R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

REVIEW PETITION NO. 10 OF 2019
IN
INCOME TAX APPEAL NO. 51 OF 2016

Sushil Gupta .. Petitioner

Versus

The Pr. Commissioner of Income Tax – 17,
Mumbai. .. Respondent

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- Mr. Vikram Nankani, Sr. Advocate a/w Mr. Shishir S. Manjrekar i/by M/s. Shah Legal for the Petitioner
- Mr. P.C. Chhotaray for the Respondent

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CORAM : AKIL KURESHI &
B.P. COLABAWALLA, JJ.

DATE : OCTOBER 11, 2019 at
3.00 IN CHAMBER

P.C.:

1. This review petition is filed by the original respondent - assessee requesting us to review / recall our judgment dated 22.2.2019 passed in Income Tax Appeal No. 51 of 2016. By the said judgment, we had allowed the Revenue's appeal. The question of law considered by the Court was as under:-

> "Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the redemption fine of Rs. 75,00,000/- is allowable as business expenditure under Section 37 of the Income Tax Act?"

2. After detail consideration of facts on record and the law canvassed by the respective parties, the Court had come to conclusion that :-

> "20. In the present case, the Tribunal, without proper justification or detailed examination of material on record, followed the line of logic adopted by this Court in the case of Pannalal (supra) whereas the facts as we have noticed squarely fall within the parameters of the decision of the Supreme Court in the case of Hazi Aziz (supra). The Assessing Officer had summoned the import licence holder M/s. Rajnikant Brothers whose representative had stated before the Assessing Officer that M.P. Gupta, the present assessee had imported almond by using the licence and that redemption fine of Rs. 75 lacs paid to the Madras Custom House was done by M.P. Gupta. All transactions were made by him and he was responsible for the fine. He stated clearly that as per the agreement, M/s. Rajnikant Brothers were only entitled to the service charges. Thus, there was ample evidence on record suggesting that the assessee had made imports through his direct involvement by using the import licence of M/s. Rajnikant Brothers and that M/s. Rajnikant Brothers merely received an agreed commission. The assessee cannot disassociate or divest himself from the irregularities or illegalities committed in the process of importing the goods. Thus, the penalty was for the infraction of law committed by the assessee. Under these circumstances, the question is answered in the negative i.e in favour of the Revenue and against the assessee. The impugned judgment of the Tribunal is set aside. Accordingly, the appeal is disposed of.

3. This review petition is argued principally on the ground that the additions made by the assessing officer in the hands of the assessee were under Section 69C of the Income Tax

Act, 1961 ("**the Act**" for short). It was at the appellate stage that the assessee had taken an alternative contention that in any case the expenditure would be allowable under Section 37 of the Act. The evidence necessary to examine this alternative contention was on record. However, the Tribunal had not carried out proper fact finding inquiries and therefore, the entire issue should be placed before the Tribunal for fresh consideration. It is also argued that the ratio of the decision in the case of **Haji Aziz & Abdul Shakoor Bros. Vs. CIT**[1] would dilute in view of the addition of explanation to Section 37(1) of the Act.

4. We do not find any reason to entertain this review petition. Firstly, it is always open for an assessee to raise an alternate contention and if such contention is purely one of law, also at appellate stage. However, the assessee must either rely on the facts already brought on record or within the permissible limits, request the appellate Commissioner or the Tribunal to permit additional evidence to be brought on record. Thus, in the judgment in question having examined all aspects of the matter, there is no need to

1 41 ITR 350 (SC)

remand the appeal before the Tribunal. Further, the implications of the judgment of the Supreme Court in case of Haji Aziz (supra) in the light of further development of law has been examined in the said decision before arriving at final conclusions. This has not come for review. In the result, review petition is dismissed.

[B.P. COLABAWALLA, J.] **[AKIL KURESHI, J]**