IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 53 OF 2015.

ZUARI MANAGEMENT SERVICES LIMITED, a Company incorporated under the Indian Companies Act, 1956 (Act 1 of 1956), through its Authorized representative Shri Anandu Vithal Nayak, having its registered Office at Jaikishan Bhawan, Zuarinagar, Goa 403726 …... Appellant.

V E R S U S

Commissioner of Income Tax having his office address at "Aayakar Bhavan", Plot No.5, EDC Complex, Patto Plaza, Panaji, Goa. …... Respondent.

Mr. Salil Kapoor, Senior Advocate with Mr. Sumit Lalchandani, Ananya Kapoor, Mr. Sanil Kapoor, Mr. D.J. Pangam, and Ms. K. Naik, Advocates for the appellant.

Ms. Asha Dessai, and Ms. S. Sawant, Advocates for the respondent.

CORAM :- SMT. R.P. SONDURBALDOTA &
C.V. BHADANG, JJ..

Reserved on : 28th November, 2016.

Pronounced on : 23rd December, 2016.

<u>J U D G M E N T</u> : (Per SMT. R.P. SONDURBALDOTA, J.)

This appeal, at the instance of the Assessee is directed against the order dated 28th January, 2014, passed by the Commissioner of Income-tax ("CIT" for short), under Section 263 of the Income Tax Act ("IT Act" for short) and the order dated 16th February, 2015 passed by the Income Tax Appellate Tribunal ("ITAT" for short) on the appeal preferred against the order of the CIT. On 4th April, 2016, the appeal was admitted on the following substantial question of law :

> "Whether the authorities below were justified to uphold the powers exercised under Section 263 of the Income Tax Act by CIT without recording a finding that the Assessment Order is erroneous and prejudicial to the interest of Revenue and that the assessment in the previous assessment years was accepted by the Revenue ?"

2. The appellant Company was incorporated on 6th December, 2006 under the name "M/s. Zuari SEZ Ltd." with the

objective to set up and develop Special Economic Zone (SEZ), information technology and information technology enabled services. Two years thereafter, i.e. on 27th February, 2008, the name of the company was changed to "M/s. Zuari Infrastructure and Developers Ltd." with a view to expand its activity to real estate development. There was third change in the name of the company on 7th January, 2011 to the present name of the appellant i.e. "Zuari Management Services". The dispute raised in the present appeal is in respect of the Assessment Year 2009-10.

3. The assessee Company filed return of income for the A.Y.2009-10 declaring total income of Rs. Nil and claiming loss of Rs. 36109708/- under the head "profits and gains" of business and long term capital loss of Rs. 4651437/-. The same loss was claimed as loss to be carried forward as pertained to A.Y. 2009-10. The case of the assessee Company was selected for scrutiny under CASS. On 28th December, 2011 the assessment order u/s 143(3) of the Income Tax Act was passed, accepting the income returned. The relevant part of the assessment order reads as under:-

> "The assessee-company is set up with the objectives of developing Special Economic Zone Information technology and also of real estate development activities. During the year the company transferred shares of Zuari Developers held by it and computed loss under the head long terms capital gain.
>
> After discussion with the assessee's representative and perusal of the details produced assessment is completed as under.
>
> Computation of income
>
> Total income as per return Nil."

4. The assessee company was served with notices dated 25th October, 2013 under Section 263 of the Income Tax Act for the A.Y. 2009-10 stating that the above assessment order was erroneous and prejudicial to the interest of revenue as the assessing officer had not looked into the following aspect while completing the assessment.

> "During the previous year relevant to the assessment year the company has not commenced its business of development of SEZ/Real estate. The company has obtained

loans from holding company amounting to Rs. 49,81,00,000 in the F.Y.2007-08 and utilized for investing in shares of subsidiary company M/s. Zuari Developers Private Ltd. amounting to Rs.8,26,75,564/- and giving loans to subsidiary company of Rs.42,16,40,630/-. The interest payable/paid on the above said loans amounting to Rs.3,56,51,678 and other incidental expenses amounting to Rs.4,69,544 [36121222-35651678] aggregating to Rs.3,61,21,222 was charged to the profit and loss account as expenses incurred during the P.Y. relevant to A.Y.2009-10 and computed business loss of Rs.3,61,09,708 and claimed the said loss to carry forward to subsequent years. Under the provisions of the Income Tax Act, 1961, any expenditure exclusively incurred for the purpose of the business is an allowable deduction. Since the company has not commenced its business and the loan availed was not used for the purpose of its business of development of SEZ/real estate business, the expenditure claimed is required to be disallowed and the loss claimed be carry forward to subsequent years is required to be

> disallowed and the loss claimed be carry forward to subsequent years is required to be denied. Failure to do so has resulted in loss allowed to carry forward of Rs. 3,61,09,708 involving notional tax effect of Rs. 1,22,73,689. [i.e. 33.99% of Rs. 3,61,09,708].

5. After giving due hearing to the assessee company the CIT passed the impugned order dated 28th January, 2014 under section 263 of the IT Act setting aside the assessment order dated 28th December, 2011 and directing the Assessing Officer to pass fresh order after verifying the claim of the assessee company in respect of carry forward of the loss of Rs. 36109708/-.

6. The assessee company challenged the order of CIT by preferring appeal to the ITAT contending that invoking of jurisdiction under section 263 of the Income Tax Act by the CIT was erroneous because the assessment order was neither erroneous nor prejudicial to the interest of the revenue and that it had been passed after making detailed enquiries during the course of

assessment proceedings. It was also contended that the CIT erred in ignoring the fact that the business of the appellant was set up as well as commenced during AY 2008-09 when it had borrowed money from holding company and lent it to subsidiary company, which represents one of the objects of the appellant. The ITAT dismissed the appeal by its detailed order dated 16th February, 2015. Therefore, the present appeal which is in the nature of this second appeal.

7. Before this Court, in addition to the grounds of challenge before ITAT, the assessee company, has set up two more grounds. It alleges that the order of the CIT suffers from non-application of independent mind and that the order passed by him is a non-speaking order. We find no merit in both the contentions. Though the record shows that there was a reference made by the CIT to the Assessing Officer pointing out the error in the Assessment Order, merely for that reason it cannot be said that there was no application of independent mind by the CIT. This is because under Section 263 of the IT Act, the CIT can *suo motu*

exercise his jurisdiction thereunder. As regards the objection of the order of CIT being a non-speaking order, we find that the order though not as elaborate as the Order of the ITAT, does not suffer from lack of reasons. The order clearly makes out that the assessment order is erroneous and has adverse effect on the interest of the Revenue.

8. Mr. Kapoor the learned Senior Counsel appearing for the appellants submits that once the Assessing Officer acting in according with law makes a certain assessment the same cannot be ordered as erroneous merely because the CIT views the same differently. He also submits that there is no finding of the CIT that the order sought to be revised was erroneous or prejudicial to the interest of the Revenue. He argues that it was imperative for the CIT to give positive finding that the order of the Assessing Officer was erroneous and not in the interest of the Revenue, and for this reason, the first impugned order is invalid. Mr. Kapoor further submits that it is established principle of law that for an order to be termed as erroneous it must be not in accordance with law, also

for the order to be held prejudicial to the interest of the Revenue, the consequence of the erroneous order must be, the revenue to the State either has not been realised or cannot be realised. This fact must be established on the basis of the material on record. In support of his submissions, Mr. Kapoor relies upon the following decisions of our High Court and of the Apex Court :

(1) ***Commissioner of Income-tax vs. Gabriel India Ltd.,*** [203 ITR 108 (Bombay)]***;***

(2) ***Jewel of India vs. Assistant Commissioner of Income-tax;*** [2010] 325 ITR 93 (Bombay)

(3) ***Malabar Industrial Co. Ltd. vs. CIT;*** [243 ITR 83 (SC)]

(4) ***CIT vs. Max India Ltd.***, [295 ITR 282 (SC)].

There can be no dispute as regards the propositions of law canvassed by Mr. Kapoor on exercise of revisional jurisdiction by the CIT under Section 263 of the IT Act. Therefore, the only question that is required to be considered is whether on application of these propositions of law the two impugned orders can be sustained.

9. The first requisite for exercise of revisional jurisdiction

is that the order of the Assessing Officer is erroneous on the ground of not being in accordance with law. The CIT in his order has held that the Assessing Officer has not taken into account the relevant consideration of absence of actual business activity of the appellant for the purpose of treating the expenditure claimed as an allowable expenditure. Perusal of the assessment order quoted above substantiates these observations of the CIT. Therefore, in our opinion, the first requisite of law stands satisfied.

10. The second requisite is of the loss to the revenue on account of the error in the assessment order. The impugned orders observe that the Assessing Company during the previous year, relevant to the Assessment Year 2009-10, has not commenced the business of development of SEZ/Real Estate and that the Company had merely obtained loan from the holding company amounting to Rs.49,81,00,000/- in the financial year 2007-08 and utilized it for investing in share of subsidiary company M/s. Zuari Developers Pvt. Ltd., to the extent of Rs.8,26,75,564/- and giving loans to subsidiary company to the extent of Rs.42,16,40,630/-. The

interest paid on the loans amounted to Rs. 3,56,51,678/- and other incidental expenses, amounting to Rs. 4,69,544/- were charged to the Profit and Loss Account as expenses incurred during the P.Y. relevant to the assessment year 2009-10. On the basis of this business loss of Rs.36,10,09,708/- was computed and claimed as loss to be carried forward to subsequent years. In the opinion of the CIT and ITAT since the Company had not commenced its business of development of SEZ/Real Estate, the expenditure claimed could not have been treated as the expenditure incurred for the purpose of business. As such, it was denied. Since the expenditure was not allowable expenditure, it amounted to irregular allowances of loss. Such loss was allowed to be carried forward to the extent of Rs.1,78,57,950/- and involved notional tax effect of Rs. 60,69,917/- (33.99% of Rs.1,78,57,950/-). This notional tax effect is directly attributable to the error in the assessment order. Therefore, even the second requisite is satisfied.

11. For all these reasons stated herein above, the appeal is seen to be without merit and hence dismissed.

C.V. BHADANG, J. **SMT. R.P. SONDURBALDOTA, J.**

ssm.