

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'ए', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 220/Kol/2022
Assessment Year : 2016-17

Konsortia Construction Company Pvt. Ltd. (PAN: AADCK 9323 J)	Vs.	DCIT, Circle-11(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	17.10.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	30.11.2023
For the Appellant/ निर्धारिती की ओर से	Shri Sunil Surana, A.R
For the Respondent/ राजस्व की ओर से	Shri S. Dutta, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Principal Commissioner of Income Tax-2, Kolkata [hereinafter referred to as 'Ld. PCIT'] dated 30.03.2021 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the assessment year 2016-17.

2. The only issue raised by the assessee in the various grounds of appeal is against the invalid exercise of revisionary jurisdiction u/s 263 of the Act thereby passing an

order u/s 263 of the Act and setting aside the assessment framed u/s 143(3) of the Act dated 20.12.2018.

3. Facts in brief are that the assessee filed return of income on 4.10.2016 declaring total loss of Rs. 1,40,89,078/-. The case of the assessee was selected for scrutiny and assessment was framed u/s 143(3) of the Act vide order dated 20.12.2018 assessing total loss of Rs. 54,56,223/-. The said assessment was rectified u/s 154 of the Act on 19.02.2019 with the said loss of Rs. 54,56,223/- allowing the same loss as business loss to be carried forward to be set off in the subsequent years. Thereafter the Ld. PCIT upon perusal of the assessment records observed that as per explanation 2 Section 28 where speculative transaction is carried on by an assessee are of such a nature as to constitute a business, the business shall be deemed distinct and separate from any other business in terms of Sub-section (1) of Section 73 in respect of speculative business carried on by the assessee and shall not be set off except against profits and gains, if any, of another speculation business. The PCIT noted that the assessee engaged in the business of Real estate. The Ld. PCIT further noted that from the profit and loss account that the assessee has debited a loss of Rs. 60,91,088/- and under the head other expenses besides crediting Rs. 2,38,24,664/- as other income to the profit and loss account. According to PCIT , LTCG (STT paid) of Rs. 2,25,22,906/- constituted more than 94.5% of assessee's total income and therefore business of purchase and sale of shares shall be treated as speculative business as per the provisions of Act. Therefore loss of Rs. 60,91,088/- allowed the business loss to be carried forward to be set off in the subsequent years prima facie appears erroneous and prejudicial to the interest of the revenue. Accordingly a show cause notice was issued to the assessee which was duly replied. Finally the Ld. PCIT after relying on the decision of Hon'ble Delhi High Court in the case of CIT vs. DLF Commercial Developers Ltd. in ITA 94/2013 set aside the order of AO and directed to frame the assessment afresh in accordance with law after allowing the reasonable opportunity to the assessee. The PCIT also noted that the AO has failed to enquire into the nature of LTCG and its genuineness, as it relates to penny stock and therefore the same should

be added back and thus the AO has passed the order without making enquiries which should have been made and accordingly Clause (c) of Explanation 2 to Section 263(1) was attracted.

4. The Ld. A.R vehemently submitted before us that the order passed by the AO is neither erroneous nor prejudicial to the interest of the revenue. During the course of assessment proceedings all the issues as proposed by the PCIT in the revisionary order were examined by the AO after calling for details from the assessee and only thereafter plausible view was taken which was correct view as per law. The ld AR therefore pleaded that accordingly the order passed by the AO is neither erroneous nor prejudicial to the interest of the revenue. The Ld. A.R submitted that where the PCIT is of the view that assessment framed by the AO is erroneous and prejudicial to the interest of the revenue then the PCIT is duty bound to carry out the enquiry into that issue and to record his findings as to how the order of AO is erroneous and prejudicial to the interest of the revenue. However in the present case the PCIT has completely failed to do such enquiry and failed to record his findings on the issue. The Ld. A.R therefore argued that the order passed by the PCIT to Section 263 of the Act is invalid and void ab-initio by relying on the decision of Delhi High Court in the case of *D. G. Housing vs. ITO* [2012] 343 ITR 329(Del). Further the Ld. A.R submitted that the AO has examined the evidences furnished by the assessee during the course of assessment proceedings and based on the examination of said evidences he has taken a plausible and possible view which is not against the facts on record and also not against the provisions of the Act. The ld. A.R therefore submitted that revisionary order passed by PCIT is invalid and in defense of arguments he relied on the decision Hon'ble Bombay High Court in the case of *CIT vs. Gabreal India Ltd.* in [1983]203 ITR 108 (Bom-HC) find on the merit. The Ld. A.R submitted that the issue raised by the PCIT is factually and legally incorrect. The Ld. A.R referred to the decision of Hon'ble Apex Court in the case of *Snowtex Investment Ltd. vs. PCIT* in Civil Appeal No. 4483 of 2019 Arising out of SLP (c) No. 20017 of 2017 dated 30.04.2019 wherein the Hon'ble Apex Court has held that the business of futures and options did not

constitute profits and gains of a speculative business. The Ld. A.R also referred to the decision of the Co-ordinate Bench in the case of DCIT vs. M/s Unisys Software And Holding Industries Limited in ITA NO. 57/Kol/2019 for AY 2014-15 wherein it was held as under:

“13. We have heard the arguments of both the sides and also perused the relevant material available on record. As regards the issue relating to the claim of the assessee regarding the loss in commodity transactions amounting to Rs.45,82,560/- being the normal business loss, it is observed that the same is squarely covered in favour of the assessee by the decision of the Hon'ble Calcutta High Court in the case of Asian Financial Services Limited (supra), wherein it was held that Explanation to Section 73 will not be applicable to the commodity trading loss. As regards the share trading loss of Rs.96,46,064/- is concerned, it is observed that Explanation to Section 73 is held to be not applicable by the ld. CIT(Appeals) after having found that the income of the assessee from other sources was much more than its income from business. At the time of hearing before us, nothing has been brought on record on behalf of the Revenue to rebut or controvert this finding recorded by the ld. CIT(Appeals). We, therefore, find no justifiable reason to interfere with the impugned order of the ld. CIT(Appeals) treating the loss from transaction in commodities and shares as normal business loss not being covered by Explanation to Section 73 and upholding the same, we dismiss Ground No. 3 of the Revenue's appeal.”

5. After hearing the rival contentions and perusing the material on record, we find that the issue raised by the PCIT for which the assessment was set aside to reframe de novo, was examined during the assessment proceedings by the AO and after calling for details and evidences from the assessee has taken a plausible view by accepting the explanation of the assessee which in our opinion is neither against the facts on record nor against the provision of the Act. Therefore on this count alone, the jurisdiction u/s 263 exercised by the PCIT cannot be justified. In the present case, we observe from the order passed by the PCIT that he has stated that the order passed by AO appears to be prima facie to be erroneous which is again is not correct and not as per the provision of Act. In our opinion, the PCIT has to record a clear cut finding after carrying out enquiry into the issue and record a finding as to how the order is erroneous and prejudicial to the interest of the revenue as has been decided in the case of ITO vs. D.G Housing (India) Pvt. Ltd. (supra). We also note that the AO has examined these issues and has taken a plausible view on the issue. In case where the

view taken by the AO is according to the PCIT is not correct view and AO should have taken an another view. In our opinion when the AO has taken a plausible view then the PCIT cannot be invoked u/s 263 of the Act to justify the assessment framed on the ground that he does not agree with the view of the AO and that the AO should have taken a different view. The case of the assessee finds support from the decision of Hon'ble Bombay High Court in the case of CIT vs. Gabreal India Ltd. (supra). Accordingly we are not in a position to sustain the order of PCIT and same the thereby quashed.

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

Order is pronounced in the open court on 30th November, 2023

Sd/-
(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-
(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 30th November, 2023

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Konsortia Construction Company Pvt. Ltd., 76E, A.J.C Bose Road, Kolkata-700014
2. Respondent – DCIT, Circle-11(1), Kolkata
3. Pr. CIT- 2, Kolkata
4. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata