IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

TAX APPEAL NO.19 OF 2004

Commissioner of Income Tax,
Aurangabad ... APPELLANT

VERSUS

Hotel Surya, Main Road,
Paithan, District Aurangabad ... RESPONDENT

.....
Shri Alok Sharma, Standing Counsel for the appellant
.....

CORAM: S.V. GANGAPURWALA AND A.I.S. CHEEMA, JJ.

DATED: 8th April, 2015.

ORAL JUDGMENT (Per S.V. Gangapurwala, J.):

1. At the time of admission of the appeal, the Court has framed the following substantial questions of law :-

> (i) Whether on the facts and in the circumstances of the case, the ITAT is right in cancelling the order passed by the CIT u/s. 263 of the I.T. Act, 1961 by holding that the DVO's report received subsequently does not make the order of the AO erroneous and prejudicial to the interests of Revenue.

(ii) Whether on the facts and in the circumstances of the case, the ITAT is right in law by holding that the CIT could not depend on the report of the DVO and it was not available to the AO when the AO completed the assessment. This view of the ITAT is contrary to the meaning assigned to the term "record" w.e.f. 1.6.88 vide explanation (b) of Sec. 263 which says that:-

> "records" shall include and shall be deemed always to have included all records relating to any proceedings under this Act available at the time of examination by the Commissioner. Thus "record" available at the time of examination by the Commissioner is relevant and not at the time of assessment completed by the A.O.

(iii) Whether on the facts and in the circumstances of the case, the ITAT is right in law by not appreciating the fact that the valuation report of the DVO forms part of assessment record and the CIT could revise assessment order on the basis of valuation report received after the assessment had been completed. Reliance is placed on the decision of the Calcutta High Court in the case of <u>CIT vs. S.M. Oil Extraction Pvt. Ltd. [190 ITR 404]</u>.

(iv) Whether on the facts and in the circumstances of the case, the ITAT was right in relying on the judgment of the Bombay High Court in the case of Gabrial India Ltd. vs. CIT (203 ITR 108) as the facts in both the cases are not comparable at all. The said judgment did not deal with the meaning of expression "record".

2. We have heard Mr. Alok Sharma, learned counsel for the appellant. The respondent though served, is absent.

3. Mr. Alok Sharma, learned counsel for the appellant strenuously contends that the Tribunal was in error in setting

aside the order passed by the Commissioner (Appeals) invoking its jurisdiction under Section 263 of the Income Tax Act, 1961. The assessment was completed by the Assessing Officer on 31.3.1999. The matter was referred to D.V.O. for valuation on 12.3.1999. However, the report of the D.V.O. about the valuation could not be received till 31.3.1999 i.e. the date of assessment. As such, the Assessing Officer finalised the assessment based on the valuation submitted by the assessee in his Account Books. The report of the D.V.O. was received on 24.8.1999. The Commissioner (Appeals) exercising its powers under Section 263 of the Income Tax Act directed the Assessing Officer to consider the assessment afresh considering the report of the D.V.O. and set aside the assessment. The learned counsel further submits that, the Tribunal misguided itself while interpreting the word "record" in a narrow compass. The record would mean the record in existence at the time when Commissioner was deciding the revision and it would not be limited to the record available in the file of the Assessing Officer at the time of assessment. The learned counsel relies on the judgment of the Apex Court in a case of Commissioner of Income Tax Vs. Manjunatheaware Packing Products and Camphor Works reported in SCC-1998-1-598 so also the judgment of the Calcutta High Court in the case of Commissioner of Income Tax

Vs. S.M. Oil Extraction Pvt. Ltd., reported in 1998 (96) Taxman 1 and also the judgment of the Bombay High Court in the case of Commissioner of Income Tax Vs. Gabriel India Ltd., reported in (1993) 203 ITR 108 (Bom).

4. We have considered the submissions canvassed by the learned counsel for appellant and also gone through the judgment delivered by the Tribunal and the Commissioner (Appeals). Section 263 of the Income Tax Act reads as under :

> **"263. Revision of orders prejudicial to revenue:-**
>
> (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
>
> *Explanation*:- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,--
>
> (a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include –
>
> (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under Section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under Section Section 120.

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner.

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this Section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation:- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129 and any period during which any proceeding under this Section is stayed by an order or injunction of any Court shall be excluded."

5. The interpretation of the term "record" as appearing in Section 263 is no longer res integra in view of the judgment of the Apex Court in a case of "Commissioner of Income Tax Vs. Manjunatheaware Packing Products" (referred supra), which lays down that the record shall include and shall be deemed always to have included all record relating to any proceedings under this Act available at the time of examination by the Principal Commissioner or Commissioner.

6. In light of the above, the impugned order passed by the Tribunal is unsustainable. The Appeal ITA No.1228/PN/2000 filed by the respondent assessee is dismissed. The Appeal filed by Revenue i.e. Appeal bearing ITA 910/PN/2001 is allowed. The impugned order passed by the Tribunal is set aside. The matter is remitted to the Tribunal for deciding the Income Tax Appeal No.910/PN/2001 afresh.

(A.I.S. CHEEMA, J.) (S.V. GANGAPURWALA, J.)