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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1744 OF 2014

Darashaw and Company Pvt. Ltd. ..Petitioner

-vs-

The Deputy Commissioner of Income-Tax ..Respondents
Range 4(1)

WITH
INCOME TAX APPEAL NO. 807 OF 2014

Darashaw and Company Pvt. Ltd. ..Petitioner

-vs-

The Deputy Commissioner of Income-Tax ..Respondents
Range 4(1)

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Mr.S. E. Dastur, Senior Advocate a/w. Mr. Madhur Agarwal i/b. S. R. Rudolph for the Petitioner in WP/1744/2014 and for the Appellant in ITXA/807/2014.

Mr. A. R. Malhotra a/w. Mr. N. A. Kazi for the Respondent in ITXA/807/2014.

Mr. Suresh Kumar for the Respondent in WP/1744/2014.

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CORAM : S.C. DHARMADHIKARI
A. K. MENON, JJ.

DATE : 1st September, 2017

P.C.:

1. Rule. By consent rule is made returnable forthwith.

2. Respondents waive service.

3. The writ petition is directed against order passed by the Income Tax Appellate Tribunal Bench at Mumbai dated 12th June, 2013.

4. The facts and circumstances in which this order is challenged can be briefly set out. The Assessment order was passed for the Assessment year 2008-09. The Assessing Officer in the order dated 10th May, 2010 considered the returns filed on 29th September, 2008 declaring a total loss at Rs. 11,44,66,190/- under normal provisions. Tax payable has been calculated at the rate of Rs.34,60,805/- under section 115JB of the Income Tax Act, 1961 on book-profit of Rs. 3,05,45,502/- This return was processed under section 143(1) on 26th September, 2009 determining refund of Rs. 66,02,489/-. The case was selected for scrutiny and notice under section 143(2) was issued and served on the assessee. Further notice under section 142(1) was issued.

5. The assessee company is engaged in the business of share and debt broking, trading in Debt securities, Mutual Fund Distribution and other financial services. The assessee also made investments in shares and debt securities. The Assessing Officer summarized the issues *inter-alia* for his consideration. One of which was expenditure attributable to earn exempt

income. The Assessing Officer observed that the assessee has received dividend income of Rs. 44,91,580/-. This claim is exempt under section 10(34) of the Income Tax Act, 1961. It was also observed that the assessee has allocated an amount of Rs. 1,75,583/- only in earning the dividend income. The assessee was asked during the course of scrutiny of assessment proceeding as to why expenditure incurred earning the dividend income should not be disallowed under section 14A r.w. with Rule 8D. The representative of the assessee and present before the Assessing Officer argued and what is material for our purpose is the submission of Mr. Dastur, learned Senior Counsel appearing for the petitioner. He submits that it was without prejudice to the main argument. The main argument was if they were assessing any funds and which were utilized for making investment in shares and that is how dividend income was earned, then, no expenditure should be attributed and apportioned for this dividend income. This argument was based on the judgment of this Court and which has been delivered in ITXA/4117/2010 and *Commissioner of Income Tax vs Reliance Utilities and Power Ltd. [2009]313 ITR 340* .

6. The Tribunal in considering this issue did not agree with the Assessing Officer in the initial order but still came to the conclusion that

there is a submission made by the assessee and based on that the issue needs to be answered in terms of paragraph 22 of the initial order dated 12th June, 2013. The Tribunal came to the conclusion that the balance sheet of the assesee as exhibited at page 1 of the paper books supports the contention of the Counsel that assessee has sufficient and own funds to cover up the investments. Therefore following the Judgment of the jurisdictional High Court namely in the case of *Reliance Utilities and Power Ltd. (supra)* the dis-allowance as computed by the assessee under Rule 8D at Rs.39,19,175/- which was over and above the dis-allowance as done by the Assessing Officer but adjusting that amount of Rs. 1,75,883/-, the Tribunal made a dis-allowance.

7. From the record it appears that being aggrieved and dissatisfied with this part of the order a Rectification Application was made invoking section 254(2) of the Income Tax Act, 1961. The Rectification Applications styled as M.A. No. 447 & 448/MUM/2013 were disposed of on 7th March, 2014 but the Tribunal held that there is no mistake which needs to be rectified.

8. We have heard Mr. Dastur, learned Senior Counsel appearing for the petitioner who, as above would submit that there was a patent and obvious error in the initial order of the Tribunal dated 12th June, 2013.

He would submit that once the word “without prejudice” was employed by the assessee's representative during the course of argument then its legal consequences ought to be borne in mind. There is therefore no admission. When such is the submission of the assessee's representative, it cannot be construed as a concession of the assessee either. The Tribunal relied upon it and without assigning any independent reasons, worked out the dis-allowance. That is despite the Tribunal referring to the binding judgment of this Court in the case of *Reliance Utilities and Power Ltd. (supra)*.

9. On the other hand Mr. Suresh Kumar would submit that the Tribunal has committed no error nor was there any mistake in its initial order. It is the response to the assessee's own statement or submission and relying on the balance sheet, as also the contentions raised before it, that the Tribunal held as above. Therefore as and when the assessee has also brought an appeal against initial order of the Tribunal before this Court all the more we should not entertain this petition.

10. We have considered these submissions and with the assistance of the learned Senior Counsel perused the entire petition and that part of the order of the Tribunal which was covered by the Miscellaneous Application, we find that if the jurisdictional High Court Judgment in the case of

Reliance Utilities and Power Ltd. (supra) was held to be binding on the Tribunal, why the Tribunal had to fall back on alternative dis-allowance computed by the assessee and that too without prejudice has not been clarified at all. In the initial order as well as in the order on the Miscellaneous Application for rectification the Tribunal has assigned the same reasons. We do not think that a without prejudice submission and made strictly in the alternative should have influenced the tribunal to such an extent.

11. In the peculiar facts and circumstances it was for the Tribunal to have extensively carried out the exercise and scrutinise the order of the Assessing Officer, whether the order deserved to be upheld on the issue. That having not been done, we set aside both the initial orders of the Tribunal as also orders on the Miscellaneous Application dated 12th June, 2013 and 7th March, 2014 respectively. We restore Income Tax Appeal and that particularly of the assessee bearing ITA No. 225/MUM/2011 to the file of the Tribunal and direct the Tribunal that the same shall be decided on its own merits and in accordance with law. While deciding the appeal afresh Tribunal should allow the assessee to contend that the dis-allowance worked by the Assessing Officer, particularly the assessee's without prejudice and alternative submission should not influence its final

decision. Equally all contentions of the Revenue should also be considered while disposing of the appeal afresh pursuant to our decision. We clarify that we have not expressed any opinion on the rival contentions. We also direct that the appeal shall be decided uninfluenced by the findings and conclusion in the order which we have set aside.

12. In the light of the above conclusion the assessee's Appeal no. 807 of 2014 does not survive and stands disposed of accordingly.

(A. K. MENON, J.) **(S.C. DHARMADHIKARI, J.)**