IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 418 of 2014 (O&M)

Date of Decision: 2.2.2016

B.K. Jain

....Appellant.

Versus

Commissioner of Income Tax, Ludhiana

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**
**HON'BLE MRS. JUSTICE RAJ RAHUL GARG.**

PRESENT: Mr. Sachin Bhardwaj, Advocate for the appellant.

Mr. Rajesh Katoch, Advocate for the respondent.

**AJAY KUMAR MITTAL, J.**

1. Delay of 203 days in filing the appeal is condoned.

2. This appeal has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (in short “the Act”) against the order dated 18.10.2013 (Annexure A-7) passed by the Income Tax Appellate Tribunal, Chandigarh Bench “A”, Chandigarh (hereinafter referred to as “the Tribunal”) in ITA No. 34/CHANDI/2013, for the assessment year 2004-05, claiming the following substantial questions of law:-

(i) Whether under the facts and circumstances of the case, the exparte order in the revisional jurisdiction u/s 263 is sustainable, while concealing the pendency of departmental appeal in the High Court u/s 260A and assessee's absence could be the reason which has been attributed for declining the benefit by the Tribunal?

(ii) Whether under the facts and circumstances of the case, the Tribunal order is unwarranted/ unreasonable while upholding the additions, whereas the another co-ordinate bench of the Tribunal order remands the case to AO, hence divergent orders qua the same case?

(iii) Whether under the facts and circumstances of the case, the Tribunal order is unwarranted/ unreasonable while upholding the additions, whereas the Hon'ble High Court has upheld the order of the another co-ordinate bench of the Tribunal in the appeal of the department?

3. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee is a Chartered Accountant by profession and is engaged in the job of giving accommodation/book entries to various persons making investments in long/short term capital gain/gifts/loans on commission basis. He filed his return for the assessment year 2004-05 on 30.3.2005 declaring the income of ₹ 15,00,000/-. The said return was processed under Section 143(1) of the Act on 12.4.2005. The proceedings were initiated for scrutiny by issuance of a notice under Section 143(2)/142(1) of the Act along with a questionnaire dated 5.10.2006 on 6.10.2006. A survey under Section 133A of the Act was conducted on 15.6.2004 at the office of the assessee and consequently at various other persons on 29.6.2004

(Shri Manoj Kumar), 25.6.2004 (Shri Sagun Garg) and 2.8.2004 (Pardeep Khanna) whose statements were recorded under Section 131 of the Act and thereafter information under Section 133(6) of the Act was called from various Banks, LSE Securities Ltd. The Assessing Officer vide order dated 29.12.2006 (Annexure A-1) framed the assessment at an amount of ₹ 1,01,25,140/-. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"]. The CIT(A) vide order dated 29.9.2008 (Annexure A-2) partly allowed the appeal. Against the order, Annexure A-2, the assessee and the revenue filed appeals before the Tribunal. The Tribunal vide order dated 29.4.2010 (Annexure A-4) partly allowed the appeal of the assessee and remanded the matter to the Assessing Officer for re-adjudication on certain points alone and dismissed the appeal of the revenue. Both, the revenue as well as the assessee assailed the order of the Tribunal before this Court vide ITA Nos. 38 of 2011 and 363 of 2011. During the pendency of the said appeals before this Court, the Assessing Officer passed the assessment under Section 143(3) read with Section 254 of the Act vide order dated 29.12.2011 (Annexure A-5). Accordingly, the Commissioner of Income Tax (in short "the CIT"), in pursuance to the order of the Assessing Officer, Annexure A-5, issued a show cause notice dated 24.5.2012 under Section 263 of the Act. The CIT vide order dated 7.11.2012 (Annexure A-6) enhanced the assessment framed by the Assessing Officer by ₹ 29,25,782/- [₹ 14,43,658/- qua wrong allowance of trading loss from shares and ₹ 14,82,124/- qua non-inclusion of income assessed by the Assessing Officer despite being assessed by the CIT(A)]. The assessee assailed the order, Annexure A-6, before the Tribunal who vide order dated

18.10.2013 (Annexure A-7) dismissed the appeal. Hence, the present appeal.

4. We have heard learned counsel for the parties.

5. The CIT upon examining the assessment order passed under Section 143(3) read with Section 254 of the Act found that the same was erroneous and prejudicial to the interest of the revenue. The income was enhanced by ₹ 29,25,782/- by the CIT on two counts:-

(i) ₹ 14,43,658/- qua wrong allowance of trading loss from shares;

(ii) ₹ 14,82,124/- qua non-inclusion of income assessed by the Assessing Officer despite being assessed by the CIT(A).

6. Taking up the first issue of wrong allowance of trading loss from shares amounting to ₹ 14,43,658/-, the Tribunal while upholding the revisional order of the CIT had noticed as under:-

> "The reading of above paras of the assessment order clearly shows that the Assessing Officer has wrongly understood the order of the Tribunal and has given wrong effect to the same. The assessee was required to prove the source of investment for which some additions were made in the earlier years. However, the assessee ultimately dealt with the issue on results of share transactions and the Assessing Officer accepted the same and allowed loss of ₹ 14,43,688/- which was neither the direction of the Tribunal nor a finding of the ld. CIT(A) in the appeal proceedings before the first appellate authority. In fact when the

> profits itself has been estimated there is no question of computing the loss in respect of share trading. Moreover before us the ld. counsel of the assessee has very clearly admitted on 17.9.2013 that this was clearly an error committed by the Assessing Officer. Therefore, we hold that the assessment order to the extent of allowing loss from trading in shares is erroneous and prejudicial to the interest of the Revenue."

7. Adverting to the non-inclusion of income assessed by the Assessing Officer despite being assessed by the CIT(A), the relevant findings of the Tribunal may be noticed with advantage which are as under:-

> "15. As far as second issue is concerned, we are unable to agree with the contention of the assessee that the issue is not originating from assessment order. There is no force in the contention made through written submissions that this issue pertains to assessment order dated 29.12.2006. In fact the assessment order dated 29.12.2006 was challenged before the ld. CIT(A) and then before the Tribunal and the present assessment order dated 29.12.2011 is in continuation of same proceedings because this order is passed to give appeal effect to the order of the Tribunal passed u/s 254. When an addition was already made for the first time the same cannot be ignored while giving appeal effect to the order of the

Tribunal in the last order and, therefore, it is clear that error has been committed in the latest order while giving appeal effect. The same is regarding computation of estimated profit earned on account of share dealing done by the assessee with Shri R.K. Kohli and Co. and others.

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Thus from above it is clear that the Id. CIT(A) during appeal proceedings before him has confirmed this addition particularly after noticing that the Assessing Officer has himself made additions of ₹ 14,82,124/- by invoking the provisions of Section 154 by order passed u/s 154.

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17. Now this addition should have been made part of the order of assessment while giving effect to the order of the Tribunal but the Assessing Officer has conveniently forgot ten to make addition to the income and therefore, his order has become erroneous and prejudicial to the interest of the Revenue and the Ld. Commissioner has correctly held accordingly and directed the Assessing Officer to make addition on these two items i.e. in respect of wrong loss allowed to ₹ 14,43,688/- and ₹ 14,82,124/- on account of estimated loss. Therefore, in our opinion, revisionary

order passed u/s 263 in respect of these two issues does not require any interference and we confirm the same.

18. XX XX XX XX

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19. Before parting we would like to observe that this case seems to be a total negligence on the part of the Assessing Officer. In fact the way the order has been passed it is giving a feeling that same has been done with ulterior motive and in such cases revenue should always conduct enquiries."

8. No error or perversity could be demonstrated in the order of the CIT and the Tribunal. The Tribunal had legally and validly affirmed the revisional order of the CIT passed under Section 263 of the Act while dismissing the appeal of the assessee.

9. In view of the above, there is no error in the approach of the Tribunal as the Assessing Officer had gone beyond the remand order passed by the Tribunal on 29.4.2010. Accordingly, no substantial question of law arises in this appeal. Consequently, there is no merit in the appeal and the same is hereby dismissed.

**(AJAY KUMAR MITTAL)**
**JUDGE**

**February 2, 2016** **(RAJ RAHUL GARG)**
gbs **JUDGE**