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

% *Date of Decision: 27.11.2024*

+ **W.P.(C) 6097/2021 and CM APPL. 19293/2021**

ROSE WOOD BUILDWELL PRIVATE LIMITED.....Petitioner

Through: Mr Sumit Lalchandani and Mr Tarun
Chanana, Advocates.

versus

PR. COMMISSIONER OF INCOME TAX-7

& ORS.

.....Respondents

Through: Mr Indruj Singh Rai, SSC with Mr
Sanjeev Menon, Mr Rahul Singh and
Mr Anmol Jagga, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J.(Oral)

1. The petitioner has filed the present petition, *inter alia*, impugning the certificate issued by respondent no. 3 (Commissioner of Income Tax) under Sub-section (1) of Section 5 of the Direct Tax Vivad Se Vishwas Act, 2020 (hereafter *the DTVSV Act*) whereby the declaration as furnished by the petitioner (hereafter *the Assessee*) under Section 3 of the DTVSV Act was modified to include settlement of certain disputes that were not the subject matter of the declaration made by the Assessee.

2. According to the Revenue, the Assessee was required to settle all disputes pertaining to an assessment year and could not confine the settlement of disputes to only some issues that had arisen in the assessment year, while leaving the others. Thus, the principal question that falls for



consideration of this court is whether the Assessee is entitled to confine the settlement of the disputes, which were subject matter of its appeal filed before the Income Tax Appellate Tribunal (hereafter *the ITAT*) being ITA No.5958/Del/2014 in respect of assessment year (AY) 2011-12 and excluding the disputes, which was the subject matter of the Revenue's appeal for the same assessment year.

3. The said appeal was filed by the Assessee impugning an order dated 25.07.2014 passed by the Commissioner of Income Tax (Appeals)-XVII [hereafter CIT(A)]. The CIT(A) had partly allowed the Assessee's appeal. This resulted in both the Assessee and the Revenue preferring their respective appeals against the order dated 25.07.2014 rendered by the CIT(A). The Revenue appealed the CIT(A)'s decision to the extent that the Assessee had succeeded and the Assessee appealed the decision to the extent that it hadn't. The learned ITAT, by its order dated 09.12.2019, allowed the Assessee's appeal (being ITA No.5958/Del/2014), but did not accede to the Revenue's appeal (being ITA No.5411/Del/2014). The Revenue has assailed the said order dated 09.12.2019 passed by the learned ITAT in the said appeals by filing a common appeal (being ITA No.143/2021), which is pending before this Court.

4. It is the Revenue's contention that the Assessee is also required to settle the disputes as covered under ITA 5411/Del/2014 captioned *ITO Ward-15(4) v. Rose Wood Buildwell Private Limited*, which was also disposed of by the learned ITAT by the order dated 09.12.2019.

FACTUAL CONTEXT

5. The Assessee is a company engaged in the business of real estate. The



Assessee had filed its return of income for the AY 2008-09 on 31.08.2012. The same was selected for scrutiny and the Assessing Officer (AO) issued an assessment order dated 10.03.2014 under Section 143(3) of the Act making a total addition of ₹4,05,51,837/- to the Assessee's declared income of ₹12,34,270/-. The addition was made on three grounds. First, on account of stamp duty of ₹5,39,500/-; Second, on rejection of loss on the derivative segments (future/option) claimed by the Assessee amounting to ₹50,12,337/-; and third, on account of unexplained credit of ₹3,50,00,000/- under Section 68 of the Act.

6. In respect of addition of ₹50,12,337 being the loss claimed by the Assessee towards trading in commodities, the AO found that the same was not corroborated by the confirmation received from National Commodity & Derivatives Exchange Ltd. (NCDEX).

7. The AO also found that the Assessee had received share application money amounting to ₹3,50,00,000/- from separate group entities of equity shares of a value of ₹10/- at a premium of ₹90/-. The AO asked the Assessee to establish the identity and the creditworthiness of the entities from whom funds were received for subscription of share capital. The AO held that the Assessee was unable to discharge the onus of establishing the identity and creditworthiness of the entities that had subscribed to the Assessee's share capital and therefore, the genuineness of the said transaction was not established. Accordingly, the AO added a sum of ₹3,50,00,000/- as unexplained expenditure under Section 68 of the Act.

8. The AO also found that the Assessee had claimed expenditure



amounting to ₹5,39,500/- on account of stamp duty paid on sale of property but the stamp papers of the same were purchased by the purchaser of the property and therefore, the Assessee's claim that it had incurred the said expenditure was not accepted.

9. The Assessee appealed the assessment order dated 10.03.2024 before the learned CIT(A) [being Appeal No.391/13-14].

10. The learned CIT(A) set aside the addition of ₹5,39,500/- in respect of payment of stamp duty as the sale deed of the property clearly reflected that the expenditure for the stamp duty was required to be borne by the Assessee. And, the Assessee had also produced a copy of the bank statement reflecting the payment of the stamp duty.

11. Insofar as the deletion of addition of ₹50,12,337/- on account of loss in the derivatives segment is concerned, the learned CIT(A) upheld the decision of the AO and rejected the Assessee's appeal. However, the learned CIT(A) sustained the Assessee's challenge to the addition of ₹3,50,00,000/- under Section 68 of the Act. The learned CIT(A) found that the Assessee had established the identity and creditworthiness of his shareholders. Therefore, an addition under Section 68 of the Act was not justified. Accordingly, the addition of ₹3,50,00,000/- to the Assessee's income was deleted.

12. The Assessee preferred an appeal [being ITA No.5958/Del/2014] against the decision of the learned CIT(A) insofar as it rejected the Assessee's challenge to the addition of ₹50,12,337/- claimed towards loss in trading of commodity derivatives. The Revenue also preferred an appeal



[being ITA No.5411/Del/2014] against learned CIT(A)'s order dated 25.07.2014 insofar as it deleted the addition of ₹3,50,00,000/- as unexplained credit under Section 68 of the Act. Both the appeals – ITA No.5958/Del/2014 & ITA No.5411/Del/2014 – were disposed of by the learned ITAT by an order dated 09.12.2019. Insofar as the Assessee's challenge to the addition of ₹50,12,337/- is concerned, the learned ITAT noted that the Assessee had produced all the relevant documents to establish that it had suffered the loss as claimed. However, the said transactions had not been confirmed by the broker (M/s Tushar Commodities Pvt. Ltd.). Enquiries from NCDEX had revealed that the said broker had not traded during the period 01.04.2010 to 31.03.2011, thus, raising doubts as to the derivatives transactions as claimed by the Assessee. The learned ITAT noted that the notice sent to the broker (M/s Tushar Commodities Pvt. Ltd.) has been received back. The learned ITAT was of the view that it was necessary that a proper enquiry be conducted as to the genuineness of the transactions as claimed by the Assessee. Accordingly, the learned ITAT remanded the matter to the AO to carry out the necessary enquiry with a further direction to the Assessee to cooperate with the AO in the enquiry. Insofar as the Revenue's appeal against the deletion of ₹3,50,00,000/- is concerned, the learned ITAT rejected the Revenue's appeal.

13. In the meantime, the Parliament enacted the Direct Tax Vivad se Vishwas Act, 2020 (DTVSV Act), which was notified on 17.03.2020.

14. The Assessee being desirous of settling the dispute in respect of its appeal (ITA No.5958/Del/2014) – which as noticed above was confined to the disallowance of ₹50,12,337/- on account of loss suffered in trading in



derivatives – filed a declaration under Section 3 of the DTVSV Act. The said declaration was filed in the requisite forms (Form Nos.1 and 2) on 08.03.2021.

15. Respondent no. 3 [CIT(A)] issued a certificate under Section 5(1) of the DTVSV Act (in Form No.3) on 23.04.2021, which is impugned in the present petition to the limited extent that it had modified the Assessee's declaration.

16. The Revenue being aggrieved by the order dated 09.12.2019 passed by the learned ITAT in the Assessee's appeal [being ITA No.5958/Del/2014) as well as in its appeal (being ITA No.5411/Del/2014) preferred a consolidated appeal under Section 260A of the Act in this Court (being ITA No.143/2021) on 11.08.2021.

REASONS & CONCLUSION

17. At the outset, it is relevant to note that there is no dispute that the petitioner is entitled to avail the benefit of DTVSV Act in respect of its disputed tax liability pertaining to AY 2011-12. The only question which is required to be addressed is whether the Assessee can confine the settlement of disputes to the issue regarding disallowance of loss claimed by it in respect of trading in derivatives, which was subject matter of its appeal (being ITA No.5958/Del/2014) and was disposed of by the learned ITAT by its order dated 09.12.2019.

18. Section 3 of the DTVSV Act provides that where a declarant files a declaration before the designated authority in accordance with Section 4 of the DTVSV Act in respect of tax arrears then notwithstanding anything



contained in the Act or any other law for the time being in force, the amount declared as payable would be computed in accordance with the tabular statement as set out in the said section.

19. The term “declarant” is defined under Section 2(1)(c) of the DTVSV Act to mean a person who files a declaration under Section 4 of the DTVSV Act.

20. The expression “tax arrears” as defined in clause (o) of Section 2(1) of the DTVSV Act and reads as under:

“2. Definitions.

(1) In this Act, unless the context otherwise requires, –

(o) “tax arrear” means,—

(i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or

(ii) disputed interest; or

(iii) disputed penalty; or

(iv) disputed fee,

as determined under the provisions of the Income-tax Act.”

21. As is apparent from the aforesaid definition, the term “tax arrears” would include the aggregate amount of disputed tax as well as interest chargeable or charged on such disputed tax. The expression “disputed tax” is defined in clause (j) of Section 2(1) of the DTVSV Act. The relevant extract of the said clause is set out below:

“2. Definitions.



(1) In this Act, unless the context otherwise requires, –

(j) “disputed tax”, in relation to an assessment year or financial year, as the case may be, means the income-tax, including surcharge and cess (hereafter in this clause referred to as the amount of tax) payable by the appellant under the provisions of the Income-tax Act, 1961 (43 of 1961), as computed hereunder:--

(A) in a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the appellant if such appeal or writ petition or special leave petition was to be decided against him;

(B) in a case where an order in an appeal or in writ petition has been passed by the appellate forum on or before the specified date, and the time for filing appeal or special leave petition against such order has not expired as on that date, the amount of tax payable by the appellant after giving effect to the order so passed;”

22. It is clear from clause (A) of Section 2(1)(j) of the DTVSV Act that the quantum of disputed tax is required to be determined by ascertaining the amount of tax which would be payable by the Assessee if its appeal, writ petition or special leave petition is decided against him. This clearly indicates that the expression “disputed tax” is the tax and other levy which is the subject matter of the pending appeal, writ petition or special leave petition.

23. The expression “appellant” is defined under Section 2(1)(a) of the DTVSV Act. Sub-clauses (i) and (ii) of Section 2(1)(a) of the DTVSV Act, is relevant and the same is set out below:

“2. Definitions.



(1) In this Act, unless the context otherwise requires, –

(a) “appellant” means--

(i) a person in whose case an appeal or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by both, before an appellate forum and such appeal or petition is pending as on the specified date;

(ii) a person in whose case an order has been passed by the Assessing Officer, or an order has been passed by the Commissioner (Appeals) or the Income Tax Appellate Tribunal in an appeal, or by the High Court in a writ petition, on or before the specified date, and the time for filing any appeal or special leave petition against such order by that person has not expired as on that date;”

24. It is apparent from the above that the expression “appellant” also refers to a person in whose case an appeal has been filed either by him or by the income tax authority or by both. A reading of Section 2(1)(j)(A) in conjunction with Section 2(1)(a)(i) of the DTVSV Act makes it clear that the disputed tax, which would be a subject matter of settlement as tax arrears, is required to be determined on the basis of subject matter of the appeal (whether filed by the Assessee or by the Revenue) before the appellate forum.

25. Section 4(1) of the Act provides for the declarant filing a declaration as referred to in Section 3 of the DTVSV Act before the designated authority in such form and verified in such a manner as may be prescribed. It is relevant to refer to Sub-section (2) of Section 4 of the DTVSV Act, which reads as under:

“4. Filing of declaration and particulars to be furnished



(2) Upon the filing the declaration, any appeal pending before the Income Tax Appellate Tribunal or Commissioner (Appeals), in respect of the disputed income or disputed interest or disputed penalty or disputed fee and tax arrear shall be deemed to have been withdrawn from the date on which certificate under sub-section (1) of section 5 is issued by the designated authority.”

26. The aforesaid provision also indicates that filing of a declaration as prescribed would result in any appeal in respect of the disputed income being withdrawn from the date on which the certificate under Section 5(1) of the DTVSV Act was issued by the designated authority. This also clearly establishes that a declarant as referred to in Section 3 of the DTVSV Act is in respect of disputes pending in an appeal, which on the declaration being made shall be deemed to be withdrawn. It is clear from the express language of the provisions of DTVSV Act that the unit of settlement is the subject matter of disputes pending before an appellate forum.

27. This issue was also considered by this court in **MUFG Bank Ltd. v. Commissioner of Income Tax 2 & Anr. Neutral Citation No. 2022/DHC/005159**. The relevant extract of the said decision is set out below:

“34. This Court is further of the view that under the DTVSV Act, 2020 each appeal, writ petition or SLP is treated as a separate dispute which is evident from Section 2(1)(j) read with Section 2(1)(a) of the Act. The said Sections provide that disputed tax for each appeal, writ petition or SLP is to be computed and, the disputed tax payable by the declarant is the amount as if such appeal, writ petition or SLP were to be decided against the assessee. Section 2(1)(a) of the Act use the words “an appeal” and Section 2(1)(j) of the Act uses the word “any appeal” both of which indicate that the unit for settlement of dispute under the provisions of DTVSV Act is an appeal or a writ petition or a SLP. The aforesaid position is further confirmed by the



definition of “dispute” in Rule 2(b) of the DTVSV Rules, 2020 which defines each appeal, writ petition or SLP as a separate dispute for the purpose of computing disputed tax under Rules 9, 10 and 11 of the DTVSV Rules. This is also evident from the statutory Form No.5 issued by the designated authority prescribed under the Rules where the Column No.3 records the detail of the ‘Details of dispute settled (Appeal Reference Number)’.

35. The submission of the revenue that under the DTVSV Act the unit of settlement is an assessment year is contrary to its own stand as the Department has no grievance with the petitioner not settling the appeal filed by it for the same assessment year, but requires the petitioner to settle all the Departmental appeals for an assessment year. In fact, the aforesaid position is not borne out from any provision of the DTVSV Act or the Rules. Consequently, the unit for settlement of dispute under the DTVSV Act, 2020 is an appeal, writ petition or SLP and not the assessment year as had been canvassed by the revenue.

36. Even assuming that the DTVSV Act is a taxing statute, there is no restriction on an assessee to choose an appeal to be settled under the DTVSV Act as Section 2(1)(j) uses the words “any appeal” which even on a literal interpretation would mean any one or more appeals.

37. Moreover, the issues raised by the Department in the SLP filed before the Supreme Court is in respect of deduction for salary paid to expatriates and the applicability of Section 115JB of the Act. However, this issue is not at all connected with the deemed appeal arising from the order of the Tribunal dated 16th September, 2019 wherein the issue of taxability of ECB interest and levy of interest under Section 234D of the Act is involved. Since, the issues involved in both the appeals are different and unconnected, this Court is of the view that the contention of the Department that the Petitioner ought to have settled the SLP pending in the Supreme Court, along with the deemed appeal of the Department is incorrect and bad in law.”

28. Circular No.9/2020 issued by Central Board of Direct Taxes on 22.04.2020 also amply clarifies the above. The question no.4 and its response as set out in the said Circular clarifying the provisions of DTVSV Act is set out below:



“Question No.4 An appeal has been filed against the interest levied on assessed tax; however, there is no dispute against the amount of assessed tax. Can the benefit of the Vivad se Vishwas be availed?”

Answer: Declarations covering disputed interest (where there is no dispute on tax corresponding to such interest) are eligible under Vivad se Vishwas. It may be clarified that if there is a dispute on tax amount, and a declaration is filed for the disputed tax, the full amount of interest levied or leviable related to the disputed tax shall be waived.”

29. The learned counsel appearing for the Revenue submits that in the present case, there was no appeal pending before any forum on 31.01.2020 being the specified date as mentioned in clause (n) of Section 2(1) of the DTVSV Act. The learned ITAT rendered the decision on 09.12.2019 and the Revenue had not filed its appeal (ITA No.143/2021] prior to the specified date. Thus, the ambit of disputes must necessarily be construed on the basis of an appeal filed by the Revenue subsequently.

30. It is necessary to note that the DTVSV Act also contains provisions to address the question of disputes when an order has been passed by the AO, CIT(A), or the learned ITAT and the time for filing the appeal against the said order has not expired. In such cases, the person in whose case such an order has been passed would also fall within the meaning of the term “appellant” as defined under Section 2(1)(a) of the DTVSV Act. In such cases, the disputed tax would amount to the tax payable by the appellant after giving effect to the order so passed.

31. It is also relevant to refer to the following clarification provided under the CBDT Circular dated 22.04.2020:



“Question No.36

In a case ITAT has passed order giving relief on two issues and confirming three issues. Time to file appeal has not expired as on specified date. The taxpayer wishes to file declaration for the three issues which have gone against him. What about the other two issues as the taxpayer is not sure if the department will file appeal or not?

Answer:

The *Vivad se Vishwas* allow declaration to be filed even when time to file appeal has not expired considering them to be a deemed appeal. *Vivad se Vishwas* also envisages option to assessee to file declaration for only his appeal or declaration for department appeal or declaration or both. Thus, in a given situation the appellant has a choice, he can only settle his deemed appeal on three issues, or he can settle department deemed appeal on two issues or he can settle both. If he decides to settle only his deemed appeal, then department would be free to file appeal on the two issues (where the assessee has got relief) as per the extant procedure laid down and directions issued by the CBDT.”

32. The aforesaid clarification also underscores the principle that the unit of settlement is an appeal and includes a prospective appeal.

33. In the present case, the Assessee had filed a declaration in respect of its appeal (ITA No.5958/Del/2014). The disputed tax paid is confined to the tax, interest and penalty payable in respect of the loss in derivatives amounting to ₹50,12,377/- which was the subject matter of appeal (ITA No.5958/Del/2014). The fact that the Revenue had preferred a consolidated appeal against the order passed in ITA No.5958/Del/2014 as well as its



appeal (ITA No.5411/Del/2014) would not in any manner detract from the fact that Revenue's appeal to this Court is in respect of order relatable to two separate appeals. The issue involved in the two appeals are not interlinked. The dispute, which is subject matter of ITA No.5958/Del/2014 and ITA No.5411/Del/2014 is confined to deletion of addition of ₹3,50,00,000/- under Section 68 of the Act. The Assessee's declaration does not concern the said dispute as it was confined to the order passed by the ITAT in respect of its appeal (ITA No.5958/Del/2014).

34. In view of the above, the present petition is allowed and the certificate dated 23.04.2021 issued by the designated authority in Form no.3 is directed to be confined to the declaration made by the Assessee. The respondents are accordingly directed to take steps for issuing a modified certificate under Section 5(1) of the DTVSV Act.

35. The petition is allowed in the aforesaid terms. The pending application also stands disposed of.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 27, 2024

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