**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**INCOME TAX APPEAL NO. 64 OF 2016**

Digambar Bhaurao Patil (Hotalkar)
Prop. Gangaramji Ginning and
Pressing Factory Naigaon .. Appellant

**Versus**

Income Tax Officer, Ward - 3(2) Nanded .. Respondent

**WITH
INCOME TAX APPEAL NO. 71 OF 2016**

Digambar Bhaurao Patil (Hotalkar)
Prop. Gangaramji Ginning and
Pressing Factory Naigaon .. Appellant

**Versus**

Income Tax Officer, Ward - 3(2) Nanded .. Respondent

Shri Raviraj Chandak, Advocate h/f Shri D. S. Ladda, Advocate for the Appellant in both matters.
Shri Alok Sharma, Standing Counsel for the Respondent in both matters.

**CORAM : S. V. GANGAPURWALA AND
K. L. WADANE, JJ.
DATE : 09TH JANUARY, 2017.**

**PER COURT :**

. The common judgment and order passed by the Income Tax

Appellate Tribunal is assailed in present income tax appeals.

2. Mr. Chandak, the learned counsel holding for Mr. D. S. Ladda, the learned counsel for appellant submits that, the appellant is engaged in the business of Ginning and Pressing and is proprietor of Gangaramji Ginning and Pressing Factory, Naigaon, Tq. Naigaon, Dist. Nanded. The learned counsel submits that, the appellant had filed regular return of income for the Assessment Years 2007-2008 and 2008-2009, which is duly received by the office of Income Tax Officer. The respondent thereafter issued notice U/Sec. 142(1) of the Income Tax Act, 1961 (for short "said Act") for filing of return in appropriate form. Thereafter, within fifteen days, the respondent issued further notice U/Sec. 148 of the said Act thereby proposed to assess the income U/Sec. 147 of the said Act for the assessment years 2007-2008 and 2008-2009. The learned counsel submits that, the appellant at the relevant time was undergoing kidney treatment. The business and office matters personally could not be looked into and they were managed through consultant, manager and the employees.

3. The learned counsel submits that, in response to the notice e-return of income was filed. The petitioner declared total income of Rs. 4,18,543/- for the assessment year 2007-2008 and Rs. 6,50,175/- for the assessment year 2008-2009. The learned

counsel submits that, the respondent did not consider the request made by the appellant on 11.02.2011 and again issued statutory notice U/Sec. 142(1) of the said Act. Hearing was fixed on 15.03.2011. Because of the ill health of the appellant, appellant could not appear. The queries were received by the appellant. Thereafter, written submissions were made. The respondent issued letter to produce the books of accounts. Thereafter on 28.12.2011 the respondent passed the assessment order U/Sec. 143(3) read with Sec. 147 of the said Act and assessed the income of Rs. 25,07,654/- for the assessment year 2007-2008 and Rs. 1,21,51,569/- for assessment year 2008-2009. Interest was also directed to be charged. Notice of demand was issued.

4. The learned counsel further submits that, the appellant being aggrieved by the said order preferred appeals before the Commissioner of Income Tax (Appeals). The appellant submitted revised financial statements, balance sheet, profit and loss account, etc. So also explained the circumstances. The Commissioner (Appeals) directed the assessing officer to forward his report. Pursuant thereto assessing officer forwarded his report. The Commissioner (Appeals) issued notice U/Sec. 251(1) of the said Act. Thereafter the Commissioner (Appeals) partly allowed the appeals. For the assessment year 2007-2008 it confirmed the order of the assessing officer to the extent of Rs. 70,000/- only, whereas for the assessment year 2008-2009 it

confirmed the order of assessing officer to the extent of Rs. 1,60,583/-. The learned counsel further submits that, the Department filed appeals before the Income Tax Appellate Tribunal, Pune. Upon hearing being conducted the Income Tax Appellate Tribunal partly allowed the appeals filed by the Department and directed liability of Rs. 18,20,687/- for the assessment year 2007-2008 and Rs. 49,10,860/- for the assessment year 2008-2009. The learned counsel submits that, it was erroneous on the part of the Tribunal to hold that the additional evidence cannot be produced before the Commissioner (Appeals) in view of Rule 46-A of of the Income Tax Rules. Additional evidence in certain circumstances can be produced before the Commissioner (Appeals). The appellant was complying with said conditions. The Tribunal has accepted the factum about ill-health of the appellant. In view of that, under Rule 46-A(b) of the Income Tax Rules, the additional evidence was permissible. The Tribunal has committed an error in holding that same is not permissible.

5. The learned counsel further submits that, notice U/Sec. 147 of the said Act is *per-se* illegal. The regular returns filed U/Sec. 139 of the said Act were not assessed by the office. As returns are not being assessed, the department could not have issued notice U/Sec. 147 of the said Act. To substantiate said contention the learned counsel relies on the judgment of the Division Bench of

Delhi High Court in a case of **KLM Royal Dutch Airlines Vs. Assistant Director of Income Tax** reported in ***2007(2) AD 502***. According to the learned counsel, inspite of the fact that, the assessment of return was pending, the proceedings U/Sec. 148 of the said Act was initiated and same is not permissible. According to the learned counsel, even though these grounds were not raised before the Commissioner (Appeals) and the Income Tax Appellate Tribunal, this being a question of law can be considered by this Court.

6. Mr. Sharma, the learned counsel for the respondent submits that, U/Sec. 143 of the said Act, if no intimation has been given, then it is deemed that, return has been accepted. The learned counsel submits that, the appellant at no point of time raised this objection before the assessing officer or the Commissioner (Appeals) or the Apellate Tribunal. For the first time has raised this objection in the present appeals. The same is not permissible. The appeal against the judgment of the Tribunal can only be entertained on substantial question of law U/Sec. 268 of the said Act. The learned counsel submits that, though under Rule 46-A of the Income Tax Rules under certain circumstances additional evidence is permissible, however, it is not permissible to rewrite books of accounts and statement afresh. The appellant had submitted fresh accounts and not additional evidence. The same is rightly dealt with by the

Tribunal. Mr. Sharma, the learned counsel relies on the judgment of this Court in Writ Petition No. 1807 of 2011 dated 29.01.2014.

7. We have considered submissions canvassed by the learned counsel for respective parties. There cannot be any debate with the proposition that the appeal against the judgment and order of the Income Tax Appellate Tribunal can only be entertained on substantial question of law. The same is the mandate of Sec. 268 of the said Act.

8. The appellant after having received notice U/Sec. 147 and 148 of the said Act submitted to the jurisdiction of the authority and did not raise any objection at the relevant point of time and allowed the proceedings to proceed. The appellant submitted fresh accounts before the Commissioner (Appeals). The cognizance of which was also taken. The purpose of the assessment proceedings before the taxing authorities is to assess the correct tax liability. All the material placed by the appellant has been considered by the authorities. Upon consideration of the said material, the authorities have arrived at conclusion. We cannot enter into the factual dispute in the present appeal, unless it is shown that there is manifest illegality or on facts the finding is perverse. No such case appears to have been made out in the present matters. The bone of contention of the appellant

appears to be that the proceedings U/Sec. 147 and 148 of the said Act could not have been initiated. The said objection was never raised at any material point of time before any of the authorities or the Tribunal. On the contrary the appellant submitted to the jurisdiction of the authorities. The authorities considered entire evidence on record and thereafter have arrived at a conclusion. As observed above, the process of assessment is to be undertaken to assess the correct tax liability which has been done in the present matters. We could have considered objection of the appellant, had it been raised at the relevant time before proceeding were proceeded further. Not having done so and on facts conclusions have been drawn by the authorities, which are plausible, it would be too late in the day for this Court to consider the said objection.

9. In the light of the above, no substantial question of law arises, as such, the appeals are dismissed. No costs.

**[ K. L. WADANE, J. ]** **[ S. V. GANGAPURWALA, J. ]**

bsb/Jan. 17