IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.245 OF 2015

Golden Tobacco Ltd.
(formerly known as GTC Industries Ltd.) .... Appellant
Vs.
The Asstt. Commissioner of Income-tax-
8(1), Mumbai - 400 020 .... Respondent

Mr. Jitendra Jain with Mr. Sameer Dalal for the Appellant.

Mr. Arvind Pinto for the Respondent.

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

**DATE : ** SEPTEMBER 12, 2017

P.C:

1. The assessee/appellant is aggrieved by an order passed by the Tribunal initially on 19-6-2013.

2. Later on the appellant/assessee moved an application invoking Section 254(2) of the Income Tax Act, 1961 ("the I.T. Act, 1961" for short) requesting the Tribunal to

correct a mistake which, according to the appellant, is apparent from the initial order. The Tribunal refused to take cognizance even of that request made in writing. It made a further order rejecting that application.

3. We have heard Mr. Jain, appearing for the appellant/assessee and Mr. Pinto, appearing for the respondent/Revenue.

4. The appellant claims that it had right to occupy residential units in a holiday resort at Goa. The appellant-company in order to further its business prospects promoted a holiday scheme. The scheme envisaged payment of initial lumpsum amount by the purchaser towards purchase of a Unit Week and in lieu of which the purchaser was entitled to occupy a residential unit in the resort for a specified week every year. This right could be given by the appellant on the basis that it had an authority to exclusively occupy the residential units in the resort. These were shown as intangible assets in its books under the head 'Property time sharing unit'. On that basis

depreciation was claimed. The details were also filed appended with a note. The appellant had leased out a part of these units to one M/s. Old Anchor Club. For the immediate assessment year but preceding the subject-assessment year, the case of the appellant was selected for scrutiny assessment and during the course of which the Assessing Officer addressed a letter dated 17-2-2006 to the appellant to show cause as to why its claim should not be disallowed. A reply was filed on 7-3-2006 (Exhibit-B) and after considering the same, a detailed order was passed dealing with the issue in the assessment proceedings.

5. Once again, for the Assessment Year 2004-05, the case of the appellant was selected for scrutiny. After examining the details of income and expenditure, the Assessing Officer examined the depreciation chart and called upon the appellant to furnish further details. The details were supplied and after examining them, an assessment order was passed. The assessment order disallowed the claim for depreciation, aggrieved by which an appeal was filed before the Commissioner of Income Tax (Appeals).

6. On 6-3-2009, the Commissioner of Income Tax (Appeals) issued a show cause notice to the appellant under Section 263 of the I.T. Act, 1961 proposing to revise the assessment order passed by the Assessing Officer as, according to him, he had failed to make the necessary inquiries while allowing the appellant's claim for depreciation and also while allowing its claim pertaining to diminution in the value of shares.

7. This was for the Assessment Year 2004-05 and the notice dated 6-3-2009 was replied. However, the Commissioner of Income Tax passed an order on 26-3-2009 invoking Section 263, aggrieved by which the matter was carried to the Tribunal.

8. The Tribunal, according to Mr. Jain appearing for the assessee, was duty bound to decide whether the power under Section 263 could at all have been exercised given the facts and circumstances of this case. Their peculiar nature would, according to Mr. Jain, enable the Tribunal to conclude

that this was not a fit case for invoking that provision.

9. The grievance of Mr. Jain is that unmindful of all this, the Tribunal proceeded on the footing that the appellant is not questioning the invocation of Section 263 but the manner in which the power thereunder has been exercised. Therefore, the Tribunal mistook the matter at the initial stage as containing a very limited request. It, therefore, disposed of the main appeal in a short but cryptic order without adverting to the basic and fundamental issue raised for its consideration.

10. Mr. Jain invited our attention to para 5 of the Tribunal's order, running page 153, and which is impugned in this appeal. Thereafter, he invited our attention to page 156 of the paper-book, which is a copy of the application styled as Miscellaneous Application seeking to rectify mistake in the order passed on 19-6-2013. In that Mr. Jain would submit that the Tribunal was obliged to consider whether the provision enabling the Commissioner to arrive at the conclusion that the Assessing Officer has passed an order prejudicial to the interest of the

Revenue can be at all invoked. He would submit that the Tribunal must consider in the facts and circumstances of this case as to whether the Commissioner could have arrived at the conclusion that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the Revenue. It was the invocation of that provision and the exercise of power thereunder which was faulted, according to Mr. Jain and throughout. In such circumstances, the Tribunal's order is vitiated by total non-application of mind and can be safely termed as perverse as well.

11. On the other hand, Mr. Pinto would submit that the Tribunal's conclusion in the peculiar facts and circumstances cannot be termed as perverse and all the more when the Tribunal, in para 5 of the initial order, has clarified by directing the Assessing Officer to verify whether the property time sharing unit actually falls under the category of intangible assets. Hence, the issue is at large and there is no prejudice to the appellant.

12. After giving our thoughtful consideration to the rival

contentions and perusing the order under challenge, we are of the firm opinion that the Tribunal was, firstly, required to consider as to whether the ingredients of Section 263 are at all attracted and satisfied in the facts and circumstances of the present case enabling the Principal Commissioner/Commissioner to step in. If the preconditions of the said provision are not at all fulfilled, then, whether the Commissioner was still justified in stepping in, was, therefore to say, the prime issue. It has found that his intervention was justified though the manner of exercise of the power thereunder could have been faulted and modified the direction through its order. However, without commenting in any manner and concluding that the invocation of the power was justified, the Tribunal has disposed of the matter. In a way it has made a short shrift or resorted to a shortcut. We do not think that this is a satisfactory way of deciding appeals and as a last fact finding authority. It was incumbent on the Tribunal to have gone into the facts and circumstances and equally the legal issue in depth and it could have arrived at a different conclusion or could have maintained the order of the Commissioner but with independent and satisfactory reasons. There being no independent application of mind, we do not think that the initial order can be sustained. Hence, we proceed to **admit** this appeal on the following substantial questions of law:-

> *"(A) Whether, on the facts and in the circumstances of the case, and in law, the revision under section 263 of the Income Tax Act of the assessment order was called for?*
>
> *(B) Whether, on the facts and in the circumstances of the case, and in law, the revision order passed by the Respondent under section 263 of the Income Tax Act, 1961 was bad, illegal and without jurisdiction?"*

13. For the reasons that we have assigned and being dissatisfied with the manner of disposal of the appeal, we do not think that the proceedings be kept pending before this Court as that would prejudice the interest of both the assessee as well as the Revenue. In the circumstances, we quash and set aside the initial order of the Tribunal dated 19-6-2013. Once that order is quashed and set aside, nothing survives in the Miscellaneous Application under Section 254(2) of the I.T. Act, 1961. Therefore, that order of the Tribunal on that application is also

quashed and set aside. The appeal (Income Tax Appeal No.3106/Mum/2009) before the Tribunal stands revived and restored for consideration afresh. It shall be decided afresh on merits and in accordance with law, uninfluenced by any earlier orders or the conclusions therein. Beyond highlighting the controversy and the rival contentions, we have not expressed any opinion on the merits of the same. It shall be decided equally uninfluenced by our order.

14. The Revenue waives service.

(PRAKASH D. NAIK, J.) (S.C. DHARMADHIKARI, J.)