आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

ITA No.274/Hyd/2019		
Assessment Year: 2010-11		
M/s. CAT Technologies Ltd Hyderabad	Vs.	Dy. CIT Circle 1(2) Hyderabad
(Appellant) PAN:AABHA3253J		(Respondent)
Assessee by:	Shri K.C. Devdas, CA	
Revenue by:	Shri L.V.Bhaskara Reddy, CIT (DR)	
Date of hearing:	18/12/2023	
Date of pronouncement:	20/12/2023	

ORDER

Per Laliet Kumar, J.M

This appeal filed by the assessee is directed against the order dated 17.12.2018 of the learned CIT (A)-, relating to A.Y.2010-11.

2. The assessee has raised the following grounds:

> *"1. The order of the learned Commissioner of Income Tax (Appeals) is against the law, weight of evidence and probabilities of the case.*
>
> *2. The learned CIT(A) ought to have considered the objections raised by the appellant before the AO in terms of Apex Courts direction in the case of GKN Drive Shafts (India) Ltd. v. Income Tax Officer, GKN Drive Shafts(India) Ltd. v. ITO [2003] 259 ITR 19. There is also no whisper in*

the assessment order about disposal of objection. The directions/observation of the Apex Court should have been followed under Article 141 of the Constitution.

3. The learned CIT(A) ought to have appreciated and accepted the principle that, when there are divergent views expressed by the Courts on an issue, the view which is favourable to the assessee should be accepted on interpretation of the direction of Apex Court.

4. The learned CIT(A) ought to have appreciated the facts of the case that, the reasons recorded by the assessing officer that a sum of Rs.47.85 crores has escaped assessment in the hands of the company is based on no tangible and verified material but on some unverified reports of other agencies which cannot be a basis for reopening. Therefore, the proceedings are liable to be quashed.

5. The learned CIT(A) ought to have appreciated facts of the case that, the reasons recorded by the learned AO for reopening the assessment are contrary to facts recorded in the assessment order. There is no consistency between the two. The only inference that there is no application of mind. This makes both reopening and assessment order 9fhe AO 0s bad in, law.

6. The learned CIT(A)' as final inference is grossly contrary to her findings the body of the assessment order in as much as while coming to a finding that the transaction is sham for benefit of a third party and appellant only provided a platform and never utilised the proceeds, should not have proceeded ahead to make addition under 68 as the assessee was never the beneficiary of the GDR as per A0's observation. This makes the addition legally not sustainable and liable to be deleted.

7. The learned CIT(A) should have appreciated the facts that, the reopening and also the assessment order of the AO is based on suspicion and surmise and replete with irrelevant evidences and therefore not sustainable as per settled judicial precedents.

8. The learned CIT(A) without appreciating the facts on the detailed submissions made by the appellant and has held that the issue pertains to penny stock issue when the Company has not sold any shares. The company has issued GDR at Luxembourg and hence the question of penny stock does not arise.

9. The learned CIT(A) without appreciating the facts that the reopening should have done within the stipulated time u/s. 149(1)(a). However, the AO has reopened the

assessment u/s. 149(1)(b) which is bad in law, not sustainable and any other consequential orders is nullity.

10.The appellant craves leave to add to, amend or modify the above grounds of appeal either before or at the time of hearing of the appeal, if it is considered necessary."

3. The learned AR drew our attention to the order passed by the learned CIT (A) more particularly at para 7 of the order which is to the following effect:

"7. I have carefully considered the facts of the case, assessment order and submissions of the appellant. The appellant has not produced anything new to substantiate his submissions against the addition made by the Assessing Officer. Further as per the latest order of ITAT, Chennai dt.06.12.2018 in the case of M/s Pankaj Agarwal & Sons (HUF) Vs. ITO, Non-Corporate Ward -10(3), Chenna & 7 other similar cases, the present issue (penny stock issue) was held in favour of Revenue. Hence, the submissions of the appellant not accepted. Therefore, the additions made by the Assessing Officer confirmed."

4. It was submitted by the learned AR that the present case is not of penny stock which has been wrongly mentioned by the learned CIT (A) in the impugned order. It was submitted that the assessee company has received the GDR proceeds from Luxembourg after due approval from the Indian authorities. However, it is the case that there is a misuse of the GDR proceeds by the assessee i.e. it was utilized for the purposes for which it was sanctioned nor by the Indian authorities. It was submitted that the order passed by the learned CIT (A) is non-speaking order and perfunctory order as the legal ground with respect to the reasons for which reopening have not been supplied to the assessee and even the assessee has not been provided an opportunity to file its objections and neither the objections were

disposed of by a speaking order in the light of the decision of the Hon'ble Supreme Court in the case of GKN Drive Shafts(India) Ltd. v. ITO [2003] 259 ITR 19. It was submitted that the assessee had filed detailed elaborate submission which were reproduced by the learned CIT(A) in the order in Para 5 &6 of the impugned order, however, there is no whisper/adjudication on the submissions made by the assessee. It was submitted by the learned AR that the assessee is entitled to relief as claimed in the appeal.

5. Per contra, the learned DR submitted that the order passed by the learned CIT (A) is cryptic and non-speaking and the learned AR has right in submitting that the objections raised by the assessee has not been adjudicated by the learned CIT (A) while passing the appellate order. He also relied on the decision of the hon Supreme Court in the case of Home Finders Housing Ltd (94 taxman.com 84) dated 8.5.2018 and also on the decision of the Securities and Exchange Board of India order dated 21.09.2011 whereby the SEBI has decided that there was a misuse of the GDR proceeds. The learned DR, however, submitted that the proceedings against the assessee are pending for adjudication before the Enforcement Directorate Courts after receiving the report from the SEBI.

6. We have heard the rival arguments made by both the sides and perused the available material on record. In the present case the learned CIT (A) had undoubtedly reproduced and mentioned the submission of the assessee in para 5.2 of his order. The findings of the learned CIT (A) is given in para 6 to 7 of the order which is to the following effect:

6. *In the light of the above observation, following inferences emerge.*

a) *It is not a fact that appellant failed to produce required document to show that the credit of Rs. Rs.47,85,99,900 came out of GDR Issue. The appellant produced the following documents in course of assessment proceeding.*

- i) *Documentation for GDR Issue*
- ii) *Approval Copy of GDR from BSE*
- iii) *Certificate of Listing of GDR*
- iv) *Basis of Valuation of GDR*
- v) *Bank Statement for credits of GDR*
- vi) *Details of Transfer of Funds from Euram Bank to Dubai*
- vii) *Details of Utilistaion of Funds in Dubai*
- viii) *Copy of SEBI Order*

Despite production of above documents, the AO did not advance ***any enquiry*** *and unilaterally utilized the untested information to make addition while admitting in no uncertain terms that the amount represented proceeds of GDR issue. This assails the very basis of addition as appellant discharged the initial burden.*

i) *It is not a fact that the appellant did not take approval from regulatory authorities. The appellant took following approvals from competent authorities.*

ii) *The AO only doubted the contribution made by foreign entities without causing any enquiry. In the whole process there is no scope for the appellant company to know as to who were the subscribers to the issue as the same was managed by PAN Asia and there was no scope to know the same and the proceeds were credited to the bank account of the appellant.*

iii) *There is nothing in the assessment order that the appellant has pumped its own money which formed GDR proceeds. It is well settled as a first principle that suspicion however strong cannot take the place of proof as held in the case of*

Umacharan Shaw & Bros. v. CIT [1959] 37 ITR 271 (SC), Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288, 299 (SC)

6.1. *One of the significant aspect of AO's reliance on the statement of Shri Dhiraj Jaiswal, recorded by Enforcement Directorate. This statement is the most important piece of evidence which has been made use by the Assessing officer in the order. The same as it appears in para-6 of the assessment order is extracted below:*

" I decided to work-------instructed by him"

On the basis of above statement and other details available with the Assessing officer, following inferences were drawn for treating the GDR proceeds as unexplained and add the same under section 68 as unexplained credits. The observations of AO are-

a) *The whole process of GDR issue was a preplanned exercise in which appellant company was a party and* ***Sri Arun Pancharia being the real person.***

b) *The appellant company knew that the money raised in GDR issue* ***would never come to the company for its business as the real beneficiary was Arun Pancharia and others.***

c) *The proceeds of the GDRs were routed to* ***Shri Arun Panchariya*** *through Dubai subsidiary.*

d) ***The appellant company being a prudent entity would not enter into such sham activity without a benefit.***

e) *It is probable that either the appellant company intended to convert its unaccounted money to accounted capital via GDR Issue or* ***the appellant company provided a platform to other companies, in lieu of some exorbitant commission, which has not been accounted.***

f) *The appellant company provided a* ***platform*** *to other companies to route their unaccounted money for* ***a huge commission*** *which was not accounted for by the company.*

g) That UAE subsidiary is a platform to channelize the money of others. The Assessing Officer has relied on the statement of its Director Sri Dhiraj Jaiswal.

h) The appellant company failed to establish the creditworthiness of the subscribers to GDR issue and finally added the entire share capital amounting to Rs.47,85,99,000/- as the income of the appellant company.

6.2. A perusal of the above observations of the AO would reveal the following:

a) That **Shri** Arun Panchariya is the real beneficiary of GDR issue. This means that AO had not doubted the proceeds of GDR issue. If this is the position, how can the AO add the amount as unexplained under section 68.

b) That the assessee-company is not the beneficiary of the GDR issue. In case of a cash credit, the real beneficiary of the credit is the assessee in whose books the amount is credited. Having observed that the assessee is merely a conduit for someone (Shri Arun Panchariya), AO should not have added the amount as unexplained credit.

c) Having observed that the UAE subsidiary of assessee-company is a platform to channelize the money of others relying on the statement of its Director Sri Dhiraj Jaiswal, the AO should not have added the amount as unexplained credit.

d) AO has observed that the assessee-company has entered into a sham activity for earning commission. There was no evidence in the possession of the AO that the assessee-company has earned commission.

e) AO has observed that the assessee-company is only a facilitator. This being the position and ultimate beneficiary being Arun Pancharia, no addition should have been made under section 68 .

f) Most of the derivations are substantive in nature

g) Moreover SEBI is a merely regulatory authority to ensure smooth stock market operation. The order of SEBI is in that direction. SEBI has not commented anything about the genuineness of the source of GDR issue. This being the position, no addition should have been made basing on SEBI report.

h) A perusal of the provisions of section 68 would reveal that where the assessee fails to offer satisfactory explanation regarding nature and source of credit in its books, the same shall be deemed as concealed income. In the case of the appellant, all the observations of the AO supports the case of the appellant. SEBI as well as AO have accepted the proceeds of GDR issue. In such a scenario and when the AO

observed that the appellant is not the real beneficiary of GDR proceeds, the question of addition in the hands of the appellant does not arise under section 68.

i) The entire case is replete with instances of self-contradiction, possibility, presumption and surmise. The same cannot be a basis for addition under section 68

7. *Without prejudice to the above, appellant draws the attention of the Hon'ble Supreme Court in the case of CIT v. Lovely Exports CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC), wherein it was held that when the share applicants are suspected to be bogus, the amount invested in the share application money should be taxed not in the hands of the company but in the hands of the shareholder. This being the position prior to amendment of section 68, the ratio of the decision should be followed and amount added should be deleted.*

8. *Without prejudice to the above submissions, it is submitted that the reopening should have been made within time stipulated u/s.149(1)(a). However from the facts of the case, it appears that the AO has reopened the assessment u/s. 149(1)(b). Therefore, the reopening is not substantiable. Further, if the reopening is bad in law, any other consequential order is nullity.*

9. *In the light of the above, the addition of Rs.47,85,99,000/- is liable to be deleted."*

7. I have carefully considered the facts of the case, assessment order and submissions of the appellant. The appellant has not produced anything new to substantiate his submissions against the addition made by the Assessing Officer. Further as per the latest order of ITAT, Chennai dt.06.12.2018 in the case of M/s Pankaj Agarwal & Sons (HUF) Vs. ITO, Non-Corporate Ward – 10(3), Chenna & 7 other similar cases, the present issue (penny stock issue) was held in favour of Revenue. Hence, the submissions of the appellant not accepted. Therefore, the additions made by the Assessing Officer confirmed.

7. The conclusion of the learned CIT (A) in para 6 to 7 clearly shows that the learned CIT (A) has failed to adjudicate the legal grounds raised by the assessee for non-disposal of the objection raised by the assessee with respect to the reopening of the assessment in the light of the judgement of the Hon'ble Supreme Court in the case of GKN Drive Shafts(India) Ltd. v. ITO [2003] 259 ITR 19. Further, we find that the conclusion mentioned

by the learned CIT (A) at para 7(Supra) is based on treating the issue at par with that of penny stock. In our considered opinion, the order passed by the learned CIT (A) is silent on various aspects/objection raised by the assessee during the appellate proceedings and the learned CIT (A) had wrongly drawn support from the decision of the Tribunal in the case of Pankaj Agarwal & Sons (HUF) (Supra) despite the fact the said case was of penny stock. In our considered opinion, once there is a finding of the fact and law given by the SEBI which is a judicial authority, then the said finding is binding and therefore, the learned CIT (A) was duty bound to decide the issue considering the binding nature of the report of the SEBI and gave a finding based on the said judgment about the additions challenged by the assessee. In the present case neither finding recorded by the learned CIT (A) is based on the finding of the SEBI order dated 21.9.2011 nor any finding was given with respect to the objection raised by the assessee on reopening. In the light of the above, we found that the reasonings and the reasons to arrive the decision by the learned CIT (A)'s order are missing, therefore, we are of the opinion that the order passed by the learned CIT (A) is required to be set aside and the matter is required to be remanded back to the file of the learned CIT (A) for fresh adjudication in the light of our above observation.

8. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 20th December, 2023.

Sd/-	**Sd/-**
(R.K. PANDA) **VICE-PRESIDENT**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 20th December, 2023.

Vinodan/SPS

Copy to:

S.No	Addresses
1	CAT Technologies, C/o M/s. Sekhar & Co. 133/4 Rashtrapathi Road, Secunderabad
2	Dy.CIT, Circle 1(2) IT Towers, Hyderabad
3	Pr. CIT -1, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order