IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.20 OF 2016

The Principal Commissioner of
Income Tax, Having office at
Aayakar Bhavan, Panaji-Goa. …. Appellant
V/s
M/s. Karishma Global Mineral
Export Pvt. Ltd., Kamat Towers,
206, 2nd floor, Patto Plaza, Panaji-Goa. …. Respondent

Ms. Asha Desai, Advocate for the Appellant.
Mr. Jitendra Jain with Mr. H.D. Naik, Advocate for the Respondent.

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

Date:- 18th April, 2016

ORAL ORDER :

Heard Ms. Asha Desai, the learned Counsel appearing for the appellant and Mr. Jitendra Jain, the learned Counsel appearing for the respondent.

2. The above appeal challenges the order passed by the Income Tax Appellate Tribunal interi alia disallowing the contention of the appellant that the commission paid to the commission agent was not based on a genuine transaction by the respondent as according to the appellant/Revenue, the commission agent was not capable of carrying out any work as such. The next contention is that on the commission paid no TDS was deducted.

3. Ms. Asha Desai, the learned Counsel appearing for the appellant has submitted that on perusal of the orders passed by the Assessing Officer it clearly shows that there is a specific finding therein to the effect that the transaction of payment of commission to the agent was not a genuine transaction and, as such, the question of deducting such amount from the income of the respondent was not justified. The learned Counsel has thereafter pointed out that the Commissioner of Income Tax (A) as well as the Income Tax Tribunal have erroneously noted that the appellant/Revenue has failed to produce any evidence to show that the transaction was not genuine when according to her though the said commission agent was called for personal verification she failed to remain present despite of the notice. The learned Counsel further pointed out that though M/s. De Long Minerals and Logistics which is a non resident company established abroad, but however, the income has to be deemed to be income in India and, as such, it was incumbent upon the respondent to deduct the tax at source. The learned Counsel further points out that in view of the failure on the part of the respondent to deduct tax at source the appellant is entitled to claim amounts from the respondent.

4. On the other hand, the learned Counsel for the respondent has pointed out that both the contentions raised in the present appeal stand concluded in view of the two judgments passed by this Court by relying upon the judgment of the Apex Court. The learned Counsel appearing of the respondents has taken us through the judgment reported in ***(2014) 50 193 (Bombay)*** in the case of ***Commissioner of Income-tax V/s. Noshira Dara Mody*** to point out that this Court has taken a view that when the commission agent himself has been taxed on the commission the question of holding that such transaction is not genuine cannot be accepted. The learned Counsel has taken us through the observations at para 6 & 7 to point out that this question of fact cannot be reappreciated by this Court in an appeal under Section 260A of the Income tax Act.

5. With regard to the next contention, the learned Counsel appearing for the respondent has pointed out that admittedly M/s. De Long Minerals and Logistics is not taxed in India and, as such, according to him the question of deducting tax at source would not arise at all. The learned Counsel has relied upon the judgment of this Court reported in ***2015 94 CCH 0148 MumHC*** in the case of ***Commissioner of Income Tax V/s. Gujarat Reclaim & Rubber Products Ltd.*** which has relied upon the judgment of the Apex Court reported in ***125 ITR 525*** in the

case of ***CIT V/s. Toshoku Ltd.***

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.)"

Taking note of the said observations, we find that the issue sought to be raised by the first substantial question stands concluded.

7. As far as the second contention of Ms. Asha Desai, the learned Counsel appearing for the appellant, we find that the Division Bench of this Court in the case of ***Commissioner of Income Tax V/s. Gujarat Reclaim & Rubber Products Ltd.*** (supra) relying upon the judgment of the Apex Court in the case of ***Toshoku Ltd.*** (supra) has observed at para 5(g),5(h) & 5(i) thus:

> (g) We find that the common order of the Tribunal while dealing with the order of the CIT(A) for the Assessment Year 2008-09 also considers the order of the CIT(A) for the Assessment Year 2007-08 while dealing with the Revenue's contention as reflected in the orders of the Assessing Officer which are similar for both the Assessment Years. In fact, the reasons for the order of the CIT(A) for Assessment Year 2007-08 are identical to the Assessing Officer's orders in both the Assessment Years i.e. the earlier Circular Nos.23 of 1969 and 786 of 2000 stand withdrawn by Circular No.7 of

2003. Therefore, the earlier Circular which cover the issue would not be applicable/ available for the Assessment Years 200708 and 2008-09. In fact, the CIT(A) in his order for Assessment Year 2008-09 while allowing the appeal of the Respondent-Assessee places reliance upon the decision of the Tribunal in case of Ardeshi B. Cursetjee (supra) which in turn relies upon the decision of the Supreme Court in ***CIT v/s. Toshoku Ltd. 125 ITR 525*** wherein on almost identical facts, the Apex Court held that the commission earned by the nonresident agent who carried on the business of selling Indian goods outside India, cannot be said have deemed to be income which has accrued and/or arisen in India. This view of the CIT(A) for Assessment Year 2008-09 was found acceptable by the Tribunal in its impugned order and applied the same even for Assessment Year 2007-08. In view of the fact that the issue sands concluded in favour of the Respondent-Assessee by the decision of the Supreme Court in Toshoku Ltd. (supra). The Revenue has not shown any change in the law in the subject Assessment Years which would warrant our not following the Apex Court's decision;

(h) Moreover, we find CBDT Circular No.23 of 1969 has been reproduced – in the impugned order and the relevant extract reads as under: *"Foreign agents of Indian exports – a foreign agent of Indian exporter operates in his own country and no part of his income arises in India. His commission is usually remitted directly to him and is,therefore, not received by him or on his behalf in India. Such an agent is not liable to income tax in India on the commission."*

This Circular of 1969 was admittedly in force during the two Assessment Years. It was only subsequently i.e. on 22nd October, 2009 that the earlier Circular of 1969 and its reiteration as found in Circular No.786 of 2000 were withdrawn. However, such subsequent withdrawal of an

> earlier Circular cannot have retrospective operation as held by this Court in ***UTI v/s. P. K. Unny and Others 249 ITR 612.***
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> (i) In view of the above, not only the entire issue stands concluded in favour of the Respondent-Assessee in the present facts by the CBDT Circular Nos. 23 of 2969 and 786 of 2000 which were in force during the subject Assessment Years but also by the decision of the Apex Court in Toshoku Ltd. (supra) in favour of the Respondent-Assessee. Thus, no substantial question of law arises in the question framed for our consideration. Accordingly, Question (a) not entertained.

8. In the present case, it is not disputed that the said company M/s. De Long Minerals and Logistics is not having any establishment in India. It is also not established that any income of the said company is assessed in India or any tax is paid on that count in India. In such circumstances, the observations of the Apex Court relied upon by this Court in the judgment of ***Commissioner of Income Tax V/s. Gujarat Reclaim & Rubber Products Ltd.*** (supra) would be squarely applicable to the facts of the present case.

9. Hence, we find that there are no substantial questions of law which arise in the above appeal. The appeal sands accordingly rejected.

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

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