IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.726/Bang/2023
Assessment year : 2014-15

Ambicaa Sales Corporation, No.1, MDP Market, Betappa Lane, CT Street Cross, Bangalore – 560 002. **PAN: AAGFA 6709A**	Vs.	The Principal Commissioner of Income Tax, Bengaluru-5, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Balram R. Rao, Advocate
Respondent by	:	Shri D.K. Mishra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.01.2024
Date of Pronouncement	:	18.01.2024

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the Order dated 07.03.2019 of the Principal Commissioner of Income-tax [PR.CIT], BNG-5, Bangalore passed u/s. 263 of the Income-tax Act, 1961 [the Act] for the AY 2014-15 on the following grounds:-

> "1. On the facts and in the circumstances of the case, the conditions precedent being absent the proceedings-initiated U/s.263 of the Act was opposed to law and the order passed U/s.263 is liable to be cancelled.

2. On the facts there being no error much less an error prejudicial to the interest of revenue, the learned Commissioner of Income-tax ought to have refrained from invoking the provisions of Sec.263 of the Act.

3. The learned Commissioner ought to have considered the submissions made by the appellant and ought not to have invoked the proceedings u/ s.263 of the Act.

4. The learned Commissioner failed to appreciate the fact that AO has considered the issue in depth during the Original Assessment proceedings and specific queries had been raised on the transactions (which were under revision under section 263 of the Act) and in response to the same the Appellant had provided all the details as called for.

5. The Ld. CIT failed to consider that inadequate enquiry would not give an occasion to exercise jurisdiction under Section 263 of the Act.

6. The learned Commissioner ought to have appreciated the fact that the appellant had furnished all the details as required by the Assessing Officer in the course of assessment proceedings u/s.143(3) of the Act and thereby the AO was satisfied with the claim of the appellant and therefore the revision initiated under section 263 of the act was uncalled for.

7. The Ld. Commissioner erred in holding that the order now passed was made without making proper enquiries or verification which should have been made and hence the assessment order passed was not only erroneous but also prejudicial to the interest of revenue.

8. The learned Commissioner erred in setting aside the order passed U/S 143(3) of the Act dated 20.12.2016 and directing the AO to de-novo consider the provisions of clause (a) of sub section (5) of Section 43 of the Act.

9. The Learned PR.CIT erred in holding that the transactions on MCX have been entered for the purpose of hedging its stock in trade in the form of gold and silver bullion which attracted clause (a) of subsection (5) of section 43 of the Act.

> 10. For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed."

2. At the outset, it is noticed that the Registry has pointed out that appeal is time barred by 1599 days including the Covid period. In this regard, the assessee has placed a letter dated 11.10.2023 stating as under:-

> "With regard to delay of 1599 days, we have attached the copy of the Hon'ble High Court of Karnataka in WP No.52852/2019 while filing the appeal electronically.
>
> The assessee had challenged the order passed u/s 263 of the Act before the Hon'ble High Court by the way of Writ Petition under Article 226 of The Indian Constitution. The said Writ Petition came to be disposed on 30.08.2023 wherein the Hon'ble Court disposed off the matter reserving the liberty to the assessee to avail the remedy of appeal as the said order was appellable. Further the Hon'ble High Court has stated that if appeal is filed within 4 weeks the question •of limitation, delay an latches shall pale into insignificance. Accordingly, the appeal was filed on 25.09.2023 which is well within the period of 4 weeks and therefore the delay of 1599 days will not arise.
>
> In light of the above submissions the defect of delay of 1599 days may please be ignored."

3. It is clear from the Hon'ble High Court by judgment dated 30.08.2023 has directed the assessee filing the appeal within four weeks. Accordingly the assessee has filed appeal on 25.09.2023 and complied with the direction of the Hon'ble High Court. Accordingly, the appeal is taken up for adjudication.

4. The brief facts are that the assessee has filed return of income on 17.09.2014 declaring total income of Rs.1,00,,47,730. The case was selected for scrutiny and statutory notices were issued to the assessee. One of the reasons for selection of scrutiny was "large value commodity exchange transactions." Accordingly, questionnaires were issued by the AO to the assessee which were replied. The AO accepted the returned income and completed the assessment.

5. Later on, the ld. Pr.CIT noticed that the order passed by the AO is erroneous and prejudicial to the interests of the revenue and issued show cause notice to the assessee on 19.02.2019 u/s. 263 of the Act, which is as under:-

> ""The assessment records of your firm, M/s Ambica Sales Corporation, for the assessment year 2014-15 were called for and examined by this office. In this case, an Order u/s 143(3) of the Income-tax Act, 1961 has been passed by the ACIT, Circle 5(2)(1), Bengaluru on 20.12.2016. On examination of the assessment order and the documents available in the assessment folder, it is seen that the Order passed u/s 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of the revenue on account of the following facts –
>
> i) The return of income for the AY 2014-15 in your case was selected for scrutiny under the heading "Limited Scrutiny". One of the reasons for selection of scrutiny was "Large value commodity exchange transaction". In this regard, following details were furnished during the course of assessment proceedings.
>
> a) MCX Client Ledger
> b) MCX Settlement Ledger
>
> Further to this, one Ledger Account in the books of M/s. Multi Commodity Exchange India Ltd. has a/so been furnished.

Again on 15.12.2016, separate ledger for profits from MCX and loss from MCX has been furnished.

Regarding the allowability of such loss, reliance has been placed upon Section 43(5)(d) of the IT Act, 1961. Further, it has been submitted that as per Notification No.46/2009, dated 22.05.2009, MCX has been including in the recognized Stock Exchanges along with BSE and NSE, and hence, transactions via these Stock Exchanges are not to be considered as speculative transactions. Based upon these documents and explanations, the Assessing Officer has accepted and allowed the MCX loss debited in the Purchases Account.

In this regard, it is seen that clause (d) sub-section (5) of Section 43 of the Act talks of an eligible deduction in respect of trading in derivatives. Upon the details submitted by you, it is not clear as to whether the transactions done by you are in derivatives or they are in the nature of daily transactions squired off without taking any delivery. The Assessing Officer was supposed to enquire into this aspect which she has failed to do so.

Besides, if the loss was on account of transactions in derivatives, the Assessing Officer was bound to analyse as to whether a part of the loss is on account of marked to market of open derivative contracts as on 31.3.2014 or not and to decide the allowability of such marked to market loss as per law. The Assessing Officer failed to carry out any such investigation.

ii) It is seen that you had also claimed losses from Rate Deference of Rs.52,177/- in your P & L Account.- The Assessing Officer has not made any enquiry into the allowability of such loss.

iii) It is further seen that an amount of Rs.42,78,477/- has been debited towards interest on capital of the partners in the P&L Account. However, as per the Partnership Deed, all the partners were entitled to receive interest @ 9% p.a. on their credit balance in the Capital Accounts and were also liable to pay interest at 9% p.a. on their debit balance in the Capital Accounts of the firm. On verification of the Capital Accounts of the partners, it is noticed that in the case of one partner, Shri Mahaveer Chand, interest on capital was paid at Rs.14,68,343/-

on the credit balance of Rs.1,57,12,659/- and thus exceeding the permissible limit of 9% resulting in excess deduction of Rs.54,204/-. Similarly, in the case of partner, Shri Manoj M Kotari, no interest has been charged on the debit balance of Rs.1,30,936/-. The Assessing Officer has not made any enquiry into these discrepancies.

2. Thus, in my consideration, the Assessing Officer has failed to make enquiries or verification which should have been made and has also provided relief without enquiring into the claim properly. Under such circumstances, I consider the assessment order to be erroneous in so far as it is prejudicial to the interest of revenue. Hence, you are requested to show cause as to why the assessment order should not be cancelled and a fresh assessment is directed to be done."

6. In response to the show cause notice, the assessee replied as under:-

""1. I am a bullion dealer how deal in gold and silver bars. My normal course is buying from recognized big dealers. In normal course of business, we buy in bulk quantity from banks and sell to customer in small quantities. So we require to hedge our commodity in MCX and when customer buys from me I have to buy back from MCX so where is the speculation. If I have incurred loss in MCX. I would have profited in my normal business activities and viceversa. Trading in derivatives is trading in Index. Option swaps and warrants options. We done not deal or neither MCX deals in options or index and I have enclosed few judgement. Kindly Consider my request.

2. Towards our second question, my partner on 21st have introduced 1075000.00 [Ten Lakh Seventy Five thousand] has extra capital. So he is entitled to receive an interest of 54205.00. I have enclosed the interest calculation document self signed. Please consider my request and another partner Mr. Manojkothari M has left the firm in the preceding year. Kindly help us.

3. Rate difference. I have enclosed the documents Sir."

7. The ld. Pr.CIT after considering the above reply of the assessee observed that the assessee firm is a trader in gold and silver bullion. Along with delivery based transaction in Gold and silver bullion, the assessee firm has also entered into speculative transactions on MCX (Multi Commodity Exchange) in which loss of Rs.3,10,97,497 has been incurred. The AO has allowed such loss on the explanation of the assessee that transactions done on MCX are not speculative as per section 43(5)(d) r.w. Notification No.46/2009 dated 22.05.2009. The ld. Pr.CIT observed section 43(5)(d) is applicable to trading in derivatives and admittedly the assessee has not traded in derivatives in MCX exchange, hence AO has allowed speculative loss to be set off against the other income on the basis of wrong section and notification issued for such sections. He also noted that assessee has claimed the transactions on MCX have been entered for the purpose of hedging its stock in trade in the form of gold and silver bullion. Accordingly, clause (a) of sub-section (5) of section 43 will apply to the assessee. For this purpose, the claim of assessee of hedging its holdings of stock to guard against loss due to price fluctuation is to be examined by the AO. The ld. Pr.CIT held that the assessment order passed by the AO is erroneous and prejudicial to the interests of revenue since the AO has allowed the speculative loss and directed the AO for de novo assessment by considering section 43(5)(a) and relevant CBDT Circular. He also directed the AO to verify the assessee's submissions on the other issues. Aggrieved by the order of the Pr.CIT, the assessee is in appeal before the ITAT.

8. The ld. AR submitted that the AO has issued notice on the issue of loss incurred by the assessee and it was replied by the assessee which has been incorporated in the show cause notice issued by the Pr.CIT. After examining the assessee's submissions in detail, the AO had allowed the loss claimed by the assessee in the assessment order. Therefore, it cannot be said that the AO did not examine this issue. He further submitted that assessee is in the business of gold and silver bullion and traded through MCX for hedging its stock for reducing the loss. Therefore the loss arising through MCX transaction is not a speculative transaction as per clause (a) of section 43(5). Therefore, assessee is eligible to set off loss against other income. He further submitted that the Pr.CIT has to give finding on the issue raised by him and merely directing the AO for de novo assessment is not sufficient. He also submitted that no findings were given by the Pr.CIT on the other issues. The ld AR further submitted that the case was selected for limited scrutiny which was examined by the AO during the assessment proceedings in detail which is clear from the order of the AO. The Pr.CIT cannot travel beyond the scope of limited scrutiny. Therefore, the ld Pr.CIT is not justified in exercising power u/s. 263 of the Act. He relied on the following judgments:-

i) PCCIT v. Shark Mines and Minerals (P) Ltd. [2023] 151 taxmann.com 71 (Orissa)

ii) Jayesh Raichand Shah v. ACIT, [2013] 29 taxmann.com 151 (Guj)

iii) CIT v. Sri Vasavai Gold & Bullion (P) Ltd. [2018] 92 taxmann.com 290 (Mad)

9. The ld. DR relied on the order of the Pr.CIT and submitted that while passing the assessment order the AO has not made any enquiry/comments on this issue and merely he has accepted the submissions of the assessee and no further questions/clarifications also have been asked by the AO. He has also not observed why the assessee's case falls under section 43(5) of the Act. He further submitted that firstly the AO is an investigation officer, thereafter he is an adjudicating officer. But the AO has not done so. Therefore the Pr.CIT set aside the assessment order u/s. 263 of the Act for de novo assessment. He further submitted that sec. 263 gives power to the ld. Pr.CIT for revision proceedings call the record of any proceedings under the Income Tax Act. 1961, and if he considers that any order passed therein by the assessing officer is erroneous in so far as it is prejudicial to the interest of the revenue , he may exercise his powers. The word "any order" gives wide power to the ld. Pr. CIT, it does not restrict on selective basis. In this case there were more reasons for selection of scrutiny proceedings, therefore, the arguments of ld. AR is not sustainable. The case law relied by the ld. AR is not applicable in the present facts of the case

10. Heard both the parties. We note that the assessee is a dealer in gold and silver bullion. The selection of assessee's case for scrutiny was 'large value commodity exchange transaction' which is one of the reason. The Pr.CIT after examining the assessment record issued a show cause notice. The assessee replied to the show cause notice that the assessee suffered a loss of Rs.3,10,97,497 through the MCX

transaction for hedging its stock in trade. The loss has been allowed by the AO for setting off against other income. The ld. Pr.CIT was of the view that the MCX transaction falls under section 43(5)(a) and the AO had accepted the claim of the assessee under section 43(5)(d) which deals with derivatives transactions. Therefore, the AO should have examined the issue under the provisions of section 43(5)(a) and the Board Circular dated 12.09.1960. Therefore the ld. Pr.CIT set aside the assessment order as erroneous and prejudicial to the interests of revenue and directed the AO for fresh assessment accordingly.

11. We note that the assessee had responded to the questionnaire issued by the AO regarding MCX transaction and after considering the submissions of the assessee as observed by the ld. Pr.CIT the AO accepted that it was not a speculative loss and allowed loss claimed by the assessee from hedging its stock through MCX transactions. We note from the show cause notice of the ld. Pr.CIT, during the course of assessment proceedings the assessee had filed the documents i.e., MCX Client Leder, MCX Settlement Ledger, Ledger account in the books of M/s. Multi Commodity Exchange India Ltd. and separate ledger for profits and loss from MCX and the AO allowed the loss of Rs.3,10,97,497.94. During the revision proceedings before the ld. Pr.CIT, the assessee submitted that the transactions were done through MCX for hedging the trading loss in the normal course of business. The ld. Pr.CIT has observed that the MCX transaction of the assessee falls under clause (a) of section 43(5) which was not examined by the AO. Section 43(5) of the Act reads as follows:-

"(*5*) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause—

(*a*) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(*b*) ……..

(*c*) ……

(*d*) an eligible transaction in respect of trading in derivatives referred to in clause (*ac*) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; or

(*e*) …..,

shall not be deemed to be a speculative transaction:"

12. From the above provisions of the Act, it is clear that even according to the ld. Pr.CIT, the assessee's case of MCX transactions for hedging the loss falling under clause (a) of section 43(5) is not covered under speculative transaction and MCX transactions were done in the normal course of business of the assessee. Therefore the loss suffered is business loss of the assessee and accordingly the assessee is eligible for setting of loss as per CBDT Circular dated 12.09.1960 referred by the ld. Pr.CIT. Hence the order of the AO allowing the loss claimed by the assessee on this issue is not erroneous in so far as it is not prejudicial to the interest of the revenue. We further note that the ld. Pr.CIT has observed that the AO has treated the loss u/s. 43(5)(d) and has allowed the loss. Even if the assessee's case

falls under any of the provisions of (a) or (d) of section 43(5), it is not speculative loss. Therefore, the AO was justified in allowing the loss claimed by the assessee. Hence the order passed by the AO is not erroneous and prejudicial to the interest of the revenue. The case law relied by the ld. AR in the case of Jayesh Raichand Shah v. ACIT, [2013] 29 taxmann.com 151 (Guj) and CIT v. Sri Vasavai Gold & Bullion (P) Ltd. [2018] 92 taxmann.com 290 (Mad) supports the case of the assessee.

13. On the other issues of loss from rate deference and interest on partners capital also, the ld. Pr.CIT has directed the AO to examine these issues without giving any finding and merely directing the AO for examination of these issues is not sufficient. We note that the assessee had submitted reply to the ld. Pr.CIT, However, the ld. Pr.CIT instead of examining that it is prejudicial to the interest of revenue or not, he has merely giving direction to the AO. As per our considered opinion, the ld. Pr.CIT should have determined that the assessee's submission is not correct. Therefore merely giving direction to the AO is not sustainable.

14. We further note from the arguments of the ld. AR of the assessee that the case was selected for limited scrutiny, therefore the ld. PCIT cannot travel beyond the reason for selection of limited. Scrutiny. On carefully going through section 263 of the Act, the ld. Pr.CIT may call for and examine the record of any proceeding under the Act and consider any order passed therein by the AO as erroneous and

prejudicial to the interests of the revenue and pass such order thereon. Hence we reject this argument of the ld. AR.

15. In view of the above, we set aside the order of the ld. PR.CIT passed u/s. 263 of the Act.

16. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 18th day of January, 2024.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(LAXMI PRASAD SAHU)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 18th January, 2024.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.