IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1298 OF 2017

Principal Commissioner of Income Tax-3 … Appellant
Vs.
Shapoorji Pallonji & Co. Ltd. … Respondent

Mr. A. R. Malhotra for Appellant.
Mr. Porus F. Kaka, Senior Advocate a/w. Mr. Divesh Chawla i/b. Mr. Atul K. Jasani for Respondent.

**CORAM : UJJAL BHUYAN,**
**MILIND N. JADHAV, JJ.**

**DATE : MARCH 04, 2020**

**P.C.** :

Heard Mr. Malhotra, learned counsel for the appellant and Mr. Kaka, learned senior counsel assisted by Mr. Chawla and Mr. Jasani, learned counsel for the respondent - assessee.

2. This appeal has been preferred by the Revenue under Section 260-A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) assailing the order dated 28.09.2016 passed by the Income Tax Appellate Tribunal, 'E' Bench, Mumbai ('the Tribunal' for short) in I.T.A.Nos.5768/Mum/2013 and 5304/Mum/2013 for the assessment year 2010-11.

3. The appeal has been preferred projecting the following questions as substantial questions of law:

> "1. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the decision of the Commissioner in restricting the disallowance made under Section 14A of the Act to Rs.10,00,000.00 giving relief of Rs.2,38,71,710.00 without appreciating the fact that the disallowance was worked out as per Rule 8D of the Income Tax Rules, 1962 read with Section 14A of the Act?
>
> 2. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the decision of the Commissioner in deleting the disallowance of Rs.7,38,98,631.00 under Section 36(1)(iii) of the Act without appreciating the fact that interest bearing funds were advanced for non business purpose?

3. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the decision of the Commissioner in deleting the disallowance under Section 14A and foreign exchange fluctuations to the book profit under Section 115JB of the Act ignoring the decisions of the Tribunal in the case of ITO Vs. RBK Share Broking Pvt. Ltd., 37 Taxmann 128 (2013), M/s. Viraj Profiles Limited in ITA No.4439/Mum/2013 dated 21.10.2015 - 46 ITR (T) 626 and in Ferani Hotels Pvt. Ltd. in ITA No.857/Mum/2013 dated 17/11/2014?

4. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.3,32,867.00 relating to bogus purchases without appreciating the fact that the addition was made on the basis of statement given before the Sale Tax Department by the proprietors of M/s. Nutan Metal and M/s. Kant Enterprises who have submitted that they have neither purchased nor sold goods and have issued fake bills for the amount received by cheque and have returned these amounts in cash?"

4. In respect of question No.1 initial submission of Mr. Malhotra was that identical question was admitted for hearing by this Court *vide* order dated 05.12.2017 in Income Tax Appeal No.1195 of 2015 in the case of the assessee itself for the assessment year 2009-10. However, Mr. Kaka has pointed out that because of the low tax effect being below the prescribed limit under the relevant CBDT Circular, the said appeal was dismissed as withdrawn. Moreover, he submits that in the case of the assessee itself for the assessment year 2008-2009 being Income Tax Appeal No.1843 of 2016, this Court by order dated 06.03.2019 declined to admit identical question framed.

5. However, Mr. Malhotra submits that while declining to admit the above question, this Court did not take into consideration the decision of the Supreme Court in *Maxopp Investment Limited Vs. CIT*, **402 ITR 640** and also did not apply the principle of apportionment in terms of Rule 8D(2) of the Income Tax Rules, 1962 (briefly 'the Rules' hereinafter).

6. On thorough consideration we find that the principle of apportionment does not arise in this case as the jurisdictional facts have not been pleaded by the Revenue. In fact Tribunal while affirming the

order of the first appellate authority noted that the first appellate authority had deleted the addition made by the assessing officer under Section 14-A of the Act by observing that the interest-free fund available with the respondent - assessee was far in excess of the advance given. Tribunal further noted that the Revenue does not dispute the said finding and relying on the decision of this Court in *CIT Vs. Reliance Utilities and Power Limited*, **313 ITR 340**, affirmed the deletion made by the first appellate authority.

7. We have perused the decision of this Court in **Reliance Utilities and Power Limited** (*supra*) wherein it has been held that if there are funds available with the assessee, both, interest-free and overdraft and / or loans taken then a presumption would arise that investments would be out of the interest-free funds generated or available with the assessee if the interest-free funds were sufficient to meet the investments. In the facts of that case, it was noted that the said presumption was established considering the finding of fact returned by the first appellate authority as affirmed by the Tribunal which is identical in the present case.

7.1. We also note that the said decision of this Court has been affirmed by the Supreme Court in *CIT Vs. Reliance Industries Limited*, **410 ITR 466**.

8. In the light of the above, we do not find any good ground to entertain this question for consideration.

9. In so far question No.2 is concerned, the same relates to deletion by the first appellate authority of the disallowance made by the assessing officer by invoking the provisions of Section 36(1)(iii) of the Act. We find that this question is intertwined with question No.1. We also find that this issue was raised by the Revenue in the case of the assessee itself in Income Tax Appeal Nos.766 and 820 of 2016 before this Court decided on 04.12.2018. In that decision, this Court referred to the

finding of the first appellate authority as affirmed by the Tribunal that respondent / assessee had not utilized interest bearing borrowed funds for making such interest-free advances. Respondent - assessee had its own interest-free fund far in excess of interest-free advance. This being a pure question of fact, it was held that no question of law arises therefrom.

9.1. Following the above, we decline to admit question No.2 for consideration.

10. In so far question No.3 is concerned, we find that in paragraph 9 of the order dated 28.09.2016, the Tribunal followed the decision of the Supreme Court in *CIT Vs. Woodward Governor India Pvt. Ltd.*, **312 ITR 254** declaring that it is now settled proposition of law that the loss arising on account of valuation of outstanding liabilities / receivables cannot be considered as a notional loss. Therefore, Tribunal held that the first appellate authority had rightly set aside the addition made by the assessing officer.

11. Regarding adjustments made in the book profit under Section 115JB of the Act following disallowance made under Section 14A of the Act on account of foreign exchange fluctuations, Tribunal held that since it had upheld the order of the first appellate authority deleting the additions made under Section 14A of the Act, the contention of the Revenue needed to be turned down.

12. In the present decision, we have also affirmed the finding of the Tribunal affirming the deletion of disallowance made under Section 14A of the Act. Since disallowance under the substantive provision have been interfered with, question of consequential adjustments in book profit under Section 115JB of the Act does not arise.

13. In view of above, we are also not inclined to entertain this question as framed by the Revenue for consideration.

14. This brings us to the last question framed by the Revenue, which is deletion by the Tribunal of an amount of Rs.3,32,867.00, the addition of which was made by the assessing officer under Section 69-C of the Act as bogus purchases.

15. From the assessment order, we find that assessing officer had noted that the respondent - assessee had made purchases of Rs.3,23,944.00 and Rs.8,923.00 from M/s. Kant Enterprises and M/s. Nutan Metals respectively. Assessing officer further noted that information was received from the Sale Tax Department, Government of Maharashtra that the above two parties had not actually sold any material to the respondent - assessee. Accordingly, show cause notice was issued to the respondent - assessee to furnish details relating to above purchases. In response to the show cause notice, respondent - assessee furnished copies of the bills and entries made in its books of accounts relating to such purchases pertaining to glass mosaic tiles from M/s. Kant Enterprises and stainless steel top railing from M/s. Nutan Metals. However, assessing officer vide his assessment order dated 31.01.2013 held that there was no actual purchase of goods by the respondent - assessee and accordingly the aforesaid two amounts totalling Rs.3,32,867.00 was disallowed and consequently added to the total income of the respondent - assessee.

16. Though the first appellate authority did not interfere with the order passed by the assessing officer, contention of the respondent - assessee that copy of the statement made by M/s. Kant Enterprises before the Sales Tax Department, Government of Maharashtra was not made available to the respondent - assessee though copy of statement made by M/s. Nutan Metals was made available, was recorded.

17. On further appeal before the Tribunal by the respondent - assessee, Tribunal held as under:

> "16. Having heard rival submissions, we are of the view that there is merit in the submissions made by the assessee. We

> notice that the AO has simply relied upon the Sales Tax Department report about suspicious dealers, without making independent inquiries. On the contrary, the assessee has furnished all the materials to prove the genuineness of purchases and the AO has failed to show that those materials were bogus. Under these set of facts, we are of the view that there is no justification in doubting the genuineness of purchases made by the assessee. Further, these alleged bogus purchases forms a minor fraction of total volume of the assessee company and it is stated that there is no day to day involvement of the management. It was further submitted that the assessee is having strict internal controls. Hence we are of the view that the AO has not made a proper ground in support of the disallowance. Accordingly we set aside the order passed by Ld. CIT (A) on this issue and direct the AO to delete the addition of Rs.3,23,944/-."

18. Thus, we find that according to the Tribunal the assessing officer had merely relied upon information received from the Sales Tax Department, Government of Maharashtra without carrying out any independent enquiry. Tribunal had recorded a finding that assessing officer had failed to show that the purchased materials were bogus and held that there was no justification to doubt genuineness of the purchases made by the respondent - assessee.

19. We are in agreement with the views expressed by the Tribunal. Merely on suspicion based on information received from another authority, the assessing officer ought not to have made the additions without carrying out independent enquiry and without affording due opportunity to the respondent - assessee to controvert the statements made by the sellers before the other authority. Accordingly, we do not find any good ground to entertain this question for consideration as well.

20. Consequently, we find no merit in the appeal preferred by the Revenue. Appeal is dismissed.

**(MILIND N. JADHAV, J.)** **(UJJAL BHUYAN, J.)**

*Minal Parab*