IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 61 OF 2016

M/s Zephyr Biomedicals
Plot No.13, Sagar Society,
Dona Paula, Panaji Goa.
Represented by its Partner
Shri Natarajan Sriram,
56 years of age,
s/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula,
Panaji Goa 403 004 … Appellant

Versus

ACIT, Circle – 1(1),
Aaykar Bhavan,
Plot No.5, EDC Complex,
Patto, Panaji Goa. …. Respondent

Mr. Pramod Vaidya and Ms. Ninotska Pimenta, Advocates for the appellant.

Ms. Asha Desai, Advocate for the respondent.

Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.

Date:- 10th October, 2016

<u>ORAL JUDGMENT</u> (Per F. M. Reis, J)

Heard Mr. Pramod Vaidya, learned counsel appearing for the appellant and Ms. Asha Desai, learned counsel appearing for the respondent.

2. Admit on the following substantial questions of law.

(i) Whether on the facts and circumstances of the case, the ITAT is right in upholding the disallowance of the assessee's claim of commission payment to non resident not appreciating that the commission was not liable to tax as per the provisions of the Income Tax Act, 1961 ?

(ii) Whether the ITAT was right in upholding the disallowance under Section 40(a)(ia), by applying the Explanation 2 to Section 195 when there was no chargeability to tax of income as per the provisions of the Income Tax Act, 1961 ?

3. Heard with the consent of the learned counsel.

4. The learned counsel appearing for the respondent waives service.

5. Briefly, the facts of the case are as follows :

The appellant filed their return of income and declared a total income of Rs.8,35,850/-. An Assessment Order under Section 143(3) of the Income Tax Act was passed by the respondent for the Assessment Year 2006-2007 on 16.12.2008. Being aggrieved by the said Order, the appellant preferred an appeal before the learned Commissioner of Income Tax (Appeals), Panaji. The learned Commissioner by order dated 28.08.2013 allowed the claim of the appellant as regards the non applicability of TDS on payment of commission to the non resident. The respondent preferred an appeal challenging the relief granted by the learned Commissioner on the applicability of Section 40(a)(ia) of the Income Tax Act. The appellant also filed a Cross Objections claiming deduction under Section 80IB on disallowance under Section 40(a)(ia) before the learned Tribunal. The learned Tribunal by an order dated 08.06.2015 directed the Assessment Officer to readjudicate and examine the issue as to the applicability of deduction under Section 80IB and thereby upholding the disallowance under Section 40(a)(ia). Being aggrieved by the said order, the appellant preferred the present appeal.

6. The learned counsel appearing for the appellant has taken us through the order of the learned Tribunal to point out that without giving any reason the matter has been remanded to the Assessment Officer on a spacious ground that a new plea has been raised by the appellant herein. The learned counsel has thereafter taken us through the order passed by the learned Commissioner to point out that the learned Commissioner has rightly come to the conclusion that there is no case of disallowance of the assessee's claim of commission payment to non resident. The learned counsel further submits that the appellant was not liable to deduct tax and that vide Circular No. 786 dated 07.02.2000, the CBDT has clarified that when non resident operates outside the country, no part of his income arises in India and as the payment is usually remitted directly abroad, it cannot be said to have received by or on behalf by the agent in India. The learned counsel further submits that the CIT (Appeals) has rightly found that a person paying interest or any other sum to a non resident is not liable to deduct tax if such sum is not chargeable to tax in India. The learned counsel further points out that the Commissioner has found that since no

part of the income of Harizanto Supungkat was assessed in India, the appellant was not liable to deduct tax at source. The learned counsel further points out that the learned Tribunal has erroneously restored the issue of claim of deduction under Section 80IB for readjudication and examination as to the applicability of Section 80IB and allowance of the same if found eligible. The learned counsel further points out that an alternate claim of the appellant under Section 80IB in respect of disallowance under Section 40(a)(ia) is a step subsequent to disallowance under Section 40(a)(ia) and the Tribunal by sending back the issue of deduction under Section 80IB of disallowance under Section 40(a) (ia) committed an error in applying Explanation 2 to Section 195 which would come into play if the income is chargeable to tax as per the provisions of the Income Tax Act.

7. The learned counsel further submits that the appellant are not liable to tax is no longer res integra in view of the judgment of this Court passed in Tax Appeal No. 20 of 2016 dated 18.04.2016 and the judgment of this Court passed in Income Tax Appeal No. 169 of 2014 dated 08.12.2015. The learned counsel as such points out that the substantial questions of law be answered in favour of the appellant.

8. On the other hand, Ms. Asha Desai, learned counsel appearing for the respondent supports the impugned order but however does not dispute that the issues involved in the present appeal are covered by the said judgments. The learned counsel also points out that the claim of the appellant of deduction under Section 80IB in respect of the disallowance under Section 40(a)(ia) was in alternative.

9. We have considered the submissions of the learned counsel and we have also gone through the records. In the judgment dated 18.04.2016 passed in Tax Appeal No. 20 of 2016 in the case of ***the Principal Commissioner of Income Tax V/s M/s Karishma Global Mineral Export Pvt. Ltd.,*** this Court has observed at para 6 thus :

> **6.** We have considered the submissions of the learned Counsel and we have also gone through the records. It is not disputed that the commission paid to Mrs. Sita Ram Parodkar has been assessed to tax by the Revenue. Both the authorities upon appreciating the evidence on record has found that the Revenue has failed to establish that the transaction was not genuine. In fact, the amount paid by the respondent to the said commission agent has not been disputed as admittedly such

amount was taxed at the hands of the said Assessee. In such circumstances, we find that the question of interference in concurrent finding of fact on this aspect would not be justified. The Division Bench of this Court in the case of ***Commissioner of Income-tax V/s. Noshira Dara Mody*** (supra) where one of us (F.M. Reis, J.) was a party has observed at paras 6 & 7 thus:

> 6. We have considered the submissions of the learned counsel and also gone through the records. On perusal of the order passed by the Commissioner, we find that the payment of commission to said Pradeep Shirodkar was duly accepted by the Commissioner to hold that the respondent – assessee was entitled for deduction in terms of Section 37 of the Income Tax Act. The Tribunal whilst re-assessing the findings of the Commissioner, has also confirmed the said findings and has also taken note of the fact that said Pradeep Shirodkar had also given a statement admitting the receipt of commission to the extent of Rs.8,00,000/- from the assessee.

This statement corroborated the returns filed by said Pradeep Shirodkar which also, inter alia, disclose the receipt of the commission from different persons. Considering that the facts finding authorities have concurrently come to the conclusion based on material on record that the amount of commission was paid to Pradeep Shirodkar and as such the respondent is entitled to deductions under Section 37 of the Income Tax Act, we find no perversity in the said findings which would result in a substantial question of law which could be examined in the present appeal. The learned Tribunal has dealt with payment of commission at para 4.3.7 of the impugned order dated 05.07.2013 and has given cogent reason on the basis of the material on record to dismiss the contention of the appellant with that regard.

7. The Apex Court in the judgment reported in ***(2005)2 SCC 324*** in

the case of ***M. Janardhana Rao V/s Joint Commissioner of Income Tax*** has observed at paras 10 and 15 thus :

> "**10**. Some of the provisions of Section 260-A are in pari materia with various sub-sections of Section 100 CPC. The provisions are Sections 260-A(1), 260-A(2)(c), 260-A(3), 260-A(4) of the Act corresponding to Sections 100(1), 100(3), 100(4) and 100(5) CPC.
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> …
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> ...
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> **15**. An appeal under Section 260-A can only be in respect of a "substantial question of law". The expression "substantial question of law" has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. this Court laid down the following tests to determine

whether a substantial question of law is involved. The tests are: (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question in the sense that the issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact."

Similar view has been taken by the Apex Court in the judgment reported in ***(2011) 1 S.C.C. 673*** in the case of ***Vijay Kumar Talwar Vs Commissioner of Income Tax, Delhi*** by observing at para 23 thus :

"**23**. A finding of fact may give

> > rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See Madan Lal v. Gopi, Narendra Gopal Vidyarthi v. Rajat Vidyarthi, Commr. of Customs v. Vijay Dasharath Patel, Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v. CESC Ltd.)"
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> Taking note of the said observations, we find that the issue sought to be raised by the first substantial question stands concluded."

10. In the present case, it is not disputed that the said Harizanto Supungkat who is a non resident has no taxable income in India and

taking note of the observations of this Court in the said judgment referred to herein above, we find that the question of the learned Tribunal interfering in the order of the learned Commissioner and remitting the matter to the Assessing Officer is not at all justified. The substantial questions of law are answered in favour of the appellant herein.

11. In view of the above, we pass the following :

<u>O R D E R</u>

(i) The appeal is allowed.

(ii) The impugned order dated 08.06.2015 passed by the Income Tax Appellate Tribunal, Panaji is quashed and set aside

(iii) The appeal stands disposed of accordingly with no order as to costs.

NUTAN D. SARDESSAI, J **F. M. REIS, J**

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