IN THE HIGH COURT OF BOMBAY AT GOA.

Tax Appeal No.60/2016

The Pr. Commissioner of Income Tax,
Having its office at Aayakar Bhavan,
Patto-Plaza,
Panaji-Goa. Appellant

Versus

M/s. Bandekar Brothers Pvt. Ltd.,
Suvarna Bandekar Building,
P.B.No.11, Swatantrapath,
Vasco-da-Gama, Goa.
PAN NO.AAACB5502B Respondent

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Ms. A. Razaq, Advocate for the Appellant.
Shri P. Karpe, Advocate for the Respondent.

CORAM : ANOOP V. MOHTA &
NUTAN D. SARDESSAI, JJ.
RESERVED ON : 14/03/2017.
PRONOUNCED ON : 20/03/2017.

JUDGMENT (Per Anoop V.Mohta, J) :

1. Admit. Heard finally by consent.

2. The appellant the revenue department has preferred this appeal under Section 260 A of the Income Tax Act, 1961 ("Act") and the Income Tax Rules,1962 ("the Rules" made thereunder) whereby challenge the order of the Income Tax Appellate Tribunal, ("ITAT")Panaji Bench, Panaji dated 5.8.2015 (Assessment year 2006-07). By order dated 5.8.2015 ITAT Bench dismissed the Revenue Appeal against the order of Commissioner of Income Tax (Appeals), Panaji, dated

22.10.2013. The Commissioner of Income Tax (Appeals) allowed the respondent-assessee appeal against the assessment order dated 10.10.2011 thereby direct A.O. to delete addition made on account of under valuation of closing stock. This resulted into reversal of the A.O.Order by both the Appellate Authorities. Therefore, this appeal on 4.1.2016 by the appellant.

3. The issue involved in the appeal is revolving around the relief granted to the assessee in respect of valuation of closing stock of low grade iron ore.

4. The points for determination so raised by the appellant as under:-

A. Whether the Tribunal is justified in upholding the order of CIT (A) by simplicitor reliance on an order passed by the coordinate bench in ITA No.29/PNJ/2008 for assessment year 2004-05, without discussing and considering the facts interse an applicability thereof between the assessee's case in the present proceedings in proper perspective?

B. Whether the impugned order passed by the Tribunal is sustainable in as much as the order does not disclose application of mind assigning any reasons what so ever while dismissing the appeal filed by the revenue save and except observations at para

10 which are cryptic?

C. Whether the Tribunal is justified in law in upholding the deletion on account of under valuation of closing stock in the light of omission/failure on the part of assessee in filing a revised return u/s 139(5) during the pendency of reassessment proceedings initiated pursuant to note u/s 148 of the Act?

D. Whether the order passed by the Tribunal is contrary to the law declared by the Hon'ble Supreme Court reported in 189 ITR (SC) (ALA firm Vs. CIT), 188 ITR 44 (CIT Vs. British Paints India Ltd.) & 284 ITR 323)Goetze India Ltd., VS. CIT)?

5. The background which led to file this appeal is as under:-

The respondent-Assessee is a Company engaged in the Mining, Transport & Allied activities.

I. The assessee e-filed return of income on 31.10.2006, declaring a total income at Rs. 56,83,06,395/- Assessment under section 143(3) was completed on 18.03.2008 on a total income of Rs. 53,62,65,431/-. Thereafter it was noticed that an income of Rs. 3,20,40,964/- was reduced from total income returned by assessee due to additions made towards closing stock as assessee was not valuing the lumpy ore & low grade iron ore. Said return was processed and the case was thereafter taken up for scrutiny.

II. The Assessing Officer (AO) by order dated 18.10.2011 added the value of lumpy ore of Rs. 6,50,05,000/- (including the value of reduction in total income is Rs. 3,20,40,964/-) to the total income of the assessee.

III. Aggrieved by AO's order the Assessee filed an appeal before the Commissioner of Income Tax (A), Commissioner of Income Tax (A), Commissioner of Income Tax (A), after hearing the parties by order dated 22.10.2013, allowed the appeal thereby directing AO to delete the addition made on account of under valuation of closing stock.

IV. Aggrieved by the order passed by the Commissioner (Appeals) (CITA), the appellant filed an appeal Tribunal (ITAT), Tribunal by order dated 05.08.2015, dismissed the appeal of the Revenue upholding the order of CIT (A).

6. A preliminary objection was raised by the learned counsel appearing for the respondent based upon the clarification of Circulars 21/2015, 8/2016 dated 23rd January, 2017 (Circular No.5/2017) issued by the Government of India, Ministry of Finance, Department of Revenue Central Board Direct Taxes specifically referring the following paragraphs 1 to 3 as under:-

> "Subject:Measures for reducing litigation -Clarification on Circulars 21/2015 and 8/2016 reg.
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> Instructions were issued vide CBDT Circular No.21/2015 dated 10.12.2015, to the effect that appeals/SLPs should

not be filed in cases where tax effect does not exceed the monetary limits specified under para 3 of the said Circular. It was also clarified therein that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed in the said Circular.

2. In para 8 of the aforesaid Circular No.21/2015, it has been unambiguously and expressly provided that adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in Circular or even if there is no tax effect:

a. Where the Constitutional validity of the provisions of an Act or Rule are under challenge, or.

b. Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or.

c. Where Revenue Audit Objection in the case has been accepted by the Department.

d. Where the addition relates to undisclosed foreign assets/bank accounts.

The direction to contest on merits' negates the mechanical filing of appeals in these cases.

3. However, it has been noticed that para 8 (c) of Circular No.21/2015, regarding cases where addition made on account of Revenue Audit Objection is deleted, is being erroneously interpreted and appeals are being mechanically filed by the Department without proper examination of the case on merits. This is contrary to the instructions contained in Circular No.21/2015 and Circular No.8/2016. It is, therefore, clarified that the import and intent of para 8 of the Circular No.21/2015 is that even on issues mentioned in the said para, appeals

> against the adverse judgment should only be filed on merits.
>
> 4. Accordingly, henceforth, appeals should not be filed by the Department in violation of instructions mentioned above. Further appeals that may have been filed in violation of these instructions may be withdrawn.

7. To the preliminary objection, the submission is made by the learned counsel appearing for the appellant that this is the case where the appellant on verifying the provisions of law and record and after due deliberation comes to the conclusion to challenge the orders on its merit, as contemplated under Circular 5 of 2017. The endorsements are made accordingly on the respective assessee file and the record. The files are also brought in Court in support of the submission and the statement is made those endorsements can be seen even by the Court.

8. Considering the scheme and purpose of the Income Tax Act, Rules and the Circulars, and the concern measures for reducing litigation so issued from time to time, still we have to consider the fact and circumstances of the case including its merits specially when once the appellant has taken decision to challenge the orders in appeal as done in the present case with a clear endorsement on record to proceed and challenge the orders on merits. We are not inclined to accept the case of assessee

counsel that those endorsements need to be verified and/or seen by the Court and/ or by the parties. Keeping in mind the Circulars and the position of law including the elements so referred in the Circulars. The appellant, department's points of law so agitated/required to be considered on its own merits. They have filed this appeal under Section 260 A of the Income Tax Act. At this stage, therefore, the Appellate Court would not be in a position to test or give its opinion on the endorsements so made by the appellant department after examining the record to challenge and filed in the appeal. The provisions and power so provided with the appellant, in our view, need not be interfered with at this stage of filing of appeal. However, this is always subject to the hearing of appeal of questions of law and/or points of law so raised. The Appellate Court required to be considered those questions/respective appeals in accordance with law in-spite of endorsements and/or decision so taken by the department to challenge the orders passed by the lower Appellate Court/Assessment Officer. Merely because there are endorsements made to challenge the appeal on merits that itself cannot be the reason for the higher Appellate Court or Appellate Bench or Court under Section 260 A or such other Sections to accept the question of law without hearing the parties. The procedure so contemplated of hearing of such appeals by the higher Appellate Forum required to be followed. In the present case, therefore, we are not inclined to accept the preliminary objection so raised by the counsel for the assessee. However, we are inclined to proceed with the hearing of the matter on its own merits based upon the points so raised in the background of the litigation so recorded.

9. It is clarified here that there is no issue with regard to the monetary limits where tax effect does not exceed the monetary limits given. The relevant paragraph of Circular dated 21/2015 is reproduced as under:

> "3. Henceforth, appeals/SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:-

S.No	Appeals in Income-tax matters	Monetary Limited (In Rs.
1	Before Appellate Tribunal	10,00,000/-
2	Before High Court	20,00,000/-
3	Before Supreme Court	25,00,000/-

10. Even this contention in the fact and circumstances and in view of tax effect limit is more that Rs.20,00,000/- need no further discussion as sought to be contended by learned counsel appearing for the assessee based upon the Circulars so referred above. If case is made out, we have to consider clause (2) of the Circular (5/2017) dated 23.1.2017, even if monetary limits is more or less as prescribed in the circular. The Apex Court has expressed in [2013] 350 ITR 300

(SC) Commissioner of Income-Tax Vs. Surya Herbal Ltd.as under:-

> "Delay condoned.
>
> Liberty is given to the Department to move the High Court pointing out that the Circular dated February 9, 2011, should not be applied ipso facto, particulaly, when the matter has a cascading effect. There are cases under the Income-tax Act, 1961, in which a common principle may be involved in subsequent group of matters or a large number of matters. In our view, in such cases if attention of the High Court is drawn, the High Court will not apply the Circular ipso facto. For that purpose, liberty is granted to the Department to move the High Court in two weeks."

11. Section 260 A of the Income Tax Act, has been inserted with effect from 1.10.1998 and amended on 1.6.1999 by Finance Act, 1998. This Section makes the provision for filing an appeal in the High Court from any order passed in appeal by the Tribunal, however, it is subject to the opinion/satisfaction/decision of the High Court that a substantial question of law is involved. What is the meaning of substantial question of law has been settled by the Supreme Court in AIR 1962 SC 1314 (Chunnilal V. Mehta & Sons Vs. Century Spinning & Manufacturing Co.Ltd. & (2005) 273 ITR 50 (SC) M Janardhana Rao Vs. Joint CIT, followed by many judgments.

12. It is also settled that the High Court may frame the question of law before deciding the appeal or by answering it finally. The High Court need to dispose off the appeal after framing the issues, if case is

made out. Non-framing of issues and deciding the appeal without it, is unacceptable situation : [2016] 388 ITR 482 (SC) Jai Hind Cyhcle Company Ltd. Vs. Commissioner of Income Tax. It is, therefore, required to frame the proper and correct question of law before giving any opinion by the High Court while deciding such appeal on merits : [2016] 383 ITR 195 (SC) Liberty Footwear Co.Vs. Commissioner of Income Tax.

13. The perversity of facts in a given case may also be treated as, on facts and circumstances, a substantial question of law: Sudarshan Silks & Sarees Vs. CIT 300 ITR 205. There are various situations and questions, which may arise where the High Court need to frame the question of law based upon the record as the concept "substantial question of law" has not been defined specifically. Therefore, in a given case the principle of Section 100 of the Code of Civil Procedure may be kept in mind while dealing with Section 260 A of the Income Tax Act.

14. We have to consider in the present case, therefore, whether the question, so raised, in the appeal falls within the ambit of substantial question of law, keeping in mind the concurrent findings of fact against the department given by two Appellate Authorities and whether any substantial question of law including of any perversity in the findings so recorded is made out by the appellant. We have also to

see whether on facts and circumstances both the Appellate Authorities right in passing the order in favour of the assessee and against the appellant. This is specifically in the background of clear observation and the fact that the appellant unable to place any additional evidence/documents in support of their grounds so raised in appeals except the order passed by A.O. We have noted, after going through the reasons given by the Appellate Authorities, that no case is made out by the department to interfere with the concurrent findings so given as the same is not contrary to the record and/or the law.

15. There is no question of law arose for consideration less a substantial question of law so framed in the appeal so recorded above. We see no infirmity in the order passed by the Appellate authorities.

16. In case in hand the cross-appeal, as such, not filed by the assessee but still on record it reflects that he has been taxed twice by the A.O. to the extent of Rs.32040964/- . The Appellate Authorities on merit reversed the order passed by the A.O. and the second Appellate Authority has maintained the reversal order. The finding, so recorded on facts, therefore, there is no scope for interference by the High Court (M. Janardhana Rao Vs. JCIT, 273 ITR 50 (SC).

17. The explanation offered by the assessee was not taken note of and not recorded by the A.O. However, the Appellate Authorities have

taken into consideration all the facts, evidence and recorded the factual finding, which according to us, call for no interference. There is no question of re-appreciating and/or appreciating the evidence to reach a conclusion other than reached by the Appellate Authorities merely because A.O. has taken particular and/or possible view.

18. The following are the additional reasons not to interfere with the following findings confimred & given by the Tribunals:-

> "Since the assessee has consistently following the method of accounting and no such addition has been made in earlier years, even though the assessee is in the business for so many years, we are not persuaded by the contention that the asseee would get benefit of opening stock in the following year. In fact the correct procedure which could have been followed by the A.O. is to consider the amount of opening stock of low grade iron ore also while bringing to tax the entire stock available, which might have been produced over a period of many years, in the closing stock of this year which certainly distort the profits of this year. Since we are not in agreement with the addition of closing stock of unrealisable low grade iron ore, we have no hesitation in deleting the addition so made by the A.O. Acccodingly the grounds raised in the cross objection are considered allowed A.O. is directed to delete the addition."

> "8 Departmaental Represetnative simply relied on the order of the Assessing Officer. He could not point out

> any specific error in the order of Commissioner of Income Tax (Appeals).
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> 10. We have considered the rival submissions of both the parties and persued the material available on record. The Commissioner of Income Tax (Appeals) has deleted the addition made by the Assessing Officer by following the order of this Bench of the Tribunal in assessee's own case in assessment year 2004-05 in I.T.A.No.29/PNJ/2008 dated 07/08/2009. Therefeore, we find no good reason to interfere with the order of the Commissioner of Income Tax (Appeals), which is confirmed and the ground of appeal of the Revenue is dismissed."

19. Therefore, there is no case made out by the department under Section 260 A of the Income Tax Act to admit the appeal for final hearing. There is no perversity pointed out and/or referred. The conclusions so drawn by the Higher Authorities based upon the material available on record and it is well within the framework of law.

20. This is not the case where the question of fact can be treated and convert as question of law for want of additional material and/or material on record. After hearing the parties and after going through the reasons given by the Appellate Authorities and the conclusions so drawn cannot be stated to be adverse and/or contrary to the record and/or law. The Tribunal's orders and the conclusions, so drawn, could not be stated to suffer from any legal infirmities.

21. It is also settled that timely Circulars issued by the CBDT under the provisions of the Income Tax Act, required to be kept in mind while entertaing/admitting and/or deciding the appeal. The reasons, therefore, so given referring to those Circulars have been kept in mind while passing this order as on merits also we have noted that there is no substantial question of law involved or arose. Therefore, there is no occasion to frame or reframe any additional question of law for the reason above recorded. We are dismissing the appeal at the admission stage itself.

22. In view of the above, we are inclined to observe that there is no substantial point for determination involved. There is no non-application of mind. The concurrent finding reflects the position on facts in the case in hand. There was no question to file the revised return on facts. The orders passed by the Appellate Authorities are not contrary to law specifically to the judgmnts cited by and referred in the order of Assessing Officer. The grounds so raised are distinct and distinguishable on facts itself. Therefore, following resultant order:-

Order

(a) The appeal is dismissed.

(b) No costs.

NUTAN D. SARDESSAI, J. **ANOOP V. MOHTA, J.**

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