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

INCOME TAX APPEAL NO. 76 OF 2013

Commissioner of Income Tax 10 … Appellant

Versus

M/s. Swati Energy & Projects Pvt. Ltd. … Respondent

Mr. Arvind Pinto, A.P.P. for Appellant-Revenue.

Mr. Atul Jasani along with Mr. P.C. Tripathi for respondent.

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : JANUARY 14, 2015

P.C.

This appeal by the Revenue under Section 260A of the Income Tax Act 1961 ((the "Act") challenges the order dated 15th June, 2012 passed by the Income Tax Appellate Tribunal (the "tribunal").

2. This appeal relates to Assessment Year 2008-09. The appellant has formulated the following questions of law for our consideration :

> "(1) Whether on the facts and in the circumstance of the case and in law, the tribunal was justified in merely following the orders of their Coordinate Bench for AY 2004-05 and not considering the facts for this year, where the AO had obtained information from the Buyers that they have purchased directly from the Respondent Company?

(2) Whether on the facts and in the circumstances of the case, the tribunal was justified in ignoring the fact that the purchasing companies were specifically asked by the AO as to whether any agent was involved in the course of the transaction and they have denied the existence of any agent, but the tribunal failed to take this fact into consideration?

(3) Whether on the facts and in the circumstances of the case and in law, the tribunal was correct in holding that the additions made by the AO were on presumption, whereas the AO had evidence to hold that no sale commission was paid in respect of 3 transactions during the financial year."

3. We find that the impugned order dated 15th June, 2012 has dismissed the appellant's appeal from Order of Commissioner of Income Tax (Appeals) dated 15th February, 2011 by following its earlier decision in the respondent asssess's own case for the Assessment Year 2004-05 in Income Tax Appeal No. 1297/Mum/2010 by order dated 12th August, 2011. We are informed that the appeal filed by the Revenue for assessment year 2004-05 has been dismissed. Mr. Pinto learned counsel for the Revenue submits that the impugned order of the tribunal holding that the commission payment is allowable as business expenditure has been passed without taking into account the fact that the subject assessment year is distinguishable from the order passed by the tribunal for Assessment Year 2004-05.

4. In the impugned order, we do not find any submission having been made on behalf of the Revenue that the order passed for Assessment

Year 2004-05 is inapplicable to the subject assessment. It is pertinent to note that the Commissioner of Income Tax (Appeals) had in his order dated 15th February, 2011 while allowing the respondent Assessee's appeal placed reliance upon the order of the tribunal dated 12th August, 2011 for the Assessment Year 2004-05. Mr. Pinto learned counsel for the Revenue is unable to state whether or not such submission was made before the tribunal during the course of the hearing leading to the impugned order. However, in case such a submission was made and not considered by the tribunal, the appropriate remedy would have been to file an application seeking to bring on record the submission of the appellant Revenue made before the Tribunal.

5. In view of the above, as the impugned order merely follows its own order in respect of the assessee's own case for Assessment Year 2004-05 and same having been dismissed by the Tribunal and the appeal from the same also having been dismissed by this court, we see no substantial question of law arising for our consideration. Accordingly appeal is dismissed.

(G.S. KULKARNI,J.) **(M.S. SANKLECHA, J.)**