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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 772 OF 2014**

The Commissioner of Income Tax-4 ..Appellant
vs
Darashaw and Co. Pvt. Ltd. ..Respondent

**WITH
INCOME TAX APPEAL NO. 807 OF 2014**

Darashaw & Co. Pvt. Ltd. ..Appellant
vs.
The Deputy Commissioner of Income Tax – Range 4(1) ..Respondent

**WITH
WRIT PETITION NO. 1744 OF 2014**

Darashaw & Co. Pvt. Ltd. ..Appellant
vs.
The Deputy Commissioner of Income Tax – Range 4(1) ..Respondent

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Mr. A. R. Malhotra a/w. Mr. N. A. Kazi for the Appellant in ITXA/772/2014 and for the Respondent in ITXA/807/2014.

Mr. S. E. Dastur, Senior Advocate a/w. Mr. Madhur Agarwal for the Respondent in ITXA/772/2014 and for the Appellant in ITXA/807/2014.

Mr. Suresh Kumar a/w. Ms. Samiksha Kanani 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. This Revenue appeal challenges an order passed by the Tribunal on 12th June, 2013. The Revenue has proposed two questions of law and Mr. Malhotra would urge that both are substantial questions of law. However, it is fairly conceded that as far as question no. 4(A) is concerned that pertains to dis-allowance by the Assessing Officer of Rs. 1,24,22,472/- under section 14A of the Income Tax Act, 1961. In the light of the order passed by this court in the assessee's Writ Petition no. 1744/2014 and since this issue has been restored to the file of the Income Tax Appellate Tribunal, Mr. Malhotra would contend that this Court should clarify that it will be open during the course of the fresh exercise before the Tribunal for the Revenue to contend that Rule 8D(3) of the Income Tax Rules would also be relevant and will have a bearing on the controversy.

2. Since we have already remitted the matter back to the Tribunal and by keeping open all contentions, needless to clarify that the Revenue can contend before the Tribunal Rule 8D(3) is also relevant for this issue and will have bearing on the same. Equally it will be open for the assessee to urge that said Rule and its sub-rule cannot be relied upon. Even such contentions are open before the Tribunal for being raised by the parties.

3. Then Mr. Malhotra would submit that the question proposed as question no.4(B) at page 4 of the paper book is also substantial question of law and that is already admitted by this Court in ITXA/1521/2012 on 14th November, 2014.

4. On this point we have heard both Counsel. Since this point has been admitted by this Court in the above appeal we admit this appeal on question no 4(B).

5. With the consent of both sides we take up the appeal for hearing forthwith.

6. Mr Dastur, learned Senior Counsel appearing for the assessee would submit that there is no necessity of rendering any finding on this issue for the simple reason that the issue is rendered academic. The Revenue has now issued circular and that circular says if the tax affect is below a specified sum and namely Rs.25 lakhs, then, the appeals need not be pressed even if they are pending.

7. Mr. Dastur would submit that the tax effect as far as the above question is concerned would be minimal. The amount in dispute is

Rs.5,91,000/- and the tax effect would be much less. Therefore the Revenue's Circular should be relied upon by this Court to dismiss the appeal. On the other hand Mr. Malhotra would submit that it is the overall impact and tax effect which has to be taken into consideration and one cannot pick up only this issue and consider it in isolation for applying the Revenue Circular.

8. After hearing both sides and perusing the orders of the authorities under the Income Tax Act we are of the opinion that since the appeal ITA No.456/Mum/2012 and ITA No. 660/Mum/2012 from which the Writ Petition 1744 of 2014 arises has been restored to the file of the the Income Tax Appellate Tribunal for disposal afresh on merits and in accordance with law, the present appeal of the Revenue need not be kept pending limited to the above question no. 4(B). We are of the opinion that interest of justice would be served if the order of the Tribunal is set aside as far as this issue is concerned as well and the Tribunal be directed to consider it afresh when the appeals as aforesaid are being decided. We therefore permit both sides to argue on the question of the claim of provision for “Mark to Market” loss and whether it was contingent as urged and whether it was crystallized at the end of the year and therefore

not allowable as revenue deduction in the previous relevant year. We keep open all contentions of both sides even with regard to this issue. The Tribunal to decide this ground without being influenced by the earlier order or any finding and conclusion therein.

9. The appeal is also allowed in the above terms but without any order as to costs.

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