Chittewan

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

INCOME TAX APPEAL NO.395 OF 2018

Pr. Commissioner of Income Tax 14,
Mumbai, Room No.409, Aayakar Bhavan,
M.K. Road, Mumbai-400 020. … Appellant

Versus

Shivshahi Punarvasan Prakalp Ltd.
5th Floor, Griha Nirman Bhavan,
Bandra (East), Mumbai
PAN:AAACS1590C
AY 2005-06 … Respondent

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Mr. Suresh Kumar for the Appellant.
Mr. Nishant Thakkar a/w Ms. Jasmin Amalsadvala i/b Mint & Confreres for the Respondent.

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CORAM : DHIRAJ SINGH THAKUR & VALMIKI SA MENEZES, JJ.

DATE : 21 JULY 2022

P. C.

. The present Appeal has been filed under Section 260A of the Income Tax Act, 1961 ("Act") against the Order dated 16 January 2017 passed by the Income Tax Appellate Tribunal ("ITAT"), Mumbai Bench 'E' pertaining to Assessment Year 2005-06. The following substantial question of law is framed for our consideration.

> "Whether on the facts and circumstances of the case and in law, the Tribunal was correct in quashing Order under Section 263 without taking into consideration the relevant portion of the Order under Section 263 passed by Pr. CIT-10, which clearly state that reference in the show cause

notice under Section 263 was to Order under Section 143(3) read with Section 147 dated 16 November 2009 and opportunity of being heard was given to the assessee on 25 March 2011 ?"

2 Briefly stated the material facts are as under :

The assessee filed the return of income for the Assessment Year 2005-06 on 29 October 2005 declaring a loss of Rs.3,42,36,260/-. The assessment under Section 143(3) was completed on 14 December 2007 at an income of Rs.5,04,99,620/-. Vide an Order under Section 154 dated 15 September 2008, the total income was revised to Nil by setting off of brought forward business loss of the Assessment Year 2002-03.

3 The assessment was subsequently reopened under Section 147 and completed on 16 November 2009 under Section 143(3) read with Section 147 of the Act at Nil income.

4 The Commissioner of Income Tax ("CIT"), however, in purported exercise of powers under Section 263(1) of the Act, issued the following show cause notice :

> "Sub:Show cause notice u/s. 263(1) of the I.T. Act, 1961
> A.Y. 2005-06 – PAN AACCS1590C – Reg.
>
> The assessment in your case for the A.Y.2005-06 was completed on 14.12.2007 u/s 143(3) of the I.T. Act, 1961, assessing loss at Nil.
>
> It is seen that construction cost claimed by you in the Profit & loss account has not been allowed against the sale of TDR and has been capitalized with the WIP of the respective projects. However, in the P & L A/c. loss under OTS amounting to Rs.15,57,36,497/- and interest on Dindoshi Site amounting to Rs.3,06,29,906/- are also claimed which are related to the

> projects under WIP, hence required to be capitalized. The omission to disallow the same has resulted in underassessment of income and allowance of excessive relief. Therefore the assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of revenue."

5 The assessee, however, in response to show cause notice *inter alia* took a stand that the revisional power could not be exercised in view of the Bar of limitation as contained in Section 263(2) of the Act, which provides that no Order could be revised after the expiry of two years from the end of the financial year, in which the Order sought to be revised was passed.

6 The CIT, however, did not accept the stand of the assessee and set aside the Order passed under Section 143(3) dated 14 December 2007 read with Order dated 16 November 2009 under Section 147 holding the same to be erroneous and prejudicial to the interest of revenue.

7 This Order came to be challenged before ITAT, who vide its Order dated 16 January 2017 allowed the Appeal of the assessee on the ground that Order passed by CIT was passed on 31 March 2011 under Section 263(1) and was, therefore, barred by limitation, as such an Order could be passed only upto 31 March 2010, considering the fact that the Order that was sought to be revived by CIT was passed by Assessing Officer on 14 December 2007.

8 Not only this, the ITAT held on a question of fact that no notice in terms of Section 263(1) was served on the assessee in respect of the Order passed under Section 143(3) read with Section 147 dated 16 November 2009 and the show cause notice dated 18 March 2011 was only in respect of Order of assessment dated 14 December 2007 under Section 143(3) of

the Act.

9 In the background of the facts discussed hereinabove, we are of the view that the view expressed by ITAT does not warrant any interference and it was rightly held that the Order impugned passed by CIT dated 31 March 2011 was barred by limitation in terms of Section 263(2) of the Act. Thus, the Appeal is devoid of merits and, accordingly, dismissed.

(VALMIKI SA MENEZES, J.) **(DHIRAJ SINGH THAKUR, J.)**