

SetCom application rejected as assessee claimed to be involved in hedging as broker but failed to substantiate it

Summary – The High Court of Gujarat in a recent case of Manojkumar Babulal Agrawala, (the Assessee) held that where assessee claimed that off market commodity transactions/hedging transactions found in seized documents were entered into by him only in capacity of a broker and entire unaccounted income from such transactions did not belong to him but failed to substantiate same, Settlement Commission was justified in rejecting application of assessee

Facts

- The assessee individual was engaged in off market commodity transactions. Such transactions were carried on his own account as well as a broker. Search and seizure operations were carried on the premises of the assessee and his relatives. During search at premises of one RA who was nephew of the assessee, several documents including a rough note book containing references to various transactions of off market commodities were seized. The assessee filed return of income in response to notices issued by the department under section 153A. During the pendency of such assessment proceedings, the assessee filed a settlement application under section 245C(1). The Settlement Commission allowed the application to proceed further.
- In response to notice issued, the revenue opposed the disclosures made by the assessee in the settlement application as not being true and full disclosures. Of the many transactions contained in the rough diary seized by the department during the search operations, according to the assessee, 29 names or codes represented the direct transactions carried on by the assessee himself or through his relatives and the rest were as a broker. It was on this basis that the assessee had declared the additional income in the settlement application. According to the revenue, this theory of splitting up of transactions into those directly entered into by the assessee on his own account and other as a broker was not a correct and the entire unaccounted income from off market commodity trading on the basis of the seized diary represented the unaccounted income of the assessee.
- The Settlement Commission rejected the assessee's application for settlement primarily on the ground that the assessee had not made true and full disclosures of the unaccounted income. In the process, the Commission rejected the assessee's theory of earning income in two different manners, firstly, through direct off market transactions and secondly, as a broker of such transactions.
- In instant petition before the High Court, the main grievance of the assessee was that the Settlement Commission had discarded the affidavits produced by the assessee of four persons who confirmed that the transactions referred to in the seized diary were those in which they were the sub-brokers and the assessee had acted as a broker. According to the assessee, proper inquiry had to be made before discarding such affidavits.

Held

- With this background the findings of the Commission in the impugned order might be referred. The Commission noted that during the search conducted certain documents were seized from the residence of RA, the nephew of the petitioner. His statement was recorded in which he had stated that the transactions recorded in the said diary were as per the instructions given by the petitioner. There is nothing in the diary to suggest that some of the transactions were executed in the capacity of a broker. The petitioner's statement was recorded in which he admitted that the diary seized from the residence of RA contained the records of off market trading transactions/hedging transactions carried out by his group and that there was no chance that these transactions would have been recorded in the regular books of account. The petitioner also agreed to draw the profit and loss account in respect of transactions recorded in the said seized diary within 7 days. Though the copies of the entries from the seized diary were supplied to the petitioner, he did not furnish any explanation with regard to the said entries. It was only in the course of his statement recorded under section 132(4), he took a stand that the transactions relating to 29 names were in respect of off market commodity trading done by his group and the remaining entries represented his involvement as a broker. He was asked to give the names, addresses and other details of the persons in respect of whom he had executed such brokerage transactions. He promised to provide such details within ten days but did not do so. The Commission noted that in case of one person namely SK, the transactions involved a huge profit during the period between 9-1-2012 to 21-3-2012 despite which the assessee had not given his name or address. It was only after a gap of nearly two years that the petitioner revealed the identity of the said sub-broker while filing settlement application. The Commission noted that the assessee had disclosed the identity of one BDT, one of the sub-brokers, without showing any connection with the recorded names of Sanjiv/Sanjeev/Sonuji (purportedly names of sub-brokers available in seized diary) if they happened to be code names.
- The Commission further noted that similar facts were involved with respect to the remaining three sub-brokers also. It was noticed that all these sub-brokers had filed the returns for the assessment years 2012-13 and 2013-14 on a single date and from the same IP address. The returns were not filed within the due dates. In case of BDT, the return for the assessment year 2012-13 was filed after the date of search and even after the date of statement by the petitioner under section 132(4). BDT had shown income of Rs. 4.32 lakhs and Rs. 4.43 lakhs for the assessment years 2012-13 and 2013-14 respectively. The Commission also noted that all the affidavits filed by the said so-called sub-brokers were identically worded. The Commission also examined minutely the dummy or the code names used in the seized diary allegedly representing one or the other of the four sub-brokers but did not find any connection. It was noticed that the details filed along with the confirmations of the four sub-brokers as well as their affidavits did not contain any details of payments of brokerage income to them. The statement supplied by the petitioner showing the brokerage paid to BDT was not confirmed by him. The Commission also noticed similarity of transactions of those admittedly executed by the assessee on his own account and those in which according to him he had acted as a sub-broker. The Commission observed that during the search nothing was found to connect the

code names Sanjiv/Sanjeev/Sonuji with BDT. On the basis of such materials noticed by the Commission, the claim of the petitioner was rejected.

- It can thus be seen that the Commission had taken into account the documents and evidence on record and rejected the petitioner's theory of having entered into off market transactions in two different capacities. These findings of the Commission are based on consideration of relevant materials presented before the Commission by both sides.
- The petitioner did produce the affidavits of four persons who claimed that they were the sub-brokers for whom the petitioner had acted as a broker in respect of certain entries made in the seized diary. However, this by itself cannot be clinching evidence, nor can the petitioner contend that such factor cannot be discarded without cross examination of the deponents. The affidavits of such persons would certainly be a relevant factor to be taken into account by the Commission but can neither be sole nor a conclusive factor. The Commission was duty bound to take into account all the evidences and documents on record and evaluate for itself the contents of affidavits produced by the petitioner. If on basis of existing materials itself the contention of the petitioner and the contents of the affidavits are found to be unreliable it would always be open for the Commission to adopt such a course. To cause further inquiry including offering such deponents for cross examination at the hands of the department would certainly be one of the options before the Commission.
- It can thus be seen that the case stood on peculiar facts. The court did not lay down any proposition that such affidavits are to be accepted unless the deponents were cross examined.
- In the present case the Commission, as noted earlier, has taken into account all the relevant factors and given cogent reasons to hold that the petitioner's theory that he had acted as a broker in certain transactions was not correct. The reasons are found to be quite convincing. It was precisely to demonstrate this that various facts and circumstances have been taken into account by the Commission. For example, Commission noted that though BDT, according to the petitioner, was a sub-broker in majority of these transactions, the petitioner had not disclosed his identity in his statement under section 132(4) recorded two months after the search and did so for the first time while filing settlement application nearly two years later.