assessee as unexplained cash credit on the basis that the transactions showing generation of commodity trading profit were sham and bogus transactions without any element of genuineness. The Tribunal also upheld addition of the commodity trading profit as unexplained cash credit under Section 68 of the Act. The question is whether having confirmed the addition of the alleged commodity trading profit as unexplained cash credit under Section 68 of the Act, whether the Tribunal was justified in allowing set off.

6. In our view, answer to this question should be in the negative. This is evident from the judgment of the Gujarat High Court in *Fakir Mohmed Haji Hassam v. CIT (2001) 247 ITR 290* distinguished by the

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Tribunal itself where it has been held that when income cannot be classified under any one of the heads of income under Section 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. Insofar as this case is concerned, admittedly the income has been treated as unexplained cash credit under Section 68 of the Act. Once it is so done for the purpose of set off or any other purpose, the said unexplained income cannot be treated as business income under any one of the head provided under Section 14 in which case the question of set off does not arise.

7. Insofar as the Supreme Court judgment in Lakhmichand Baijnath v. Commissioner of Income Tax, West Bengal (1959) 35 ITR 416 relying on which the Calcutta High Court has rendered its judgment in Daulatram Rawat Mull v. CIT (64 ITR 593) is concerned, reading of the judgment itself show that the disputed income therein was assessed by the Assessing Officer as concealed profits of the business. This finding of the Assessing Officer was confirmed by the First Appellate Authority, Tribunal, High Court and the Supreme Court. Therefore, the decision

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rendered on the basis of such a conclusion could not have been of any assistance to arrive at the conclusion of the Tribunal that the assessee was entitled to set off the unexplained income under Section 68 of the Act in accordance with the provisions of the Act relating to set off.

We, therefore, set aside the order passed by the Tribunal, to the extent it has set aside the order of the Commissioner of Income Tax (Appeals) directing the Assessing Officer to allow the set off of current year business loss as well as brought forward business loss/unabsorbed depreciation against income assessed under Section 68 of the Act. Therefore, answering the question of law raised in favour of the Revenue, this appeal is disposed of.

SD/-
ANTONY DOMINIC
JUDGE

SD/-
SHAJI P. CHALY
JUDGE

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