IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

INCOME TAX APPEAL NO.37 OF 2009
AND
INCOME TAX APPEAL NO.39 OF 2009

The Commissioner of Income Tax-III,
Aayakar Bhawan, Civil Lines,
Nagpur … Appellant

-vs-

Sanvijay Rolling & Engg. Ltd.
9-10 Imambada Road, Nagpur … Respondent

Shri S. N. Bhattad, Advocate for Appellant.
Shri K. P. Dewani, Advocate for respondent.

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.
DATE : December 06, 2021

Common Judgment : (Per A. S. Chandurkar, J.)

These appeals under Section 260A of the Income Tax Act, 1961 (for short, the said Act) have been admitted on the common substantial question of law :

> *" Whether ITAT was justified in nullifying the exercise of Commissioner under Section 263 of the Income Tax Act in the present matters, in the wake of provisions of Section 263(1)(c) ?"*

2. The facts giving rise to the present proceedings are that the respondent-assessee is engaged in the business of manufacturing and trading of iron and steel items. Search and seizure operations under Section 132 of

the said Act were carried out at the residential as well as business premises of the assessee on 25/08/2004. Pursuant thereto a notice under Section 142(1) of the said Act was issued to the assessee and in response thereof the assessee filed return of income on 04/12/2006. On the same day notice under Section 143(2) of the said Act was issued followed by a detailed questionnaire. After grant of opportunity to the assessee the Assessment Officer disallowed deduction sought under Section 80IA and IB of the said Act. The amount disallowed was Rs.63,500/- under the head "Recovery against the amount written-off in earlier year". The other disallowance for purposes of deduction was for Rs.6,20,334/- under the head "Commission receipt". This order was passed on 27/12/2006 by the Assessment Officer. He also initiated penalty proceedings under Section 271(1)(c) of the said Act.

3. The assessee being aggrieved by the aforesaid preferred an appeal before the Commissioner of Income Tax (Appeals). On 31/01/2007 the Commissioner partly allowed the appeal preferred by the assessee and granted the deduction as claimed by the assessee under Section 80IA and IB of the said Act. Being aggrieved, the Assistant Commissioner of Income Tax preferred appeal before the Income Tax Appellate Tribunal which by its judgment dated 14/11/2007 was pleased to dismiss the same.

The Commissioner of Income Tax in exercise of powers under Section 263 of the said Act issued a notice on 29/10/2007 stating therein that the assessee's claim for deduction under Section 80IB ought to have been rejected by the Assessment Officer but the same had been allowed. Accordingly an order was passed on 20/12/2007 disallowing the deduction under Section 80-IB of the said Act. Consequently it was held that the assessee was liable for levy of concealment penalty under Section 271(1)(c) of the said Act.

4. The assessee being aggrieved by the aforesaid order passed under Section 263 of the said Act preferred appeal before the Income Tax Appellate Tribunal. This appeal along with various other appeals filed by another assessee were heard and decided together on 06/03/2009. It was held that the Commissioner of Income Tax was not justified in invoking his revisional jurisdiction under Section 263 of the said Act with regard to disallowance under Section 80-IB of the said Act. Consequently the penalty levied under Section 271(1)(c) of the said Act was also cancelled. Being aggrieved the Revenue has preferred ITL No.37/2009 challenging the order passed by the Tribunal in IT(SS)A No.13/Nag/2008 for the Assessment Year 2005-06 and ITL No.39/2009 challenging the order passed by the Tribunal in ITA No.380/Nag/2008 for the same Assessment Year 2005-06.

5. Shri S. N. Bhattad, learned counsel for the Revenue invited attention to the order passed under Section 263 of the said Act and sought to

justify the conclusion recorded by the Commissioner that the assessee was not eligible for any incentive under Section 80-IB of the said Act. Such benefit was admissible only to a newly established Small Scale Industrial Undertaking in which the investment in fixed assets like plant and machinery did not exceed Rs.3 Crores. Since the assessee's unit was already in existence and the same was sought to be expanded, it was rightly held by the Commissioner that the assessee was not entitled to seek such benefit. The claim for deduction was therefore rightly disallowed and consequently it was found that the assessee was liable for levy of concealment penalty under Section 271(1)(c) of the said Act. He further submitted that the aspect of merger was not attracted and the Tribunal committed an error in holding otherwise. The learned counsel also referred to the provisions of Section 263(1)(c) of the said Act in that regard. In support of his submissions the learned counsel placed reliance on the decisions in ***Commissioner of Income Tax, Gujrat-I, Ahmedabad vs. Shri Arbuda Mills Ltd., Ahmedabad (1998) 9 SCC 702*** and ***Commissioner of Income Tax vs. International Tractors Ltd. 2017(397) ITR 696*** and submitted that the order passed by the Tribunal ought to be set aside.

6. Shri K. P. Dewani, learned counsel for the assessee supported the order passed by the Tribunal. He submitted that since the order passed by the Assessing Officer had merged in the order passed by the appellate

Authority, there was no power with the Commissioner to invoke the provisions of Section 263 of the said Act. Inviting attention to the Assessment Order it was submitted that disallowance was made for certain amounts under provisions of Section 80-IA and 80-IB of the said Act. Ultimately deduction was permitted to the extent of Rs.8,58,547/- under Section 80-IA of the said Act. In the appeal preferred before the Commissioner of Income Tax (Appeals) the contention raised by the assessee that it was entitled to seek deductions under Section 80-IA/IB of the said Act was upheld. This order came to be maintained by the Tribunal in the appeal preferred by the Revenue on 29/10/2007. Thus it was submitted that the order of Assessing Officer having merged with the order of the Tribunal when it dismissed the appeal preferred by the Revenue, the jurisdiction under Section 263(1)(c) could not have been invoked by the Commissioner. This was rightly noticed by the Tribunal while passing the impugned order. To substantiate his contention the learned counsel placed reliance on the decisions in ***CIT (Exemption) vs. Slum Rehabilitation Authority (2019) 412 ITR 0521 (Bom), CIT vs. Nirma Chemicals Works (P) Ltd. (2009) 309 ITR 0067 (Guj), CIT vs. Mehana District Co-operative Milk Producers Union Ltd. (2003) 263 ITR 0645 (Guj), Pr. CIT and Anr. vs. H. Nagaraja (2018) 406 ITR 0242 (Karn), CIT vs. Shashi Theatre (P) Ltd. (2001) 248 ITR 0126 (Guj), DCIT vs. Varma Industrial Ltd. (2001) 250 ITR 0472 (Karn), Pr. CIT And Anr. Govt. of India, Ministry of Finance, Dibrugarh and Anr. vs. Oil India Ltd. (2019) 307 CTR 0403 (Gauhati),***

CIT vs. Shri Arbuda Mills Ltd. (1998) 231 ITR 0050 (SC) and ***Commissioner of Income Tax vs. Reliance Petroproducts (P) Ltd. AIR 2010 SC 1881.*** Consequently, it was submitted that if the jurisdiction invoked by the Commissioner under Section 263(1)(c) of the said Act was found to be bad then there would be no question of initiating any penalty proceedings under Section 271(1)(c) of the said Act. He therefore submitted that both the appeals were liable to be dismissed.

7. We have heard the learned counsel for the parties and we have given due consideration to their respective submissions. For answering the substantial question of law as framed, it would be necessary to first refer to the judgment of Gujarat High Court in ***Nirma Chemicals Works (P) Ltd***. (supra). The facts of the said case indicate that the assessee had claimed relief under Section 80-I of the said Act. The Assessing Officer partially reduced the claim made by the assessee. The assessee therefore challenged the said order and the Commissioner of Income Tax (Appeals) allowed that appeal and directed the Assessing Officer to grant relief under Section 80-I of the said Act as claimed by the assessee without any disallowance. It was held on the aspect of merger that when deduction under Section 80-I of the said Act was granted by the Assessing Officer after disallowing part of the claim and the appellate Authority thereafter examined such claim, it was clear that the appellate Authority was duty bound to examine as to whether

the claim made by the assessee was in accordance with and subject to the provisions of Section 80-I of the said Act. The entire Section was in the form of a complete codified scheme for deciding the eligibility as well as for the computation of the relief to which the assessee was entitled. In that context it was held that the Tribunal erred in concluding that the prohibition imposed by Section 263(1)(c) of the said Act would not be applicable. This decision of the Gujarat High Court has been followed by this Court in ***Slum Rehabilitation Authority*** (supra). It was held that the provisions of Section 263 (1)(c) of the said Act had been incorporated for the purposes of removal of doubt and the same was in recognition of the principle of merger so as to avoid any conflict of opinion between two quasi-judicial authorities of the same rank.

8. The facts on record indicate that the Assessing Officer in proceedings under Section 143(3) of the said Act was pleased to disallow the amount of Rs.63,500/- that was claimed towards recovery of amount written-off in the earlier year as well as amount of Rs.6,20,334/- being towards receipt of commission. The Assessing Officer disallowed these deductions under Section 80IA of the said Act. This order was challenged by the assessee before the Commissioner of Income Tax (Appeals) and on 31/01/2007 the aforesaid two deductions that were disallowed by the Assessing Officer came to be permitted. A finding was recorded that the deduction as claimed by the

assessee under Section 80IA/80IB was in accordance with law and was hence granted. This appellate order was challenged by the Revenue before the Tribunal. In the judgment dated 29/10/2007 the Tribunal subsequently considered the aforesaid two heads of disallowances and proceeded to dismiss the appeal preferred by the Revenue on merits. It was thus clear from the aforesaid sequence of events that the order passed by the Commissioner of Income Tax (Appeals) dated 31/01/2007 merged in the order passed by the Tribunal on 29/10/2007 and attained finality. In other words, the order of the Commissioner Income Tax (Appeals) having merged with the order of the Tribunal, there was no scope for the Commissioner of Income Tax to initiate proceedings under Section 263 of the said Act. The legal position that on merger of the order passed by the Commissioner with that passed by the Tribunal, the jurisdiction under Section 263 (1)(c) of the said Act could not have been invoked is settled in view of judgment of this Court in ***Slum Rehabilitation Authority*** (supra) wherein the judgment of the Gujarat High Court in ***Nirma Chemicals Works (P) Ltd.*** (supra) was followed.

The reliance placed by the learned counsel for the Revenue on the decision in ***Arbuda Mills Ltd.*** (supra) would not assist the case of the Revenue for the reason that the aspect of disallowances towards the amount written-off as well as receipts towards commission was specifically considered and decided against the Revenue by the Tribunal. The Honourable Supreme Court therein has held that the powers of the Commissioner under Section

263 of the said Act would extend and shall be deemed always to have been extended to matters that have not been considered and decided in appeal filed by the assessee. The case in hand indicates that the items of disallowances were specifically considered by the Tribunal and decided against the Revenue. In that view of the matter the substantial question of law as framed is answered by holding that the Tribunal was justified in nullifying the exercise of Commissioner under Section 263 of the said Act.

In view of aforesaid ITL No.37/2009 stands dismissed with no order as to costs.

9. Income Tax Appeal No.39/2009 arises in view of the consequential order passed by the Commissioner of Income Tax under Section 271 (1)(c) of the said Act being set aside by the Tribunal pursuant to the aforesaid disallowances being permitted. Once it is found that the order passed by the Commissioner of Income Tax (Appeals) permitting such deductions under Section 80IA/80IB was maintained by the Tribunal in Appeal No.183/Nag/2008 on 29/10/2007 there would be no occasion to invoke penalty proceedings under Section 271(1)(c) of the said Act for aforesaid items. The basic order permitting such deductions having been upheld, there would be no occasion to impose any penalty on the assessee. Consequently in view of adjudication of ITL No.37/2009, no substantial question of law arises in ITL No.39/2009 and the said appeal stands

dismissed with no order as to costs.

(G. A. Sanap, J.) **(A. S. Chandurkar, J.)**

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