

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1254/Mum/2022 (A.Y.2012-13)

M/s. Advantage Overseas Pvt. Ltd.

414, A-Wing Express Zone,
Off Western Express Highway,
Malad East
Mumbai-400 097

PAN: AAAECA8925F

..... Appellant

Vs.

DCIT CC-5(3)

Mumbai

..... Respondent

Appellant by : Shri Rushabh Mehta, Ld. AR
Respondent by : Shri Manoj Kumar Sinha, Sr. AR

Date of hearing : 17/04/2023
Date of pronouncement : 12/06/2023

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of Ld. CIT (A)-53, Mumbai dated 25.02.2022 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2012-13. The assessee has raised the following grounds of appeal:-

1. a) *The assessment order passed u/s. 143(3) r.w.s. 147 of the Act by the Id. Assessing Officer is invalid, bad-in-law and in violation of the principles of natural justice.*

b) *The Id. CIT(A) erred in facts and law in confirming the action of the Id. Assessing Officer of reopening the case of the appellant without any independent application of mind; merely based on reason to suspect and without having any live link / nexus with the information / material received.*

2. *The Id. CIT (A) erred in facts and law in confirming the addition made by the Id. Assessing Officer u/s. 68 of the Act of Rs. 25, 39,000/- on receipt from M/s. Ganpati Trading Co. on his own surmises and conjectures without understanding and appreciating the explanations and material furnished and that nothing adverse have been brought on record against the appellant.*

3. *The Id. CIT (A) erred in facts and law in confirming the action of the Id. Assessing Officer in treating transactions with M/s. A. N. Commodity Broking Pvt. Ltd. of Rs. 7, 23, 75,000/- and M/s. Plasma Delatrade Pvt Ltd. of Rs. 55, 00,000/- as unexplained on his own surmises and conjectures, without understanding and appreciating the explanations and material furnished and that nothing adverse have been brought on record against the appellant.*

4. *Each of the above Grounds of Appeals are independent and without prejudice to one another.*

5. *Your appellant craves leave to add, amend, alter, or drop all or any of the above grounds of appeal.*

2. Order of Ld. CIT (A) dated 25.02.2022 was received by assessee on same day but as per Form 36 and appeal was filed on 23.05.2022. It is

noticed that the appeal is barred by limitation by 27 days. The Hon'ble Supreme Court of India to mitigate the hardship caused by pandemic took suo-moto cognizance for Extension of Limitation reported as 441 ITR 722. Honourable Supreme Court held that due to the outbreak of the covid-19 pandemic in March, 2020, the Supreme Court took Suo Moto cognizance of the difficulties that might be faced by litigants in filing petitions or applications or suits or appeals or all other proceedings within the period of limitation prescribed and directed extension of the period of limitation in all proceedings with effect from March 15, 2020 till further orders. Further orders were passed on March 8, 2021, April 27, 2021 and September 23, 2021. On an application, the Supreme Court passed further orders considering the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions directing : (i) that the order dated March 23, 2020 was to be restored and the period from March 15, 2020 till February 28, 2022 was to be excluded for the purposes of limitation as might be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings ; (ii) consequently, the balance period of limitation remaining as on October 3, 2021, if any, was to become available with effect from March 1, 2022 ; (iii) in cases where the limitation would have expired during the period between March 15, 2020 till February 28, 2022 notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from March 1, 2022. In the event the actual balance period of limitation remaining, with effect from March 1, 2022 was greater than 90 days, that longer period to apply ; (iv)

that the period from March 15, 2020 till February 28, 2022 also to be excluded in computing the periods prescribed under sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe periods of limitation for instituting proceedings, outer limits (within which the court or Tribunal could condone delay) and termination of proceedings. Referred Cognizance For Extension of Limitation, In Re (2020)424 ITR 314 (SC), Cognizance For Extension of Limitation, In Re (2020)432 ITR 206 (SC), Cognizance For Extension of Limitation, In Re (2021) 226 Comp Case 127 (SC), Extension of Limitation, In Re (2021) 438 ITR 296 (SC). In term of the aforesaid decision of Hon'ble Supreme Court, we condone the delay of 27 days in filing of this appeal by assessee and admit the appeal for adjudication.

3. The brief facts of the case are that the assessee company filed its original return of income declaring total income of Rs 4,10,99,220/-. Return of the assessee was selected for scrutiny and assessed u/s. 143(3) at Rs 4, 43, 02,205/-. Subsequently the investigation wing provided the information that the assessee has undertaken the transaction with M/s. Ganpati Trading Co. amounting to Rs 25,39,000/-. Thereafter notice u/s. 133(6) of the act was issued to M/s Ganpati Trading Co. asking for details of bank account, source of income, audited balance-sheet and to explain the nature of transactions with various entities. However, the notices were either returned un-served

or no explanation was furnished. The investigation wing after making discrete enquiry with regard to fund trail recorded its findings that various beneficiaries including Assessee Company have brought unaccounted money in their books of accounts through the bank account of M/s Ganpati Trading Co. It was further observed by the investigation wing that the transactions appearing in the bank account of M/s. Ganpati Trading Co. did not commensurate with the income declared in the return of income by M/s. Ganpati Trading Co.

4. On the basis of information mentioned (supra) the AO formed his belief that income chargeable to tax has escaped assessment and accordingly the AO recorded his reasons and issued a notice u/s. 148 dated 29-03-2019. In response to the same the assessee filed its return of income on 17-04-2019 declaring total income of Rs 3,07,36,460/-. Thereafter statutory notice u/s. 143(2) dated 16-07-2019 was issued.

5. Thereafter a search and seizure action u/s. 132 was conducted in the case of the assessee. Despite of filing return in compliance to sec. 148, assessee never asked for the reasons for reopening but as a matter of abundant caution revenue provided a copy of reasons recorded for reopening of the matter vide letter dated 18-11-2019. After a considerable time assessee filed its objection with regard to reopening of the assessment on 18-12-2019. Objections filed by the assessee were dealt with and AO

proceeded to assess the income of the assessee company u/s. 143(3) r.w.s. 147 of the Act.

6. During the assessment proceedings, AO received same information with respect to transactions of the assessee with M/s AN Commodity Broking Pvt. Ltd. and M/s Plasma Delatrade Pvt. Ltd. amounting to Rs. 7,23,75,000/- and Rs. 55,00,000/- respectively. AO analyzed the financials of these two companies also looking at the amount of transactions involved with the assessee. Being dissatisfied, AO made an addition of Rs. 25,39,000/-, Rs. 723,75,000/- and Rs. 55,00,000/- respectively on account of transactions with M/s Ganpati Trading Company, M/s AN Commodity Broking Pvt. Ltd. and M/s Plasma Delatrade Pvt. Ltd. alongwith income as per the order u/s. 143(3). Assessee being aggrieved preferred an appeal before the Ld. CIT (A). The Ld. CIT (A) vide his order dated 25.02.2022 confirmed the order passed by the AO.

7. Assessee being further aggrieved with the order of Ld. CIT (A) preferred this appeal before us. We have gone through the order of AO, order of the Ld. CIT (A) and submissions of the assessee alongwith case laws relied upon. We observed that assessee is involved in the bulk trading of agro commodities like Soya and its allied products, bulk trading of steel, coal, iron ore and petrochemicals. The assessee company also exports rape seed meal, soya meal, Indian yellow maize from India to South East Asia and South

Korea. It is observed that holding company of the assessee namely, M/s Asian Business Connection Pvt. Ltd. (ABCPL) was involved in circular trading with M/s Ganpati Trading Co. This fact is an admitted preposition by the assessee itself.

8. It is observed that assessee received an advance of Rs. 25.39 lakhs from m/s Ganpati Trading Co. on 16.04.2011 in the nature of trade advance. We have gone through this submission of the assessee and nowhere in the submissions, we found the name of the commodity and the nature of transaction to be undertaken for which this amount was advanced to the assessee. Finally, this amount was returned back on 25.03.2014 without doing any transaction on account of advance received. Further, we have referred page no. 54 to 60 of the factual paper book submitted by assessee contain the ledger account of M/s Ganpati Trading Co. in the books of assessee for financial year 2011-12 and 2013-14. It is pertinent to mention here that in spite of such a serious doubts, on the transaction with M/s. Ganpati Trading Co., assessee simply furnished ledger account of the party in its books and vice versa copy still not provided. This fact strengthen the version of investigation wing and AO that notices issued u/s. 133(6) were not responded by the party and it doubts the very existence and genuineness of the party. We do not found any financials, bank statements and ITR of M/s Ganpati Trading Company to authenticate the version of the assessee and creditworthiness, identity and genuineness of the transaction. Case laws relied upon by the assessee are not found to be matched with the facts of the assessee. Assessee is neither providing the name of the commodities for which

assessee received advance, despite of retaining the amount for almost 3 years assessee returned the amount without any transaction being carried out and interest thereon. Such type of facts cannot be seen in isolation vis-à-vis the ground realities of the business. No prudent businessmen will leave his money like idle for 3 years without any transaction being done and also no interest being paid. It is also observed that instead of justifying the merits of the matter assessee is more emphasizing on judicial precedents that is too without going into the facts of those cases vis-à-vis the facts of the assessee. The assessee failed to discharge the primary onus which lay on it to prove the nature and source of the credits. It was necessary for the assessee to prove prima facie the identity of his creditors, the capacity of such creditors to advance the money and lastly, the genuineness of the transaction; only when these things are proved by the assessee prima facie and only after the assessee has adduced evidence to establish the aforesaid facts, the onus shifts on to the department. It is not enough to establish the identity of the creditors. Mere production of confirmation letters before the ITO would not by itself prove that the loans have been obtained from those loan creditors or they have credit worthiness. In the absence of the books of account and other evidence of the parties concerned, it was not possible to verify the real nature of the alleged transactions even though they were made by cheques. Thus, the assessee had failed to prove the creditworthiness of the alleged lenders and that those lenders actually had any funds of their own out of which loans could have been advanced to the assessee and as such, the additions made by the ITO were justified. In view of this, we are not inclined to allow the

ground taken by the assessee. **Hence, ground no. 2 raised by the assessee is dismissed.**

9. As far as ground no. 3 raised by the assessee is concerned, it pertains to transactions entered into with M/s A.N. Commodity Broking Pvt. Ltd. and M/s Plasma Delatrade Pvt. Ltd. We have gone through the ledger account of A. N. Commodity Pvt. Ltd. and observed that other than opening balance receivable in favor of assessee throughout the transaction history assessee never made any payment to M/s A.N. Commodity Broking Pvt. Ltd. Assessee had transactions with M/s A.N. Commodity Broking Pvt. Ltd. since 28.07.2011 and having continuous losses on commodity transactions barring few transactions of profit also but ultimately assessee's account was carrying negative balance and then assessee made first payment on 14.11.2011 to 23.11.2011, thereafter again assessee carried a negative balance we see clear on 07.12.2011, 19.12.2011 and 20.12.2011. We have gone through the invoices attached by the assessee issued by M/s A.N. Commodity Broking Pvt. Ltd. about sale purchase on national multi-commodity exchange and found that no margin money ever paid by the assessee to his broker M/s A.N. Commodity Broking Pvt. Ltd. for carrying the transactions on its behalf in trade parlance to enter into transactions of commodity hedging concerned party has to paid margin to book the transactions in a exchange /broker. Its standard practice and no deviation ever allowed by the broker community to any party because amount of transaction involved is always huge and fluctuations also. To cover this inherent business risk, brokers/exchange

always asks for margin money of certain percentage on the value of transaction. This material fact, essential to establish the genuineness of transaction is missing in this matter. On the other hand there is a report from DGIT (Inv.), Kolkata about M/s A.N. Commodity Broking Pvt. Ltd. and a fact emerged out of enquiry that M/s A.N. Commodity Broking Pvt. Ltd. is not a genuine entity and is a shell entity/paper company involved in arrangement of fake profit/loss arrangement for parties.

10. It is further observed by the AO vide para 5, page 7 of the assessment order, that the broking firms were also not very wealthy to bear the margin money burden of the assessee. Moreover, he commented upon the amount of assets, investments, sales and profit declared by the broking entities involved in the case of the assessee. In the case of M/s Plasma also same pattern observed vide ledger in the books of the assessee furnished vide page no. 121-122. Assessee started transaction from 01.09.2011, the total transactions till 20.12.2011 were to the tune of Rs. 4, 66, 47,179/-. Actual payments were started only on 22.11.2011 to settle the losses incurred in F & O transactions again without any margin money being paid neither to the broking firm nor to the exchange. This pattern of assessee established without any doubt that these transactions were entered into to manipulate the real figure of income earned by the assessee with the help of broking firms mentioned above. As a final fact finding authority, we are of the firm view that these transactions are non genuine and name of the broking firm red-flagged by the office of DGIT (Inv.), Kolkata were also correct. **Kailash Gupta, who pioneered the first electronic bourse**

NMCE in India in 2003, was arrested for alleged multi-crore fraud. He was charged with abusing his position to favour family -run companies. NCDEX was dragged into court by traders for alleged delivery of poor quality pepper.

11. This whole set up of exchange itself is under clouds and is primarily promoted by group of traders to accommodate each others in terms of getting fictitious profit or loss as desired by the members. The report of DGIT (Inv.), Kolkata cannot be scrapped on technical grounds as the same has been prepared by the high level senior investigation officers of the wing. In addition to these facts, the conduct of the assessee further strengthen that transactions were fictitious to claim business loss in the guise of F & O transactions. In view of above, we are not inclined to disturb the order of Ld. CIT(A) and consequently, ground no. 3 raised by the assessee is dismissed.

12. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 12th day of June, 2023.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 12/06/2023

Sr. PS (Dhananjay)

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT

5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai