

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "SMC" KOLKATA*

Before **Shri S.S, Godara, Judicial Member**

ITA No.2021/Kol/2018
Assessment Year:2013-14

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| Confident Investment Consultants Pvt. Ltd. C/o Subash Agarwal & Associates Siddha Gibson,1, Gibson Lane, 2 nd Floor, Suite-13, Kolkata-700069 [PAN No.AADCC 3385 L] | <u>बनाम /</u> V/s. | Income Tax Officer, Ward-6(1), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

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| अपीलार्थी की ओर से/By Appellant | Shri Subash Agarwal, Advocate |
| प्रत्यर्थी की ओर से/By Respondent | Shri S. Venkatramani Addl. CIT-SR-DR |
| सुनवाई की तारीख/Date of Hearing | 22-01-2019 |
| घोषणा की तारीख/Date of Pronouncement | 31-01-2019 |

आदेश /O R D E R

This assessee's appeal for assessment year 2013-14, arises against the Commissioner of Income-tax (Appeals)-2, Kolkata's order dated 13.07.2018 passed in case No.10131/CIT(A)-2/2016-17 involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee's sole substantive grievance raised in the instant appeal challenges correctness of both the lower authorities' action adding the amount in question of ₹5,12,832/- to be alleged bogus business loss suffered in currency derivative business transactions. Suffice to say, it emerges during the course of hearing that the Assessing Officer had added the impugned sum for the reason that department had conducted search in case of Marigold Vanijya Pvt. Ltd. and found the said assessee to have been giving accommodation entries of loss. The Assessing

Officer further referred to search statement in this regard made by searched-assessee is director admitting accommodation entries given to various people. This made the Assessing Officer to treat the assessee's currency derivatives loss amounting to ₹5,12,832/- as undisclosed cash credits in the nature of text transactions. The CIT(A) has confirmed the same in lower appellate proceedings.

3. I have given my thoughtful consideration to rival contentions. Learned senior Addl.CIT-DR vehemently contends during the course of hearing that lower authorities have rightly added assessee's loss in currency derivatives business as an accommodation entry as per the search statement in connection with Marigold Vanijya Pvt. Ltd., (supra). I find no reason to sustain the impugned addition as this tribunal's co-ordinate bench's decision in case of Smt. Sushila Devi Kajaria & Smt. Shruti Devi Kajaria vs. DCIT, Circle-36 Kolkata in **ITA No. 1759 & 1761/Kol/2017** decided on 05.10.2018 had deleted the similar disallowance(s) / addition(s) as follows:-

“4. I have carefully considered all the factual issues which emanate from the action of the Ld. AO in making the impugned disallowance. The Ld. AO has mostly depended on the statement of the broker company's Director Shri Sachet Saraf made before the Department during the search and seizure operation, whereas it is the contention of the appellant that the Ld. AO has ignored all the direct evidence submitted in this regard. On careful perusal, I find that the transactions of the appellant in trading In currency derivatives In the MCX Stock Exchange Ltd do have certain features which have led to suspicion in the minds of the Ld. AO, and that these are mostly that the appellant had no transactions with the broker in earlier or in later years, and that the assessee has also not entered into transactions of dealing In futures currency in USD In past or future. The Ld. AO has also reckoned that the rate of brokerage charged by way of commission to be extremely high as compared to other reputed Brokers of the City. After examination of the matter, I would tend to agree with the Ld. AO that the transactions are of suspicious nature on account of the reasons offered by the Ld.AO. In that view I find that all the other direct evidences are mere arrangements of the parties to give the transactions a sheen of genuineness. There is no reason for any broker to confess to sham transactions were this not the case, as has been done by the director of the Broking Company while giving the statement during the Search and seizure operations carried out by the Department. The Direct evidence may well be in favour of the assessee, but the same cannot be accepted due to the circumstances of normal probability being against the assessee-Individual as brought on record by the Ld. AO. Therefore, I have to record that all the judicial citations do not come to the rescue of the appellant. It is to be said that 'that the entire transactions were carried out on the Stock Exchange to give It a color of real transactions, with the connivance of the Broker, to which he (the Director of the Broking Company) has confessed.

5. It must also be stated here that in *Commissioner of Income Tax vs NR Portfolio Pvt Ltd* on 22 November, 2013, the Hon'ble Delhi High court has held "The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when In doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee In such circumstances should cooperate and furnish papers, details and particulars. This may entail Issue of notices to third parties to furnish and supply information or confirm facts or even 'attend as witnesses. The Assessing Officer can also refer to Incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general- or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is required. The verification and Investigation should be one with the least amount of Intrusion, Inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is Irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be Impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge In appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and Indeed this Court. The reasoning and the grounds given In any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally falls to produce evidence before the Assessing Officer with the desire to prevent Inquiry or Investigation, an adverse view should be taken".

6. In this connection, I would also wish to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y. 1983-84) In the case of M/s. Mont Blane Properties and Industries Pvt. Ltd., which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal held that the word '**evidence**' as used In sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec.143 (3) obviously could not be confined to direct evidence. The word '**evidence**' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word '**evidence**' might recall the oral and documentary evidence as may be admissible

under the Indian Evidence Act the use of word '**material**' In Sec.143(3) showed that the assessing officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial notice of certain facts which need not be proved before them. The plain reading of section. 142 and 143 clearly suggests that the assessing officer may also act on the material gathered by him. The word 'material' clearly shows that the assessing officer Is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in court of law.

7. The Hon'ble Supreme Court in CIT v. Durga Prasad More[1971] 82 ITR 540 at pages 545-547 made a reference to the test of human probabilities In the following fact situation:-

It is true that an apparent must be considered real until It Is shown that there are reasons to believe that the apparent Is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals. Otherwise it will be very easy to make self- serving statements In documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made In a document either executed by him or executed In his favour then the door will be left wide-open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made In those documents .

8. It is a well settled principle of law as declared by the Hon'ble Supreme Court in the case of Sumati Dayal vs.CIT (214 ITR 801)(SC) that the true nature of transaction have to be ascertained In the light of surrounding circumstances. It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability In determination of matters under taxing statutes. In the present case, It Is clear that apparent is not the real as evidenced from the Investigation report. Further, the Hon'ble Supreme Court, in the case of Chuhar Mal V CIT (1988) 172 ITR 250, highlighted the fact that the principle of evidence law are not to be Ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AD Is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court In the case of Dhakeshwari Cotton Mills v CIT (1954) 261 TR 775. The Hon'ble Supreme Court, In the case of Chuhar Mal V CIT (supra) held that what was meant by saying that evidence Act did not apply to the proceedings under Income-tax Act,1961, was that the rigors of Rules of' evidence, contained in the Evidence Act was not applicable; but that did not, mean that when the taxing authorities were desirous of Invoking the principles of Evidence Act, In proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law, jurisprudence viz, where ~ person was found in possessing of anything, the onus of proving that he was viz its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies Its conditions and was applicable to taxing proceedings.

9. I am in agreement with the Ld. AO that the transactions relating to the claim of LTCG as made by the Ld. AO come within the ambit of “suspicious transactions”, and therefore the rules of suspicious transactions would apply to the case. Payment through Banks, performance through stock exchange and other such features are only apparent features. The real features are the manipulated and abnormal price of off load and the sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld.AO fall in the realm of “suspicious” and “dubious” transactions. The Ld. AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of *Win Chadha v. CIT* (International Taxation) In. ITA No.3088 & 3107/Del/2005, the Hon'ble Delhi ITAT “B” Bench has observed, on 31.12.2010 as under:

"SUSPICIOUS AND DIBIOUS TRASANCTION HOW TO BE DEALT WITH:

6.11. The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.

6.12. In the case of *Sumati Dayal V. CIT* (1995) 80 Taxman 89 (SC), the Hon'ble Supreme Court has dealt with the relevance of human conduct, preponderance of probabilities and surrounding circumstance, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:

" It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being un-rebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.

..... Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record, an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence.”

CIRCUMSTANTIAL EVIDENCE HOW TO BE USED

6.13. *It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence In Income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It Is evidence of venous facts, other than the fact In Issue which are so associated with the fact In Issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are -*

(1) the circumstances alleged must be established by such evidence, as In the case of other evidence

(2) the circumstances proved must be of a conclusive nature and not totally inconsistent with the circumstances or contradictory to other evidence.

(3) although there should be no missing links In the case, .yet It Is not essential that every one of the links must appear on the surface of the evidence adduced ; some of these links may have to be Inferred from the proved facts ;

(4) In drawing those .Inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.

(5) The circumstantial evidence can, with equal facility, be resorted to In proof of a fact In Issue which arises in proceedings for the assessment of taxes both direct and indirect, circumstantial evidence can be made use of In order to prove or disprove a fact alleged or In Issue. In fact, in whatever proceedings or context inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has Its place to assist the process of arriving at the truth."

6.14. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance in the Income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations, If assessee Is not forthcoming with proper or complete facts or his statement or explanation Is contradictory, drawing of suitable inferences and estimation of facts Is Inevitable. Courts generally will not Interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious.

6.15. *The Assessee's technical contentions about admissibility and reliance on material available on the AO's record are In the nature of contentions challenging criminal or civil liabilities In a court of law. We are dealing with a process of adjudication of assesses tax liability i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon'ble Supreme Court In the case of S.S. Gadgil (supra) no 'lis' is Involved In adjudication of tax liability. The Assessee's contention that there was no new material before the AO after the CIT(A)'s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, In a sensitive matter like this, even a single clue or revelation can be of great Importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of Investigation agencies like CBI,*

DRI, ED whose were In the Offing, as the relevant Investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf.' The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that it cannot be relied on by the AO, are devoid of any merit and are rejected outright."

In view of the above discussion, I find no Infirmary in the finding of the Ld. AO, and confirm the same. Grounds 2 taken by the appellant-individual stands dismissed."

Both the learned representatives reiterate their respective stands against and in favour of the impugned loss disallowance. The Revenue vehemently contends that the lower authorities have rightly disallowed the impugned loss(es) for the reason that Shri Sachet Saraf (Director/ main person) of M/s Marigold Vanijya Pvt. Ltd had deposed before the DIT(Inv) Kolkata to have provided bogus entries of loss in currency derivatives by taking cheques and returning cash to the beneficiaries / assessees. I find no merit in Revenue's instant substantive plea. This tribunal's co-ordinate bench's decision in ITA No. 1760/Kol/2017 Kamla Prasad Kajaria (HUF) vs. ITO decided on 24.05.2018 has deleted identical disallowance as follows:-

"4. I have heard the arguments of both the sides and also perused the relevant material on record. It is observed that the claim of the assessee for the impugned loss incurred in trading in derivatives was disallowed by the authorities below mainly on the ground that the assessee had not given any margin money to the broker before the relevant transactions and in his statement, the Director of the broker company had admitted that his company was indulging in providing bogus loss in currency derivatives as per the requirement of the clients. At the time of hearing before the Tribunal, the learned DR has laid emphasis on these two aspects in support of the revenue's case. However, as contended by the learned counsel for the assessee by relying on the decision of Hon'ble Bombay High Court in the case of Bonanja Commodities Brokers Pvt. Ltd. vs Mrs. Roshanara Bhinder (arbitration petition 195 of 2015 dated 16.04.2015), the collection of margin money as per the by-laws of MCX Stock Exchange Ltd. is only discretionary in nature and the transactions entered into by the clients without payment of margin money cannot be considered as illegal. As further contended by the learned counsel for the assessee, there is nothing in the statement of Shri Sachit Saraf, Director of the broker company nor anything has been brought on record by the A.O. to show that the transactions entered into by the assessee company through the said broker were bogus. As matter of fact, a perusal of the order of the A.O. shows that enquiry was directly made by him from MCX Stock Exchange Ltd. by issuing the notice u/s 133(6) of the Act in order to verify the transactions entered into by the assessee through M/s. Marigold Vanijya Pvt. Ltd. and in reply to the said notice, MCX Stock Exchange Ltd. had not only confirmed the transactions but had also furnished the required information along with a CD containing details of all transactions made by the assessee during the year under consideration through broker Marigold Vanijya Pvt. Ltd. As found by the A.O. on verification of the said details, total transactions involving sales of Rs.15,19,22,392/- and purchases of Rs. 15,19,23,880/- were made by the assessee resulting into a loss of Rs.1,488/-. This relevant evidence confirming the genuineness of the transactions made by the assessee on MCX Stock Exchange Ltd. was brushed aside by the A.O. on the ground that loss shown therein was Rs. 1,488/- whereas the assessee had claimed a loss of Rs. 5,17,141/-. As submitted on behalf of the assessee before the Assessing Officer

as well as before us, expenditure was incurred by the assessee relating to the said transactions on account of brokerage, service tax and other charges levied by the broker aggregating to Rs.5,15,653/- and accordingly the total loss as claimed by the assessee was to the tune of Rs. 5,17,141/-. As pointed out by the learned counsel for the assessee, this additional expenditure incurred by the assessee on account of brokerage, service tax and other charges was duly supported by the documentary evidence in the form of relevant bills issued by the broker and there was no reason whatsoever given by the A.O. for not accepting this explanation of the assessee. Keeping in view all these facts and circumstances of the case, I am of the view that the genuineness of the transactions made by the assessee on MCX Stock Exchange Ltd. through broker Marigold Vanijya Pvt. Ltd. was duly established and the action of the authorities below in disallowing the claim of the assessee for the resultant loss in dealing in currency derivatives is not tenable. I, therefore, delete the said disallowance and allow the appeal of the assessee.”

I find that the factual position is no different in both the instant cases as Shri Sachet Saraf's statement recorded u/s 132(4) of the Act forming part of record has nowhere mentioned these two assessee's names. I further notice that these two assessee's have filed all the relevant details in the nature of contract notes, bills, general ledger accounts regarding the broker concerned with bank statement, synopsis and Mr Sachet Saraf's affidavits retracting the search statement. I accept assessee's sole substantive ground raised in these appeals and direct the Assessing Officer to delete the impugned disallowance of loss incurred in currency derivatives activity. All other grounds of interest etc. are treated to be mere consequential.”

4. I adopt the above detailed reasoning *mutatis mutandis* to delete the impugned addition.

5. This assessee's appeal is allowed.

Order pronounced in open court on 31/01/2019

Sd/-
(S.S. Godara)
Judicial Member

Kolkata,
*Dkp/Sr.PS

दिनांक:- 31/01/2019 कोलकाता

आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Confident Investment Consultants Pvt.Ltd., C/o. Subash Agarwal & Associates Siddha Gibson, 1, Gibson Lane, 2nd Floor Suite-213, Kolkata-69
2. प्रत्यर्थी/Respondent-ITO Wd-6(1), Aayakar Bhawan,P-7,Chowringhee Sq.Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, कोलकाता ।