IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.16 of 2016

The Principal Commissioner of Income Tax,
Having office at Aayakar Bhavan,
Patto – Plaza,
Panaji – Goa. ….. Appellant

Versus

Mr. Ramchandra Naidu
Prop. M/s. Shakti Sales Corporation
Belgaum Bypass Road,
Ponda, Goa,
PAN : ADAPN4702F ...Respondent.

Ms. A. Razaq, Advocate for the appellant.

Shri D. E. Robinson, Advocate for the respondent.

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

Date :- 24th July,2017.

ORAL JUDGMENT: (per F.M. REIS,J.)

Heard Ms. A. Razaq, learned advocate for the appellant and Shri D. E. Robinson, learned advocate for the respondent.

2. The above appeal challenges the Order dated 28/11/2014 passed by the Income Tax Appellate Tribunal, Panaji (ITAT, for short) in Income Tax Appeal no.47/PNJ/2013 for the Assessment Year

2009-10 whereby the appeal preferred by the assessee came to be allowed.

3. Briefly, the case of the appellant was that the respondents filed a return of income for the Assessment Year 2009-2010 declaring total income of ₹1,08,24,020/-. The Assessing Officer by an order dated 25/11/2011 completed the assessment by making addition under various heads such as vehicle expenses, deprecation of motor car etc. and adjusted the refund towards the arrears for Assessment Year 2005-06. Thereafter, on 17/12/2012, exercising the powers under Section 263 of the Income Tax Act, 1961 (The Act, for short) the Commissioner of Income Tax found that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue and, as such, set aside the assessment order by restoring the matter to the file of the Assessing Officer afresh for passing a fresh assessment order. The ITAT by an order dated 28/11/2014 allowed the appeal holding that the Commissioner of Income Tax had no jurisdiction to take action under Section 263 of the Act taking the view that the order passed by the Assessing Officer is not erroneous or prejudicial to the interest of the Revenue and against the said order the above appeal came to be filed.

4. The learned Counsel for the appellant submitted that the learned Tribunal was not justified in setting aside the order passed by the Commissioner of Income Tax under Section 263 of the Act when the twin conditions for invoking the power under Section 263 of the Act had been fully satisfied. The learned Counsel further points out that the assessee filed its return of income on 18/01/2010 for the year 2009-10 which case was selected for scrutiny and the Assessing Officer by order dated 28/11/2014 concluded the assessment. The learned Counsel further points out that the Commissioner of Income Tax has jurisdiction to take action under Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the Revenue. The learned Counsel further submits that the Assessing Officer during the scrutiny has erroneously accepted the figures submitted by the assessee which entitled the Commissioner to exercise powers under Section 263 of the Act. In support of the submissions, the learned Counsel relied upon the Judgment of the Apex Court reported in 1968 67 ITR 84 SC in the case of **Rampyari Devi Saraogi v/s. Commissioner of Income Tax** and another judgment of the Apex Court in the case of **M/s. The Malabar Industrial Co. V/s. Commissioner of Income Tax** passed on 10/02/2000.

5. On the other hand, the learned Counsel for the respondent

has supported the impugned order passed by the learned tribunal. It is further pointed out that at the time of scrutiny, there was physical verification of the stock which led to the original assessment. It is also pointed out that as such the question of appreciating the value of the stocks as intended by the Commissioner for the year is misplaced and not a known manner of accounting. It is further submitted that any error by the Assessing Officer does not by itself be pre-judicial to the interest of the revenue to invoke such powers under Section 263 of the Act. There is no basis for the Commissioner to exercise powers under Section 263 of the Act, and as such there are no substantial questions of law which arise in the present appeal considering the well-reasoned order of the learned Tribunal.

6. We have considered the submissions of the learned Counsel and we have also gone through the records. On perusal of the order passed, the learned Tribunal noted that in order to exercise powers under Section 263 of the Act, both the conditions namely that an order passed by the Assessing Officer is erroneous and that it is prejudiced to the interest of the Revenue must be satisfied and if one of them is absent, it may be held that the provisions of Section 263 of the Act are not lawfully invoked. The learned Tribunal further noted that the Assessing Officer had clearly

discussed the inquiry carried out during the time of scrutiny to which the assessee have replied all the queries raised by them. Relying upon the judgment of this Court in the case of **CIT V/s Gabriel India** reported in 114 CTR 81 (Bom), it is found that if the inquiry was conducted and the explanation was accepted by the Assessing Officer who was satisfied by the same, it did not make the order erroneous simply because the Assessing Officer did not make elaborate discussion with that regard. The learned Tribunal also noted that the Commissioner of Income Tax also did not find that the view taken by the Assessing Officer was erroneous. The learned Tribunal also noted that the physical stock was taken by the Assessing Officer on 20/02/2009 and during the course of the survey proceeding the quantity of the stock from both the books as well as physical verification was available to the Assessing Officer. The learned Tribunal further found that the assessment under Section 143 was completed accepting both the books result. The learned Tribunal further noted that there was no fault with the Assessing Officer's order for not having restored to estimate and the order under Section 143 cannot be termed as erroneous. The learned Tribunal noted the judgment reported in (2009)319 ITR 339 in the case of **Commissioner of Income Tax v/s. Utkal Alloys Ltd.** wherein it is held that in the course of search, the search party did not find any incriminating document or duplicate books of accounts involving the respondent – assessee in any clandestine business activity and the department could not find out any omission of important purchaser / sale from the assessee's books of account or any entry in the books of account were not supported by voucher. The addition has been made on the basis of estimate of stock worked out on the basis of the said purchases. The learned Tribunal further found that in case of wrong opinion or finding on merits, the Commissioner of the Income Tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required before the Order under Section 263 of the Act is passed. After examining the different judgments of the Court the learned Tribunal came to the opinion that in order to exercise powers under sub-Section 1 of the Section 263 of the Act, there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interest of the Revenue. The learned Tribunal also noted that the order can not be said to be prejudicial to the interest of the Revenue if it is not in accordance with the law in consequence whereof lawful Revenue dues to the State have not been realised. The learned Tribunal also noted the judgment of the Apex Court reported in (2000) 243 ITR 83 SC in the case of **Malbar Industrial Co.Ltd. V/s. Commissioner of Income-tax** where it has been observed that every loss of Revenue as a consequence of the order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. The learned Tribunal as such found that the order passed by the Assessing Officer was not erroneous or prejudicial to the interest of the Revenue or to take action under Section 263 of the Act.

7. In the present case, as already observed herein above the Assessing Officer had raised queries to the respondents which were duly replied by the respondents. The reply / clarification submitted by the assessee were accepted by the Assessing Officer and the assessment order was passed accordingly. The statement of stock submitted was brought to the notice of the authorities and upon appreciation of the material on record, the learned Tribunal came to the conclusion that the assessment order passed by the Assessing Officer was under due scrutiny and clarification sought from the assessee which cannot be said to be erroneous.

8. Considering that the learned Appellate Tribunal has found that the conditions specified under Section 263 of the Act have not been satisfied, the question of invoking such powers would not arise. Admittedly, in the present case earlier a survey action was carried out on the respondents on 20/02/2009 and thereafter regular assessment was made under Section 143(3) on 25/11/2011. It is

also admitted that the physical stock as on 20/02/2009 was taken by the Assessing Officer, which is available on record. It is also contented that the paper books in respect of the stock from 20/02/2009 to 31/03/2009 is available which meant that the Assessing Officer accepted the value of stocks as per the accounts of the Assessee and without making any assessment. When such physical verification of stocks was carried out during the period of regular assessment the question of now valuing the stock and adding 10% for every annum is not at all justified. The manner of such estimate of stock on the basis of last year G.P. of 10% as again the books which were accepted by the Assessing Officer earlier cannot be accepted. The learned Tribunal as such rightly found that the question of taking the impugned action in terms of Section 263 of the said Act would not at all be justified. The manner of assessing the respondents in the regular assessment has not been shown to be erroneous. The learned Tribunal has minutely examined the material on record to come to the conclusion that the impugned action is unsustainable and there is no perversity in the findings of the learned Tribunal. The learned Counsel appearing for the appellant was unable to point out in what manner the assessment by Assessing Officer was erroneous. The judgment of the Apex Court relied upon by the learned Counsel for the appellant is not applicable to the facts of the present case. As observed therein loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When an Assessing Officer has proceeded in a particular manner and the Assessing Officer has followed one of the permissible processes in law which has resulted in loss of revenue, it cannot be said to be prejudiced to the revenue and as such, we find there is no substantial question of law which arises in the present appeal. In the circumstances, considering the order of the learned Tribunal examining all the material on record, we are of the opinion that there are no substantial question of law in the above appeal which is stands dismissed, accordingly.

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

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