

ORDER SHEET

ITAT No.78 of 2017
GA No.747 of 2017
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME-TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-II, KOLKATA
Versus
M/S. BLB CABLES AND CONDUCTORS PVT. LTD.

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE
The Hon'ble JUSTICE AMITABHA CHATTERJEE
Date : 19th June, 2018.

MR.S.BHATTACHARYYA,ADVOCATE FOR APPELLANT.

MR.SOURABH BAGARIA, MR. RITES GOEL, ADVOCATES FOR RESPONDENT.

The Court :-The main point on which the Revenue presses this appeal is whether speculation loss arising from commodity trading to the Assessee in off market transactions would be added to its income or not for the assessment year 2009-10. The sum involved in such speculation loss is Rs.2,26,96,157/-. The Assessing Officer found claim for deduction under that head impermissible. He held :-

“From the return it has been found that the assessee has claimed loss in commodity trading of Rs.2,26,96,157/-. On enquiry, the stock exchange NMCE (National Multi Commodity Exchange) reported that the transactions were not done in the name of this party and the broker through which the assessee said to have done the

trading has been expelled by the NMCE after the broker Vatika Merchants(P) Ltd. was found to have been involved in issuing forged and fraudulent contract notes. In reply to the show cause that why it should not be treated as bogus, it has been submitted that "...As all these transactions are off market transactions, the same may not have passed through the commodity exchange. But that does not make these transactions bogus. We have produced all the purchase and sale contracts before you to prove the genuineness of the said transactions...." From the above submission it is clear that the transactions made were off market transactions and had not been informed to the Stock Exchange. Considering the above facts the transactions have been considered the assessee has furnished wrong particulars of income which amounts to concealment of income. The assessee has claimed it as speculation loss to be carried forward. So, the assessee has concealed income and furnished wrong particulars of income. For the above reasons penalty proceedings U/s 271(1)(c), Explanation-4 of the IT Act' 1961 has been initiated.

Further, the assessee has earned Long Term Capital Gain of Rs.2,56,76,147/- which has not been passed

through the Profit & Loss A/c but directly taken to capital reserve. This resulted in undervaluation of book profit u/s 115JB. So, the same has been considered for the purpose of computation of Book Profit U/s 115JB.”

On that basis the Assessing Officer recomputed the income of the Assessee adding the said sum. The Commissioner of Income Tax (Appeals) confirmed this order and his order contained the following finding of fact :-

“12. The facts which emerge from the above discussion and summarised in nutshell are as follows:-

- A) The appellant has incurred loss of Rs.2,26,96,157/- in commodity trading in off market transactions.*
- B) On enquiry the Commodity Exchange i.e. National Multi Commodity Exchange (NMCE) reported that transactions were not recorded in the name of the appellant i.e. M/s.BLB Cables & Conductors Pvt. Ltd.*
- C) The broker i.e. M/s. Vatika Merchants(P) Ltd. was also expelled by the NMCE since the broker was found indulging in issuing fraudulent contract notes.*
- D) The information “whether the appellant has ever entered into commodities trading in the last or next three years, if yes, result thereof. Does the Director in individual*

capacity or otherwise ever entered into commodity exchange prior or later to these transactions” was not given during appellate proceedings in spite of number of opportunities.

E) *The original Books of Accounts, stock register, commodity trading register etc. were not produced for verification and necessary inquiry into the commodity trading during the appellate proceedings.*

F) *The appellant was asked to produce the authorisation given to the director/employee for doing commodity trading and copy of Board Resolution giving such authorisation even during appellate proceedings which was not produced in spite of number of opportunities.*

G) *The appellant did not furnish the information who did the commodity trade transactions i.e. whether it was a director or employee, what was the experience of the said persons in the commodity trading and whether the said Director/employee has entered in these kind of transactions in individual capacity or otherwise ever.*

H) *The appellant has not produced any documents showing that the fluctuation of silver and other*

commodities has been so much rapid during the day that every time he bought and sold it resulted into a loss and there was never gain on any day.

I) *All the commodity transactions resulted into loss to the appellant.*

J) *The appellant has a long term capital gain of Rs.2,56,76,147/- which was taxable u/s 115JB and the commodity loss, if allowed was to be set off against such a gain and resulting into non-payment of taxes as filed in the return.*

K) *The appellant did not enter the long term capital gain of Rs.2,56,78,147/- in the Profit and Loss account to be prepared as per the Companies Act, 1956 and has directly taken it to the capital reserve in violation of the accounting standards and legal requirements of section 115JB and the companies Act, 1956.*

L) *The appellant knows that very few returns are selected for scrutiny assessments.*

M) *The non submission of information and avoiding verification by writing that it had already filed written submissions with enclosures at the time of first hearing and thereafter and that no further papers or clarification*

need be filed by it. Further, asking to decide the appeal on the basis of submissions already filed by submitting a letter in dak”

In the appeal filed by the assessee, the Tribunal, however, held that there is no bar in undertaking off market transactions in commodities under the law. On the aspect of proving such transactions, the Tribunal opined that the Assessing Officer was duty bound to accept the profit shown in the Profit & Loss Account of the Assessee relying on the following authorities:-

(i) *Apollo Tyres Ltd. V. CIT 255 ITR 273(SC);*

(ii) *Malayala Manorama Co. Ltd. V. CIT 300 ITR 251(SC);*

(iii) *DCIT- Circle-10(1) V. Dune Leasing & Finance Ltd. 126 ITD 255 (Del.)*

On factual analysis of the assessee’s case, the Tribunal observed and held :-

“4. We have heard both the side and perused the materials available on record. The ld. AR submitted two papers books. First book is running in pages no. 1 to 88 and 2nd paper book is running in pages 1 to 34. Before us the ld. AR submitted that the order of the AO is silent

about the date from which the broker was expelled. There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.

4.1 From the aforesaid discussion we find that the assessee has incurred losses from the off market commodity transactions and the AO held such loss as bogus and inadmissible in the eyes of the law. The same loss was also confirmed by the ld. CIT(A). However we find that all the transactions through the broker were

duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal." [quoted verbatim]

This is essentially a finding of the Tribunal on fact. No material has been shown to us which would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the

position, Tribunal having analysed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed.

There shall be no order as to costs.

(ANIRUDDHA BOSE, J.)

(AMITABHA CHATTERJEE, J.)

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