

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 24128 of 2005****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI****and****HONOURABLE MR.JUSTICE K.J.THAKER**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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BILAG INDUSTRIES PVT.LTD.....Petitioner(s)

Versus

DESH RAJ COMMISSIONER OF INCOME TAX VALSAD....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Petitioner(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 18/11/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. This is a petition by the petitioner-

assessee, praying to quash and set aside the impugned notice, Dated : 11.11.2005, issued under Section 263 of the Income Tax Act, 1961 (for short, 'the Act').

2. The brief facts leading to the filing of the present petition are that the petitioner filed its return of income for the A.Y. 1999-2000 on 30.12.1999. Pursuant thereto, the return of the petitioner came to be processed on 22.03.2001. The petitioner filed revised return on 27.03.2001. Subsequent thereto, the petitioner was issued notice under Section 148 of the Act and final assessment order came to be passed on 23.03.2005. Against the same, the petitioner preferred an appeal before the CIT(A), which came to be partly allowed, giving effect to the said order with effect from 31.08.2005. The petitioner and the respondent-Revenue, then, approached the Tribunal by way of appeals, raising various grounds. Pending the aforesaid appeals, the petitioner was issued notice under Section 263 of the Act on 11.11.2005. Hence, the present petition.

3. Mr. Patel, learned Advocate for the petitioner-assessee, submitted that a perusal of the provisions of Section 263 read with Section 143(3) of the Act would clearly show that the

action of the Revenue to revise the assessment order in respect of the petitioner, pending appeal before the Tribunal is patently bad. He, further, submitted that in view of the fact that the order of the AO got merged with the order of the CIT(A) partly allowing the appeal of the assessee, the Respondent could not have issued notice under Section 263 of the Act.

4. Mr. Patel, in support of his submissions, placed reliance on a decision of this Court in "**COMMISSIONER OF INCOME TAX VS. SHASHI THEATER PVT. LTD.**", (2001) 248 ITR 126, wherein, this Court held that power of revision do not extend to the matters on which the appellate authority had given decision.

5. As against this, Mr. Metha, learned Advocate for the respondent-revenue, supported its order and submitted that the principle of merger shall not apply in this case. Hence, the petition being without merit, same be dismissed.

6. In support of his submissions, Mr. Mehta placed reliance on the following decisions of this Court and other High Courts;

(1) "**COMMISSIONER OF INCOME TAX- I, LUDHIANA VS. ABHISHEK INDUSTRIES LTD.**",

[2013] 31 taxmann.com 77 (Punjab & Haryana);

(2) "**J.R. STEEL INDUSTRIES VS. CUSTOMS EXCISE AND SERVICE TAX APPELLATE TRIBUNAL & ANR.**", Dated : 21.08.2013, Tax Appeal No. 227 of 2013 and the allied matters;

(3) "**BROADWAY OVERSEAS LTD. VS. COMMISSIONER OF INCOME-TAX, JALANDHAR-1**", [2014] taxmann.com 75 (Punjab & Haryana)

(4) "**COMMISSIONER OF INCOME TAX VS. ATUL INTERMEDIATES**", [2014] 45 taxmann.com 275 (Gujarat)

7. Heard, learned Counsels for the parties and perused the material on record, including the order passed by the CIT(A) as well as the notice under Section 263 of the Act issued by the Revenue.

8. In this petition, a short question, which arise for our consideration, is that as to whether, the revenue could have issued notice under Section 263 of the Act, despite the fact that, against the original order of assessment, the assessee had preferred appeal before the CIT(A), which came to be allowed in part, and

against which the appeals preferred by the assessee as well as the revenue were pending decision before the Tribunal.

9. In above view of the matter, here, it would be relevant to refer to the provisions of Section 263(1) of the Act, which reads as under;

"263. (1) The [*Principal Commissioner*] Commissioner may call for and examine the record of any proceeding under this Act, and if he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

10. Thus, from the above provisions, it becomes clear that the Commissioner has powers to pass an order either enhancing or modifying the assessment, subject to the condition that the assessee is given an opportunity of being heard or after conducting an inquiry in to the matter, as he deems necessary. In other words, without affording an opportunity to an assessee or without inquiring into the matter, the Commissioner cannot invoke the provisions of Section 263.

11. In the case on hand, as stated herein

above, after the assessee filed its return of income for the A.Y. 1999-2000 on 30.12.1999, same came to be processed on 22.03.2001 and as an outcome of the same, the assessee was required to file a revised return. It is pertinent to note that, thereafter, the final assessment order came to be passed on 23.03.2005, after modifying the claim of the assessee for deduction under Sections 80HHC and 80IA of the Act, i.e. after some addition / disallowances. The assessee, hence, preferred an appeal before the CIT(A), raising various grounds including the ground of modification of his claim for deduction under Section 80HHC and 80IA of the Act, which came to be partly allowed by the CIT(A). However, as the assessee and the revenue were not satisfied with the same, they preferred separate appeals, raising all the grounds including the modification of claim for deduction under Section 80HHC and 80IA of the Act etc. and the Tribunal fixed the matter for hearing on 14.12.2005. It is pursuant to this that the revenue issued notice to the assessee under Section 263 of the Act.

12. From the above, it is clear that the assessee and the revenue both had preferred the appeals raising all the grounds, over and above the ground of deduction under Section 80HHC and 80IA of the Act, the order of the AO stood merged into the order of the CIT(A). In other words,

what was at large before the Tribunal was not only the issue with regard to claim of the assessee for deduction under Section 80HHC and 80IA of the Act, but, with regard to additions and disallowances made by the AO, as well. Thus, the principle of merger would apply in this case. Meaning thereby, once the CIT(A) partly allowed the appeal of the assessee in respect of the additions and disallowances made by the AO by way of order dated 23.03.2005, same got merged with the order of the CIT(A). Therefore, when the appeals filed by the assessee as well as the revenue before the Tribunal were pending, in view of the principle of merger and the decision of this Court in "**COMMISSIONER OF INCOME TAX VS. SHASHI THEATER PVT. LTD.**" (Supra), the assessee could not have been issued the notice under Section 263 of the Act, more particularly, in view of the fact that the matter was at large before the Tribunal in its entirety. Even otherwise, in view of the fact that before issuing the notice under Section 263 of the Act, the assessee was neither heard nor the revenue conducted any inquiry, same deserves to be quashed and set aside.

13. In view of the above discussion, the decisions relied on by the learned Advocate for the respondent-revenue, as referred to herein above, shall not apply to the facts of the present case and the present petition deserves to

be allowed.

14. In the result, this petition is **ALLOWED** and the notice, Dated : 11.11.2005, issued by the respondent-Revenue is **QUASHED** and set aside. Rule is made absolute, accordingly. No order as to costs.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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