* **THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

+ WRIT PETITION No.13264 of 2019

% 12.06.2023

Between:

M/s. Tata-AldesaJV

Petitioner

VERSUS

Union of India & 2 others

Respondents

! Counsel for Petitioner : Mr. Deepak Chopra, learned Senior Counsel representing Mr.G.Narendra Chetty, learned counsel for the petitioner.

^ Counsel for the respondents: Mr. B.Mukherjee, learned counsel representing Mr. Gadi Praveen Kumar, learned Deputy Solicitor General of India for respondent No.1.

Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department for respondent Nos.2 and 3.

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? Cases referred

[1] (2019) 101 taxmann.com 192 (Bombay)
[2] (2006) 284 ITR 323 (SC)
[3] (2017) SCC OnLine Guj 2682

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

WRIT PETITION No.13264 of 2019

ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. Deepak Chopra, learned counsel representing Mr. G.Narendra Chetty, learned counsel for the petitioner; Mr. B.Mukherjee, learned counsel representing Mr. Gadi Praveen Kumar, learned Deputy Solicitor General of India appearing for respondent No.1; and Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department for respondent Nos.2 and 3.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has assailed legality and validity of the order dated 28.03.2019 passed by the Principal Commissioner of Income Tax-6, Hyderabad i.e., respondent No.3, under Section 264 of the Income Tax Act, 1961 (briefly referred to hereinafter as 'the Act') and further seeks a direction to the said respondent to re-consider the claim of the petitioner for deduction under Section 80-IA of the Act.

3. Petitioner before us is a joint venture and is also an assessee under the Act having the status of joint venture. The joint venture was formed between two companies – M/s.Tata Projects Ltd. and Aldesa Construcciones, S.A. for design and construction of civil structures and track works for double line railway tracks, bridges, structures etc. For the assessment year 2014-15, it filed its return of income on 24.11.2014 declaring total income at Rs.15,18,42,010.00. By the assessment order dated 28.12.2016 passed under Section 143(3) of the Act, 2nd respondent being the assessing officer assessed the total income of the petitioner at Rs.15,18,42,010.00.

4. On 01.02.2018, petitioner submitted an application before respondent No.3 under Section 264 of the Act seeking revision of the assessment order. It was pointed out that assessee had commenced its business operations during the previous year 2013-14 and accordingly assessment year 2014-15 is the first year under assessment. Assessee pointed out that it is entitled to claim deduction under Section 80-IA of the Act. However, because of a *bona fide* error, the same was not claimed either at the time of filing the return of income or during the

assessment proceeding. It is in such circumstances that petitioner filed the application before the 3rd respondent under Section 264 of the Act. Petitioner also pointed out that the application was delayed by 52 days and sought for condonation of delay.

5. By the order dated 28.03.2019, 3rd respondent condoned the delay and took up the case for revision. After adverting to Section 80-IA(1) and (2) of the Act, 3rd respondent observed that assessee did not opt to make the claim of deduction and without making any such claim, had filed the return of income. In the subsequent assessment year i.e., assessment year 2015-16 also, petitioner has not made the said claim before the assessing officer. 3rd respondent opined that petitioner in its wisdom had chosen not to claim the deduction under Section 80-IA of the Act. Therefore, he declined to interfere in the decision of the assessing officer under Section 264 of the Act.

6. Aggrieved, present writ petition has been filed seeking the relief as indicated above.

7. Respondent No.3 has filed counter affidavit reiterating the decision taken on 28.03.2019, to which petitioner has filed rejoinder affidavit.

8. In the hearing today, learned counsel for the petitioner has drawn the attention of the Court to the application filed by the petitioner under Section 264 of the Act as well as to the order passed by the 3rd respondent on 28.03.2019 dismissing the revision application of the petitioner. He submits that 3rd respondent was not justified in rejecting the application of the petitioner; instead he ought to have considered the claim of the petitioner under Section 80-IA of the Act on merit. Refusal to do so has caused great prejudice to the petitioner, which needs to be rectified.

9. Learned counsel for the petitioner has referred to a compilation containing various judgments to support his case. In particular, he has referred to the decision of the Bombay High Court in **Geekay Security Services (P.) Ltd. v. Deputy**

Commissioner of Income Tax[1], more particularly to paragraphs 5, 6, 9 and 10 thereon.

10. On the other hand, Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department has referred to the contentions advanced in the counter affidavit and has also adverted to Section 264 of the Act. His submission is that under Section 264 of the Act, 3rd respondent cannot go beyond the assessment order. Since petitioner did not raise the claim either in the original return of income or by filing a revised return of income, it is not open to the petitioner to raise this claim in a revision application.

11. Learned Standing Counsel has also placed reliance on a decision of the Supreme Court in **Goetze (India) Ltd. v. Commissioner of Income-Tax**[2] in support of the contention that an issue cannot be raised for the first time before the Commissioner under Section 264 of the Act without raising the same before the assessing officer.

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[1] (2019) 101 taxmann.com 192 (Bombay)
[2] (2006) 284 ITR 323 (SC)

12. However, in his rejoinder, Mr. Chopra, learned counsel for the petitioner submits that the decision of the Supreme Court in **Goetze (India) Ltd.** (supra 2) is clearly distinguishable. The said decision was rendered in the context of the appellate power of the Income Tax Appellate Tribunal under Section 254 of the Act and does not deal with the revisional power of the Commissioner under Section 264 of the Act.

13. Submissions made by learned counsel for the parties have received the due consideration of the Court.

14. Facts lie within a very narrow compass. Neither in the return of income for the assessment year 2014-15 nor in the assessment proceedings petitioner raised the claim of deduction under Section 80-IA of the Act. While filing the revision application before the 3rd respondent, petitioner pointed out that it was because of an inadvertent error and *bona fide* mistake that such a claim was not made. Commissioner in the impugned order recorded that petitioner had decided not to exercise the option as provided under Sub-Section (2) of claiming deduction

under Section 80-IA of the Act and therefore, it is not open to the petitioner to raise such a claim in a revision proceeding.

15. Before proceeding further, it would be apposite to have a glance at the provisions of Section 80-IA of the Act.

16. Section 80-IA of the Act deals with deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development etc. Sub-Section (1), as it stands today, provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in Sub-Section (4), such business being referred to as eligible business, there shall, in accordance with and subject to the provisions of Section 80-IA of the Act, be allowed, in computing the total income of the assessee, a deduction of an amount equal to one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years. Sub-Section (2) says that the deduction specified in Sub-Section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of 15 years

beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility etc.

17. We have already noted that 3rd respondent had adverted to Sub-Section (2) of Section 80-IA of the Act and emphasized on the expression "at the option of the assessee" and thereafter proceeded to take the view that assessee (petitioner) had chosen not to exercise the option. This has been explained by the assessee (petitioner) by saying that it was a *bona fide* error not to claim such a deduction in the return of income or in the assessment proceeding. It is equally true that petitioner did not file a revised return of income claiming such deduction.

18. Before proceeding to Section 264 of the Act, we may mention that Section 80-IA of the Act is a beneficial provision providing certain benefits to an assessee which is engaged in infrastructure development etc. and needs to be interpreted accordingly.

19. As per Sub-Section (1) of Section 264 of the Act, in the case of any order other than an order to which Section 263 of the Act applies passed by an authority subordinate to him, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under the Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of the Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

20. Before analyzing the contours of Section 264 of the Act, we may briefly refer to Section 263 of the Act, which deals with revision of orders prejudicial to the Revenue.

21. As per Section 263 of the Act, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding under the Act, and if he considers that any order passed therein by the assessing officer or the transfer pricing

officer, as the case may be, is erroneous insofar as it is prejudicial to the interests of the Revenue, 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 etc.

22. Therefore, there is a fundamental difference between Section 263 and Section 264 of the Act. For invoking the power under Section 263 of the Act, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner should be of the opinion that an order passed by the assessing officer or transfer pricing officer is erroneous in as much as the same is prejudicial to the interests of the Revenue. In that event, he may call for the record of the proceedings before the assessing officer or the transfer pricing officer and after making inquiry, may pass such order as Section 263 of the Act contemplates.

23. However, there is no such limitation in Section 264 of the Act. Under Section 264 of the Act, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may either of his own motion or on an application by the assessee for revision, call for the record of any proceeding relatable to an order other than an order to which Section 263 of the Act applies and after making due inquiry, he may pass such order thereon as he thinks fit; the only caveat being that such order should not be prejudicial to the assessee. Therefore, as we have noticed above, there is no limitation on the power of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner while invoking jurisdiction under Section 264 of the Act. It is not confined to legality or validity of an order passed by the assessing officer or a claim made and disallowed or a claim not put forth by the assessee.

24. A Division Bench of the Bombay High Court in **Geekay Security Services (P.) Ltd.** (supra 1) was examining challenge to an order passed by the Principal Commissioner of Income Tax rejecting the assessee's application under Section

264 of the Act. In that case, petitioner failed to make a claim relating to deduction on account of deposit made towards employee's contribution to provident fund made belatedly, but before the due date of filing the return.

24.1. In the revision application, petitioner contended that it should be granted the benefit of the expenditure incurred but the same was rejected by the Principal Commissioner on the ground that petitioner had not claimed it in the return of income nor did it file any revised return of income. Observing that the issue before the Court was within a very narrow compass, Bombay High Court observed that the question was whether Commissioner could entertain petitioner's claim and grant the relief in exercise of the revisional power under Section 264 of the Act.

24.2. After referring to the Division Bench decision of the Gujarat High Court in **Hitech Analytical Services v. Principal Commissioner of Income Tax**[3] and other decisions, Bombay High Court came to the conclusion that Principal

[3] (2017) SCC OnLine Guj 2682

Commissioner was not correct in refusing to exercise jurisdiction under Section 264 of the Act to examine the claim of the petitioner on merit. Therefore, the order of the Principal Commissioner was set aside and the matter was remanded back to the Principal Commissioner for a fresh consideration and decision on merit in accordance with law.

25. Mr. Prasad has relied upon the decision of the Supreme Court in **Goetze (India) Ltd.** (supra 2). In that case, after filing of return, the assessee sought to make a claim for deduction by way of a letter addressed to the assessing officer. Assessing officer disallowed it on the ground that there was no such provision in the Act allowing amendment in the return of income without filing a revised return. This was carried forward in appeal before the Commissioner of Income Tax (Appeals) who had allowed the appeal of the assessee. On further appeal before the Income Tax Appellate Tribunal by the Revenue, the order of Commissioner of Income Tax (Appeals) was set aside. Ultimately the matter reached the Supreme Court. Supreme Court noted that the decision rendered by the Income Tax Appellate Tribunal was under Section 254 of the Act. Therefore,

it deals with power of the Income Tax Appellate Tribunal to entertain for the first time a point of law. It was observed that the same can be raised provided the facts on the basis of which the issue of law arises can be traced to the orders of the authorities below. Supreme Court while upholding the order of the Income Tax Appellate Tribunal and dismissing the civil appeal clarified that the issue involved in the said case was limited to the power of the assessing officer and does not infringe on the power of the Income Tax Appellate Tribunal under Section 254 of the Act.

26. On due consideration, we are of the view that the aforesaid decision cannot be applied to the facts and circumstances of the present case as facts are distinguishable. As already discussed above, the issue in the present case relates to the power of the Principal Commissioner etc., under Section 264 of the Act. As we have discussed above, there is no limitation on exercise of such a power by the Principal Chief Commissioner etc.

27. That being the position and following the decision of the Bombay High Court in **Geekay Security Services (P.) Ltd.** (supra 1), we set aside the impugned order dated 28.03.2019 and remand the matter back to the file of the 3rd respondent for re-consideration of the revision application filed by the petitioner under Section 264 of the Act on merit after giving due opportunity of hearing to both the sides.

28. Let the fresh decision on remand be taken within a period of two (02) months from the date of receipt of a copy of this order.

29. Writ Petition is accordingly allowed. However, there shall be no order as to costs.

30. As a sequel, miscellaneous applications pending, if any, in this Writ Petition shall stand closed.

UJJAL BHUYAN, CJ

N.TUKARAMJI, J

Date: 12.06.2023
Note: L.R. copy to be marked.
(B/o.)
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