HIGH COURT OF BOMBAY

Director of Income-tax (IT)-II, Mumbai

v.

Prudential Assurance Co. Ltd.

J.P. DEVADHAR AND M.S. SANKLECHA, JJ.
IT APPEAL (L) NO. 1193 OF 2012
JANUARY 10, 2013

ORDER

1. This appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act') challenges the order dated 26th March 2012 of the Income Tax Appellate Tribunal ('Tribunal' for short) relating to assessment year 2003-2004.

2. The appellant has raised the following questions of law for consideration of this Court.

> "(*a*) Whether on the facts and circumstances of the case and in law, the Tribunal is correct in quashing the initiation of reassessment and also setting aside the impugned order on merits, when the AO has clearly recorded his reason for reopening of the case and has categorically mentioned that complete facts related to investment activity in India and SEBI guidelines have not been disclosed by the assessee ?
>
> (*b*) Whether on the facts and circumstances of the case and in law, the Tribunal is correct in holding that the AO was not justified in taxing income from other sources amounting to Rs. 12,57 crore without allowing its set off against the business loss of Rs. 48.80 crore ignoring the fact that assessee's income from business is not liable to tax in India in the absence of PE in India and thus once the business income is not assessable as per the Act, the loss arising from the same cannot be set off with Income from other sources ?"

3. The respondent-assessee is a foreign company having residential status of non-resident. The respondent-assessee had approached the Authority for Advance Ruling. On 30th April 2001, the Authority for Advance Ruling held that profits arising to the respondent-assessee from realization of portfolio investments in India will be treated as part of its business profits.

4. For the assessment year 2003-2004, the respondent-assessee had claimed loss on sale of shares to the extent of Rs. 48.80 crores under the head "profits and gains of business or profession". This was accepted by the assessing officer by an order dated 20th February 2000 under Section 143(3) of the Act.

5. On 31st March 2010, a notice to re-open the assessment for the assessment year 2003-2004 under Sections 147 and 148 of the Act was issued to the respondent-assessee. The assessment was sought to be re-opened on the ground that the ruling of the Authority for Advance Rulings dated 30th April 2001 rendered in the assessee's own case is not correct in view of the subsequent ruling of the Authority for Advance Ruling in the case of Fidelity Northstar Fund. In view of the subsequent ruling, the notice for re-opening states that the earnings on purchase and sale of shares would be taxable not under the head "profits and gains of business or profession" but taxable under the head "capital gains". Thus, resulting in escapement of income to tax.

6. Consequent to the above, the assessing officer on 16th September 2011 passed a re-assessment order, wherein it was held that the income on sale of shares is chargeable to tax under the head "capital gains"

and not "business income". On appeal, the Tribunal set aside the order of the assessing officer *inter alia* on the ground that in assessee's own case for assessment years 2004-2005 and 2005-2006, the Director of Income Tax had initiated proceedings under Section 263 of the Act on the identical grounds and that decision under Section 263 of the Act had been set aside by this Court by order dated 21st April 2010 in Writ Petition No.866 of 2010.

7. We note that the notice for re-opening was issued on 31st March 2010 which is beyond a period of four years from the end of the relevant assessment year 2003-2004 and the reasons recorded for re-opening the assessment does not allege that there has been any failure on the part of the respondent-assessee to disclose fully and truly all material facts necessary for the purpose of assessment. Therefore, on the above basis itself, the notice is not sustainable. Further, even on merits we find that this Court in Writ Petition No.866 of 2010 filed by the assessee, held by order dated 29th April 2010 that the ruling of Authority for Advance Ruling in the respondent-assessec's case would not be over-ruled by subsequent decision of the Authority for Advance Ruling in the case of another assessee. Consequently, initiation of action under Section 263 of the Act for assessment years 2004-2005 and 2005-2006 was quashed on the ground that the assessment order could not be said to be prejudicial to the Revenue or erroneous as the assessing officer was merely following a binding ruling of the Authority for Advance Ruling. The Income Tax Appellate Tribunal relies upon the aforesaid facts and holds that the re-opening of assessment is not justified, as the finding of the Authority for Advance Ruling in the assessee's own case will continue to govern the assessee's assessments. This is particularly so as there has been no change in the law.

8. In our opinion, the decision of this Court in Writ Petition No.866 of 2010 rendered on 29th April 2010 in the respondent-assessee's own case is wholly applicable to the facts of the present case as held by the Tribunal. In view of above, we find no fault with the order of the Tribunal which would warrant entertaining the appeal filed by the Revenue.

9. Accordingly, the appeal is dismissed with no order as to costs.