(2000) 12 AHC CK 0110

In the Allahabad High Court

Case No : Income-tax Application No. 23 of 1999

Commissioner of Income Tax APPELLANT

Vs

Sharwan Kumar Agarwal RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 43(5), 73

Citation : (2001) 249 ITR 233

Hon'ble Judges : Sudhir Narain, J;Bhagwan Din, J

Bench : Division Bench

Advocate : Shambhu Chopra, for the Appellant; Rakesh Ranjan, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an application filed by the Commissioner of Income Tax (Central), Kanpur, for a direction to the Income Tax Appellate Tribunal to draw up a statement of the case and refer the questions of law mentioned in paragraph 3 of the application filed by the applicant.

2. The assessee is a sharebroker and filed his return of income on December 13, 1994. The assessment was completed u/s 143(3) of the Income Tax Act, 1961. During the course of assessment proceedings, the Assessing Officer had found that the assessee had at times settled the share transactions by corresponding deliveries and at times settled the contract without effecting the delivery. On an examination of invoice bills, the Assessing Officer found that the assessee had earned a profit of Rs. 32,80,949 and suffered a loss of Rs. 1,10,14,010, thereby incurring a net loss of Rs. 77,33,061. It was held that this was speculative transaction within the meaning of Sub-section (5) of Section 43 of the Income Tax Act. Invoking the provisions of Section 73 of the Income Tax Act, the Assessing Officer held that the speculative loss of Rs. 77,33,061 could not be allowed to be set off against the profit of general business of the assessee. The order was affirmed by the Commissioner of Income Tax (A)-1, Kanpur. The

Income Tax Appellate Tribunal in appeal held that the assessee was entitled to the exception covered by Clause (c) of the proviso to Section 43(5) of the Income Tax Act, which reads as under :

"a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member ;

shall not be deemed to be a speculative transaction ;"

3. The applicant filed an application for making reference before the Tribunal. The said application has been rejected by the Tribunal. Now the applicant has filed the present application to draw up the reference on the following two questions ;

"(1) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in law in holding that the transactions by the assessee, member of the U. P. Stock Exchange, on the U. P. Stock Exchange trading floor with the other fellow members termed as ''U. P. Stock Exchange clearing difference'' resulting in net credit of Rs. 3,47,17,330 were speculative transactions in accordance with the bye laws and rules of the SEBI and particularly the U. P. Stock Exchange Association Ltd. ?

(2) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in law in allowing set-off of the net credit of Rs. 3,47,17,330 with regard to the transactions by the assessee member on the U. P. Stock Exchange trading floor termed as the U. P. Stock Exchange clearing difference with and against the net debit of Rs. 77,33,001 relating to the transactions by the assessee with the clients admittedly on principal to principal basis outside the trading floors where no delivery of shares was effected and which were accepted to be speculative transactions ?"

4. We have heard Sri Shambhu Chopra, learned counsel for the applicant, and Sri Rakesh Ranjan Agrawal, learned counsel for the assessee.

5. Learned counsel for the applicant contended that the transaction was speculative mid I here was material oil record to show that the transaction was speculative.

6. The Tribunal found dial the assessee was entitled to the exception covered by the proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act. The onus of proof was on the Department to establish that such exception was not applicable. It has placed reliance upon the decision of the Supreme Court in The Commissioner of Income Tax, Bihar and Orissa Vs. Sri Ramakrishna Deo, . It further found that no material was collected al the appellate stage to show that the condition was fulfilled. Learned counsel for the applicant has not shown that there was any material to show that the assessee was not entitled to the exception, referred to above. It may also be noted that the applicant has not

sought any question to be referred in regard to proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act.

7. In view of the above, the application is rejected.