IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.4 OF 2019

The Principal Commissioner
of Income Tax, Panaji. …. Appellant

V/s

M/s. Rajaram Bandekar (Sirigao)
Mines Pvt. Ltd. …. Respondent

Ms. Amira Razaq, Standing Counsel for the Appellant.

Mr. A.F. Diniz, Advocate for the Respondent.

Coram :- S. C. GUPTE &
NUTAN D. SARDESSAI, JJ.

Date:- 25th June, 2019

ORAL ORDER : (Per S.C. Gupte, J.)

This Tax Appeal challenges an order passed by the Income Tax Appellate Tribunal, Panaji bench, Panaji, in an appeal filed by the Revenue.

2. The controversy concerns the income tax returns filed by the Assessee for Assessment Year 2012-13. In a DRI inquiry in the matter of exports effected by the Assessee, the DRI had found that the Assessee was evading export customs duty by undervaluing iron ore shipments exported to various overseas buyers. The DRI found that for facilitating its exports and recovery of sales proceeds, the Assessee had appointed non-resident foreign agents, agreeing for direct payment to such agents by the foreign

importers by deducting such amount from the export sales consideration payable to the exporter. The DRI found that customs duty was paid on such net amount remitted to the Assessee; the FOB value disclosed, on which customs duty was paid, did not include the commission paid to the foreign agents. The DRI found this to be an evasion of customs duty. Based on the DRI report, which was sent by it to the ITO, the Department issued a notice under Section 143(2) and 142(1) of the Income Tax Act. The Assessing Officer, amongst other things, disallowed the amount of ₹5,46,31,543/- (Rupees five crores forty six lakhs thirty one thousand five hindered and forty three only) paid by way of commission to the foreign agents on account of under invoicing in view of the DRI report. The income of the Assessee was assessed after adding this amount to it.

3. When the matter was carried in appeal by the Assessee before CIT (Appeals), the latter held that the appellant Assessee was engaged in the business of export of ore and had made export sales to foreign buyers during the year under consideration. It had engaged non-resident foreign agents for facilitating its exports, agreeing for direct payment to such agents by the foreign importers on its behalf for the services rendered to it and remission of net export sales consideration to it as FOB price payable by the importers. The CIT (Appeals) held that the non-resident foreign

commission agents, M/s. Good Bloom Asia Pacific Limited, Hong Kong and M/s. NRB Group INC, USA, had provided services to the Assessee outside India and no part of their income was assessable in India as the agents had no operations in India and therefore, the provisions of Section 9(1)(i) could not be invoked. The CIT (Appeals), accordingly, deleted the addition of income of ₹5,46,31,543/- (Rupees five crores forty six lakhs thirty one thousand five hindered and forty three only) made on account of dis-allowance of the commission paid to non-resident foreign agents.

4. In the Department's appeal before ITAT, the Tribunal observed that the Assessee had disclosed FOB as actual receipt, which did not include the commission paid by the foreign buyers to the non-residents. The Tribunal held that the addition of income on account of such commission was rightly deleted by the CIT (Appeals) on the ground that the appellant did not claim any expenses against the commission paid; the payment of commission had a combined effect of liability as nil in the income of the Assessee; the transaction was between foreign agents and the exporters, which was not liable to be assessed in India. The Tribunal was accordingly of the view that the CIT (Appeals) had rightly allowed the claim of the Assessee and no interference was warranted in the appeal before the Tribunal.

5. The Department's case in the present appeal is that any deduction/expenditure, which is not claimed in the return of income, cannot be claimed before the Assessing Officer without filing any revised return. The Revenue relies on the case of **Goetze (India) Ltd. V/s. Commissioner of Income Tax**[1] in this behalf. In **Goetze (India) Ltd.**, the deduction claimed by the Assessee was disallowed by the Assessing Officer on the ground that there was no provision under the Income Tax Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return. The Assessee's appeal before the Commissioner of Income Tax (Appeals) was allowed. The ITAT, however, reversed that order. The Assessee thereupon approached the Supreme Court submitting that the Tribunal was wrong in upholding the assessment order. Relying on the decision of the Supreme Court in **National Thermal Power Co. Ltd. V/s. Commissioner of Income Tax**[2], it was contended that it was open to the Assessee to raise points of law even before the Appellate Tribunal. The Supreme Court held that the decision in **National Thermal Power Co. Ltd.** dealt with the power of the Tribunal under Section 254 of the Income Tax Act, 1961 to entertain for the first time a point of law provided the fact on the basis of which such issue of law was raised was available on record

1 284 ITR 323 (SC)
2 (1998) 229 ITR 383

before the Tribunal. The Supreme Court held that the decision did not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than upon filing of a revised return.

6. In the present case, there is no question of the Assessee claiming any deduction by filing of a revised return. It is the case of the Revenue that the Assessee had not disclosed the expenditure incurred by a foreign agent on its behalf. What the Assessee received from its foreign buyers was the net FOB value; the Assessee was not claiming any expenditure on account of commission paid. There is, thus, no question of any revised return. There is no tax effect whatsoever by reason of the expenditure made by foreign buyers by way of commission paid outside India.

7. In the premises, there is no substantial question of law arising for consideration of this Court in the present appeal. The appeal is, accordingly, dismissed.

8. It is not in dispute that the other two questions of law raised by the Department in the present case do not survive, if the Department's case on the first issue is not accepted by the Court, since the tax effect in respect of those two questions is below ₹50,00,000/- (Rupees fifty lakhs only). These questions are

accordingly not considered in the appeal.

NUTAN D. SARDESSAI, J. **S. C. GUPTE, J.**

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