IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 847 OF 2013

The Commissioner of Income Tax-18	**}**	**Appellant**
versus		
M/s. Gammon Rizzani Joint Venture	**}**	**Respondent**

Mr. A. R. Malhotra with Mr. N. A. Kazi and Ms. Padma Divakar for the Appellant.

Ms. Niyati Hakani with Mr. Prakash Shah i/b. M/s. PDS Legal for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.

DATED :- MARCH 30, 2015

P.C. :-

This Appeal of the Revenue is challenging the order dated 25th July, 2012 of the Income Tax Appellate Tribunal, Mumbai Bench in Income Tax Appeal No. 3410/Mum/2008. The assessment year is 2003-04.

2) An order under section 263 of the Income Tax Act, 1961 (for short the "IT Act") was passed by the Commissioner of Income Tax Mumbai on 31st March, 2008. The Commissioner cancelled the assessment order dated 31st March, 2006 by holding that the same is erroneous and prejudicial to the interest of the Revenue.

3) This order of the Commissioner was assailed by the Assessee before the Tribunal. In assailing it, the Assessee argued that the show cause notice proposed revision of the order of the Assessing Officer on the ground that the TDS Certificate receipts showed discrepancy. The Assessee had made a short disclosure and which resulted in a sum of Rs.1,98,08,432/- escaping assessment. However, the Tribunal found that the Commissioner did not make any observation nor rendered any finding in its order under section 263 of the IT Act on this subject or issue.

4) The Tribunal found that there was no allegation in the show cause notice about the system of accounting and the Assessee receiving a sum of Rs.91,41,31,695/- and therefore, disclosing lesser income. However, the show cause notice was silent on this and yet in the final order, these observations or findings have been rendered. That would vitiate the final order of the Commissioner under section 263 of the IT Act.

5) Mr. Malhotra appearing for the Revenue submits that the Tribunal has taken a hyper technical view. The Commissioner's order under section 263 of the IT Act, copy of which is to be found at Annexute 'A' at pages 14 to 18 of the paper book specifically refers to the show cause notice. It specifically refers to the receipts from Delhi

Metro Corporation Limited. The Assessee did not disclose the actual receipts and that is why the Commissioner was justified in holding that the assessment order is erroneous and prejudicial to the interest of the Revenue. Therefore, the order of the Commissioner could not have been set aside for want of notice to the Assessee. This was the subject or issue very much before the Assessing Officer and contested. In such circumstances, this Appeal would raise substantial questions of law.

6) On the other hand, Ms. Niyati Hakani appearing for the Assessee would support the Tribunal's order and submit that no substantial questions of law arise as the Tribunal has taken a correct view of the proceedings. We find that the Commissioner issued a notice under section 263 of the IT Act. The Tribunal found in para 8 that as per the notice and particularly para 3 thereof, the Commissioner was of the view that on computation of total income filed along with return, there is an advance receipt which has been referred to. Thus an aggregate payment of Rs.86,71,93,016/- has been disclosed while the gross receipts declared in profit and loss account is at Rs.84,73,84,584/-. There is thus a non disclosure of the income of Rs.1,98,08,432/-.

7) Then, the show cause notice alleges debiting of expenses on account of stationary and auditor's remuneration to the extent of

Rs.14,725/-, which has not been examined by the Assessing Officer. It is only on these two grounds that the Assessing Officer's order was proposed to be set aside by terming it as erroneous and prejudicial to the interest of the Revenue. However, in the final order of the Commissioner, something which is not forming part of the show cause notice, has been referred and conclusion thereon is rendered. That is in relation to alleged system of accounting adopted by the Assessee, which is stated to be the mercantile system and that is why there is disclosure of lesser income. Nowhere in the show cause notice any system of accounting has been referred nor disclosure of any lesser income over and above what has been referred by us. In such circumstances, the Tribunal rightly came to a conclusion that there is a vital discrepancy in the show cause notice issued under section 263 of the Income Tax Act and the final order of the Commissioner and impugned in the Appeal before the Tribunal. This discrepancy cannot be termed as technical. If the Assessee had no notice of the issue proposed to be examined by the Commissioner, then, he should not have proceeded without the Assessee being given sufficient opportunity and prior in point of time. In the given facts and circumstances, the order of the Commissioner has been set aside on the ground of violation of the principles of natural justice.

8) We agree with the Assessee's Counsel that such an order and which is consistent with the facts placed on record does not raise

any substantial question of law. The Tribunal's view is neither perverse nor vitiated by any error of law apparent on the face of the record. As a result, this Appeal fails. It is accordingly dismissed. No costs.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**