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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decision delivered on: 09.12.2022

+ **ITA 1374/2018**

PR. COMMISSIONER OF INCOME TAX-8 Appellant

Through: Mr Sanjay Kumar, Sr. Standing
Counsel.

versus

PRABHU DAYAL AGGARWAL Respondent

Through: Mr S. Krishnan and Mr Amandeep
Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the order dated 29.06.2018 passed by the Income Tax Appellate Tribunal [in short "Tribunal"] concerning Assessment Year (AY) 2009-2010.
2. The principal allegation levelled against the respondent/assessee, based on which the reassessment proceedings under Section 147/148 of the Income Tax Act, 1961 [in short "Act"] [prior to amendment] were triggered, is that, he had taken illegal benefit of the Client Code Modification (CCM) facilities offered by his broker to register losses in respect of share transactions undertaken by him.
3. The record shows, and *qua* which there is no dispute, that the respondent/assessee, according to the appellant/revenue, had entered into

transactions with the help of a share broking entity, namely, Amarpali Adya Trading and Investment Pvt. Ltd. [hereafter referred to as “AATIPL”].

4. According to the appellant/revenue, the trading carried out by the respondent/assessee in the aforementioned AY had resulted in reduction of income i.e., registration of loss, amounting to Rs.1,62,75,825.90.

5. It is the appellant/revenue’s case, that the aforementioned share broking entity had undertaken such illegal activity i.e., CCM, to transfer losses and profits to various persons/entities, which included the respondent/assessee.

5.1 In other words, according to the appellant/revenue the CCM facility was not used for legitimate purposes, such as punching orders, but was used to transfer, as indicated above, illegal profits and losses to its clients.

6. The record shows, and with regard to which, once again, there is no dispute, that the respondent/assessee had filed his return for AY 2009-2010 on 31.07.2009, whereby he had declared his total income as Rs.1,16,37,353/-.

7. The record shows, that after scrutiny was carried out, an assessment order was passed on 24.12.2011 under Section 143(3) of the Act.

8. Interestingly, during the course of the scrutiny, the assessing officer had sought information with regard to the transactions entered into by the respondent/assessee with the aforementioned share broking entity i.e., AATIPL.

8.1 The Tribunal also records, that the respondent/assessee *via* letter dated 07.12.2011 i.e., prior to assessment order being passed had submitted a copy of the Client Ledger which adverted to details of settlement arrived between him and AATIPL. This document, admittedly, disclosed that the settlement

resulted in a loss amounting to Rs.1,82,10,431.54.

9. The record shows, that despite an order being framed under Section 143(3) of the Act on 24.12.2011, albeit after scrutiny, in the reasons to believe furnished by the appellant/revenue [based on which proceedings under Section 147/148 of the Act were triggered], there is no reference to this fact i.e., that assessment under Section 143(3) was framed on 24.12.2011 *qua* the respondent/assessee.

9.1 What makes matters worse, is that, when a fresh assessment order/reassessment was framed i.e., on 13.12.2016 pursuant to the reopening of the earlier assessment, the AO did not advert to this aspect. In other words, there is, admittedly, no reference in the order dated 13.12.2016, to the fact that Section 143(3) assessment order had been framed on 24.12.2011.

10. Admittedly, even according to the appellant/revenue, the reopening of the concluded assessment made under Section 143(3) of the Act has occurred after a period of four years commencing from the end of the relevant AY i.e., AY 2009-2010. The circumstances provided for reopening of the assessment under Section 147 of the Act (as it then stood) beyond four years from the end of the concerned financial year were:

- (i) failure on the part of the assessee to file a return under Section 139 or;
- (ii) failure to file a return in response to a notice issued under sub-section (1) of Section 142 or Section 148, or;
- (iii) failure to disclose fully and truly all material facts necessary for carrying out assessment.

11. Admittedly, even according to Mr Sanjay Kumar, who appears on behalf of the appellant/revenue, the first two circumstances set out hereinabove, did not arise in this case.

12. The argument advanced by Mr Kumar is, that the instant case falls within the third circumstance referred to hereinabove i.e., failure on the part of the assessee to disclose, fully or truly, all material facts.

13. Mr Kumar has submitted, that the information received by the appellant/revenue through the respondent's/assessee's broker had not been disclosed, and therefore, the reopening of concluded assessment under Section 143(3) of the Act was viable in law.

14. Mr S. Krishnan, who appears on behalf of the respondent/assessee, on the other hand, has submitted that the trigger for reassessment in the given circumstances was available only if the respondent-assessee had not disclosed, fully and truly, all material facts.

15. Mr Krishnan has drawn our attention to that part of the record, in particular, the order of the Tribunal, wherein the Tribunal has noted, that during the course of initial assessment/scrutiny, information was sought with regard to the respondent's/assessee's share broker, which was furnished by the respondent/assessee along with communication dated 07.12.2011.

16. It is Mr Krishnan's contention, that the Client Ledger was placed before the assessing officer, whereupon the assessment order under Section 143(3) of the Act was framed on 24.12.2011.

16.1 Furthermore, Mr Krishnan says, something we have noticed hereinabove, that neither in the extract available on record which refers to reasons to believe, nor in the order dated 13.12.2016 passed under Section 143(3) read with Section 147 of the Act, is there a reference to the fact that assessment under Section 143(3) had been framed previously on 24.12.2011.

17. According to Mr Krishnan, there was complete non-application of mind on the part of the assessing officer at the stage at which reassessment

proceedings were triggered.

18. Having heard the learned counsel for the parties, we are of the view that the appellant/revenue's appeal will necessarily fail, because of the following reasons:

(i) The trigger, in the facts and circumstances of this case, to reopen the concluded assessment framed under Section 143(3) of the Act, beyond four years commencing from the end of the relevant AY i.e., AY 2009-2010 could only have been founded on the failure on the part of the respondent/assessee to fully and truly disclose all material facts. Concededly, during the framing of the earlier assessment order, the assessing officer had sought information with regard to the respondent/assessee's share broker, which was furnished by the respondent-assessee *via* communication dated 07.12.2011.

(ii) Neither in the extract of reasons to believe which have been placed before us by the appellant/revenue, nor in the reassessment order dated 13.12.2016 passed under Section 143(3) read with Section 147 of the Act, there is a reference to the fact that previously Section 143(3) assessment order had been framed on 24.12.2011.

(iii) Lastly and more importantly, the reopening was triggered, based on a statement made by one Mr Sanjeeva Kumar Sinha, Director of AATIPL. Concededly, no opportunity was given to the respondent/assessee to cross-examine the said person.

19. In our view, given the aforesaid admitted facts, the jurisdictional ingredients for reopening assessment were not available with the concerned assessing officer. The conclusion reached by us is fortified by the view taken in the following judgments:

- (i) *Commissioner of Income Tax, Delhi v. Kelvinator of India Limited*
MANU/SC/0047/2010
- (ii) *Commissioner of Income-tax-III v. Suren International (P.) Ltd.*
[2013] 35 taxmann. Com 398 (Delhi)
- (iii) *Wel Intertrade (P.) Ltd. v. Income-tax Officer, Ward 18(3)* [2009]
178 Taxman 27 (Delhi)

20. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned judgment passed by the Tribunal. According to us, no substantial question of law arises, in the present appeal, for our consideration.

21. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

DECEMBER 09, 2022

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