

आयकर अपीलीय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 104/Kol/2020
Assessment Year: 2014-15

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|------------------------------------------------------|-----|--------------------------|
| M/s P G Commercials Pvt. Ltd. (PAN: AABCP 7532 N) | Vs. | ITO, Ward-10(4), Kolkata |
| Appellant | | Respondent |

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|---------------------------|----------------------------------------|
| Date of Hearing (Virtual) | 06.05.2021 |
| Date of Pronouncement | 18.06.2021 |
| For the Appellant | Shri S. M. Surana, Advocate |
| For the Respondent | Shri John Vincent D. Longstich, CIT DR |

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. PCIT-4, Kolkata dated 21.02.2019 passed u/s 263 of Income Tax Act, 1961 (hereinafter referred to as the Act) for Assessment year 2014-15.

2. By preferring this appeal, the assessee has challenged the jurisdiction of Ld. PCIT to invoke the revisional jurisdiction u/s 263 of the Act against the assessment order passed by the AO dated 21.12.2016. According to Ld. A.R., Shri S. M. Surana, the Ld. PCIT has erroneously invoked the jurisdiction u/s 263 without satisfying the condition precedent as prescribed u/s 263 of the Act. Consequently, according to him, the impugned order of Ld. PCIT has been passed without requisite jurisdiction and, therefore, null in the eyes of law.

3. Brief facts of the case is that the assessee declared total income of Rs. 6,56,120/- for AY 2014-15 and the case was selected for scrutiny through CASS (Computer Aided Scrutiny Selection) inter alia for the loss in shares also. According to Ld. A.R., the AO after issuing notice u/s 143(2) dated 03.09.2015 and notice u/s 142(1) dated 14.07.2016/25.11.2016 wherein the AO had asked for the details in respect of short term

capital loss and asked in respect of it specific details enumerated by queries numbered from (i) to (xiii) and thereafter taking note of the detailed reply of the assessee along with supporting documents filed during the assessment proceedings, the AO being satisfied did not to draw any adverse inference/view against the claim made by the assessee on this issue (short term capital loss) and passed an assessment order dated 21.12.2016 making an addition of Rs. 30,200/- u/s 14A of the Act read with Rule 8D of the Rules. Thereafter, the Ld. PCIT-4, Kolkata proposed to interfere with the assessment order by exercising his revisional power u/s 263 of the Act on the issue of short term capital loss on the three Scrips viz., M/s LUMINITECH, M/s SHRSHATEX & M/s UNOINDL (hereinafter the 'Scrips'). According to Ld. PCIT, these are penny stocks as per the report of the Directorate of Investigation and CBDT's circular dated 16.03.2016 which debars short term capital loss arising from the transaction of such penny stock. According to Ld. PCIT from a perusal of the assessment records there was no specific enquiry and investigation undertaken by the AO on this issue and the said loss was thus erroneously allowed by the AO. Therefore he issued show cause notice to the assessee on 23.01.2019 requiring it to submit clarification or explanation to its claim of the aforementioned loss on scrips and also to show cause why remedial action u/s 263 of the Act should not be taken against the assessment order dated 21.12.2016. Thereafter, the Ld. PCIT in his impugned order notes that the assessee incurred short term capital loss to the tune of Rs. 97,12,491/- on the aforesaid scrips and in the computation of income the said loss was set off against the other heads of income. According to Ld. PCIT, even though the AO had specific information that the stock from which the assessee had incurred the loss were from penny stock, still he had allowed it. According to Ld. PCIT, the AO failed to examine the issue for which the case has been selected for scrutiny. According to Ld. PCIT, the AO was supposed to enquire into the fact as to whether the investment made by the assessee in the aforesaid shares was bona fide or not? And for that according to Ld. PCIT, the AO should have examined the background of investment which was not done. Further according to Ld. PCIT, the AO failed to enquire whether the assessee is a regular investor or the investment was deliberately made for availing the loss to set off the gain/income which were taxable. Moreover, according to Ld. PCIT, the AO has neither discussed about details of claiming of loss on sale of shares by calling for information from the concerned brokers/SEBI and AO has not recorded the

statement of directors of the assessee company in order to check the genuineness of the transaction. Thus, according to Ld. PCIT the non-enquiry on the issue of loss from sale of scrips was prejudicial to the interest of the revenue. Therefore, he was pleased to hold that the AO's order was erroneous as well as prejudicial to the revenue also in accordance with Explanation 2(c) u/s 263 of the Act and therefore set aside the order of AO and directed the AO to frame the fresh assessment order.

4. Aggrieved by the aforesaid action of Ld. PCIT, the assessee is before us.

5. We have heard both the parties and perused the records. We note that assessment order passed by the AO dated 21.12.2016 for AY 2014-15 has been interdicted by the Ld. PCIT by exercising his revisional jurisdiction u/s 263 of the Act by holding the AO's order to be erroneous as well as prejudicial to the revenue on the issue of short term capital loss from three scrips (supra). According to Ld. PCIT, the AO has not enquired into this issue making the order passed by the AO erroneous as well as prejudicial to the revenue. However according to the assessee, the AO had duly carried out enquiry into the issue of short term capital loss on the scrips which are alleged by the Ld. PCIT not to have been enquired by issuing notice u/s 142(1) of the Act on 25.11.2016 and pursuant to which the assessee had replied on 01.12.2016 along with supporting documents. So, according to assessee, the AO after having gone through the reply of the assessee to the specific queries raised by the AO on this issue and after perusal of documents filed on the issue, after being satisfied the AO had accepted the transaction on which the assessee claimed the short term capital loss. And therefore the action of AO cannot be termed as a case of no-enquiry on the issue of short term capital loss on the scrips as claimed by the assessee, and so, according to assessee, the Ld. PCIT erred in his factual assumption on this issue, i.e, the AO has not conducted any enquiry. Thus according to the assessee, the AO has discharged his role of the investigator and an adjudicator while framing the scrutiny assessment order and no fault on this score (i.e. enquiry) of this issue can be attributed on the AO on the issue of short term capital loss. Therefore, according to Ld. AR, the jurisdictional condition precedent to invoke the revisional jurisdiction u/s 263 was on wrong footing and erroneous assumption of facts, therefore, the Ld. PCIT's action is bad in law.

6. Before we advert to the facts and law involved in this lis before us, let us revise the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by Id. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is existing in this case before the Pr. CIT rightfully exercises his revisional power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any event the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of *Malabar Industries* (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law"**.

7. In order to adjudicate this issue as to whether the Ld. PCIT had satisfied the condition precedent for invoking the revisional jurisdiction u/s 263 of the Act, we have to see, whether the AO has exercised his dual role as an investigator and as an adjudicator on the issue raised by the Ld. PCIT. According to Ld. PCIT, the AO has not carried out enquiry in respect of the short term capital loss claimed by the assessee on the three scrips (supra). Now we have to see whether the Ld. PCIT is correct or not. For that the Ld. AR has drawn our attention to page 25-26 of the PB wherein the notice issued by the AO u/s 142(1) dated 25.11.2016 which is reproduced as under:

“Your case for the A.Y. 2014-15 has been selected for scrutiny . In this regard, Notice U/s 143(2) I. T. Act has been duly served upon you, In continuation of the said Notice you are requested to furnish the following particulars/ documents-:

1. *Nature of Business*
2. *Computation of income for the year under consideration*
3. *Statement of all Bank A/cs for the F.Y.2013-14 relevant to A.Y. 2014-15*
4. *Details of Investment in Equity Shares during the year under consideration*
 - (i) *Name & address of the company in which investment is made*
 - (ii) *Copy of allotment letter*
 - (iii) *Copy of "Contract Note" in respect of quoted shares*
 - (iv) *Date of allotment of shares*
 - (v) *No, of shares*
 - (vi) *Value of shares*
 - (vii) *Source of payment made for obtaining shares*
 - (viii) *In this-regard, you are also requested to furnish the evidence of Mode of such payment alongwith the details of cheque numbers and the copy of bank statement (F.Y. 2013-14) highlighting the relevant entries therein showing the transaction*
5. *Details of "Sundry Creditors" with address and amount*
6. *Party wise Purchase Statement with address and amount*
7. *Details of share application money received during the year under consideration*
8. *Please furnish the following details in respect of Short Term Capital Loss*
 - (i) *Name of Scrip*
 - (ii) *Date of purchase*
 - (iii) *Quantity*
 - (iv) *Rate*
 - (v) *Mode of Payment*
 - (vi) *Date of Sale*
 - (vii) *Quantity Sold*
 - (viii) *Rate*
 - (ix) *Date of Dividend declaration*
 - (x) *Amount of dividend*
 - (xi) *STT paid*
 - (xii) *S. T. Capital Loss*
 - (xiii) *Copy of Brokers "Contract Note"*

In this regard, you are also requested to furnish the evidence of Mode of such payment alongwith the details of cheque numbers and the copy of bank statement (F.Y, 2013-14) highlighting the relevant entries therein showing the transaction

9. *There is mismatch in the sales turnover as reported in Annual Audited Report in comparison of Income Tax Return for the year under consideration*

In this context, and this is to inform you that, your case for the A.Y. 2014-15 has been fixed for hearing on 01/12/2016 at 03:30 P.M. You are therefore directed to appear before the undersigned on the said date either in person or through an authorized representative and furnish the particulars/documents as enumerated above."

8. From a perusal of the question no.4 (supra), we note that the AO has asked for the details of investment in equity shares and asked the specific details regarding it are asked from clause (i) to (viii). And a perusal of question no. 8 it would reveal that the AO had asked the assessee to furnish the details in respect of **short term capital loss** and also asked for specific details pertaining to it which are enumerated from queries raised from clause (i) to (xiii) and further the AO also has directed the assessee to furnish the evidence of mode of such payment along with details of cheque numbers and the copy of bank statement highlighting the relevant entries evidencing the transaction. We note that the assessee had filed the reply to the AO's notice dated 25.11.2016 on 01.12.2016 which is found placed at page 27 along with supporting documents called for by the AO which evidences support transaction in shares which resulted in loss and the same is found placed at page 28 to 69 of PB. From the reply of the assessee to the AO, it is noted that the assessee had filed, inter alia, the details of purchase and sale of shares in question along with copy of contract notes ,bills, copy of bank statements and thus along with the reply to the notice of AO, the assessee had filed the details of short term capital loss along with supporting material. Thereafter the AO has passed the assessment order without drawing any adverse view. In the aforesaid scenario the only inference that can be drawn is that the AO having gone through the reply and the supporting material being satisfied with the same has not preferred to draw any adverse view against the claim of the assessee in respect of short term capital loss from the sale of three scrips. Therefore, the allegation on the basis of which the Ld. PCIT wanted to interfere in the AO's order i.e. the non-enquiry by the AO on the claim of the short term capital loss on these scrips is erroneous since we have already discussed the contents of notice u/s. 142(1) of the Act, wherein details in respect of loss were called for and specific details of which have been elicited by the AO in respect of short term

capital loss claimed as well as that of the details of investment in equity shares were enquired and collected in that process. Since the AO had issued the notice u/s. 142(1) of the Act on 25.11.2016 it is presumed that the AO was aware of the report of Directorate of Investigation and also the CBDT vide its order No. F No. 287/30/2014-IT(inv.II)-Vol-III dated 16.03.2016 wherein the investigation wing has alerted the field officers in respect of certain nefarious activities involving business of penny stocks. This presumption of fact is based on the factual matrix which is evident from a perusal of the notice issued by AO u/s. 142(1) of the Act dated 25.11.2016 which have prompted him to ask such detailed questions in order to elicit answers for it along with supporting material/documents to substantiate the claim of loss on scrips and also we take the aid of Section 114(e) of Indian Evidence Act, 1872 wherein the Court/Tribunal may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct in their relation to the facts of the particular case. And the illustration (e) to Section 114 of the Indian Evidence Act empowers discretion to the Court/Tribunal to presume the existence of fact that official/quasi judicial/judicial acts have regularly been performed. However, before we draw such a presumption we also should have regard to such fact as to whether the official act, the regularity which was in question was performed under exceptional circumstances. When we consider this aspect also we note that no exceptional circumstances in respect of the action of AO while enquiring into the issue of short term capital loss were cited by the Ld. PCIT in his impugned order or the Ld. DR. So, we presume the fact that AO was aware of the contents of the circular of CBDT regarding penny stock and thereafter had issued notice u/s. 142(1) of the Act (supra). Thus invoking Explanation 2(c) of section 263 of the Act is not correct in the facts and circumstances of the case. Moreover, the Ld. PCIT has not bothered to refer to any cogent material on the basis it can be said that these three scrips in question are penny stock. Therefore, the assumption of Ld. PCIT is based on surmises and conjectures and it is settled principle of law that suspicion howsoever strong cannot take the place of evidence/proof. In the light of the discussion, therefore, considering the enquiry made by AO on the issue, we presume that the AO has performed his task of an investigator on the issue of short term capital loss on the scrips in question after taking note of CBDT circular No. 287/30/2014-IT(inv.II)-Vol-III dated 16.03.2016 on penny stock and thereafter conducted the enquiry. And after

perusal of the reply of the assessee to the specific queries and details called for and after perusal of the supporting materials, the AO being satisfied has accepted the claim of assessee in respect of loss on these scrips. Therefore the AO's action of accepting short term capital loss on the three (3) scrips cannot be termed as a case of no-enquiry on the part of the AO as well as discussed supra the Ld. PCIT's opinion that Explanation 2(c) u/s. 263 is attracted in this case is incorrect in the light of the facts and circumstances as aforesaid. In such a scenario, the condition precedent to invoke revisional jurisdiction u/s 263 of the Act is absent and therefore the Ld. PCIT has invoked the jurisdiction without satisfying the condition precedent i.e. the AO's action should be erroneous as well as prejudicial to the revenue. Therefore, the impugned order of Ld. PCIT is quashed.

9. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 18th June, 2021

Sd/-
(J.S. Reddy)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 18.06.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s PG Commercials Pvt. Ltd, C/o, Rajesh Mohan & Associates Unit No. 18, 5th Floor, Bagati House, 34, Ganesh Chandra Avenue, Kolkata-700013.
2. Respondent – ITO, Ward-10(4), Kolkata
3. The PCIT- 4, Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata

