

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

**INCOME TAX APPEAL NO. 1816 OF 2013**

The Commissioner of Income Tax-10 ... Petitioners

Vs

M/s. Reliance Communication Ltd. ... Respondent

Mr. Tejveer Singh for the Petitioner.

Mr. Soli E. Dastur, senior counsel with Mr. Niraj Sheth and Mr. B.G. Yewale i/b M/s. Rajesh Shah & Co. for the Respondent.

**CORAM : S.C. DHARMADHIKARI &  
G.S. KULKARNI , JJ.**

**MONDAY, 28TH MARCH, 2016**

**P.C. :**

1. This is an appeal by the Revenue questioning the order of the Tribunal dated 5<sup>th</sup> February, 2013.

2. The respondent-assessee was in appeal before the Tribunal in Income Tax Appeal No. 2915/MUM/2012. The assessment year was 2007-2008.

3. The assessee was aggrieved by an order passed by the Commissioner of Income Tax on 30<sup>th</sup> March, 2012, in exercise of the powers under Section 263 of the Income Tax Act, 1961.

4. Mr. Tejveer Singh appearing in support of this appeal would submit that the formulated questions at pages 5 and 6 are all substantial questions of law. He would submit that if for instance this Court takes into consideration the two issues dealt with in the Tribunal's order, they would denote that the Foreign Currency Convertible Bonds (for short "FCCBs") and mark to market losses, the Assessing Officer passed an order which was erroneous and prejudicial to the interest of the Revenue. The Commissioner of Income Tax being accordingly satisfied, revised the order of the Assessing Officer.

5. Mr. Tejveer Singh invites our attention to paragraphs 6.1 and 6.3 of the Commissioner's order and equally the discussion on the subjects / items in the Tribunal's order.

6. Mr. Tejveer Singh's reliance is entirely on a Circular which has been issued and which Circular the Assessing Officer totally

failed to take into account. Mr. Tejveer Singh would submit that the assessee claimed income at Nil after allowing set off of brought forward business loss to the tune of Rs.244.93 crore and unabsorbed depreciation amounting to Rs.2615.92 crore. The assessee has raised funds by way of FCCBs during the year under consideration. No investigation was carried out by the Assessing Officer to establish the name and address, genuineness and creditworthiness of the actual subscribers to such FCCBs in terms of section 68 of the Act. Mr. Tejveer Singh would submit that there is a clear reference made to a Circular and which Circular of the Revenue has been ignored by the Assessing Officer. He would also submit that this is not a case where the ingredients of section 263 are not attracted and in that regard our attention is invited to the discussion in the Tribunal's order on both the aforesaid items. Thus, Mr. Tejveer Singh's emphasis is that there is a failure on the part of the Assessing Officer to carry out an enquiry and consider the requisite material.

7. On the other hand, Mr. Dastur, learned senior counsel appearing on behalf of the assessee would submit that the Tribunal was justified in interfering with the order of the

Commissioner. The fundamental and basic ingredients on which the satisfaction of the Commissioner must be based are absent. The Assessing Officer did make an enquiry and considered all the materials. Merely because in the submission of Mr. Tejveer Singh the concession that is recorded in the Tribunal's order was lack of discussion / reference to all aspects in the assessment order does not mean that the Commissioner was justified in exercising his jurisdiction or power under section 263 of the Act. Mr. Dastur read out all the details and the discussion in the Tribunal order on FCCBs. Mr. Dastur points out that CBDT instruction No.3/2010 was issued much after the assessment order dated 11<sup>th</sup> June, 2009. The number of the Circular refers to the year and that is 2010. In such circumstances, the Assessing Officer could not have imagined and well in advance that such an instruction or Circular is likely to be issued and, therefore, the loss on account of derivatives cannot be claimed as deduction is the mandate flowing from the law itself. In such circumstances, Mr. Dastur would support the conclusions of the Tribunal by reading out paragraphs 8.1 and 8.3 of the impugned order.

8. We have considered the rival contentions carefully. There is no reason to multiply this order with some decisions and reference to them in detail. Suffice it to state that Mr. Tejveer Singh relies on the decision of a Division Bench of this Court in *Commissioner of Income Tax vs. Hindustan Lever Limited* (2012) 343 ITR 161.

9. That decision refers to the assessment year 1998-99 where the assessee filed return of income of Rs.661.15 crore and claimed deduction in the sum of Rs.11.41 crore under section 80-I, Rs.21,=8.62 crore under section 80-IA and Rs.20.20 crore under section 80-HH. The Assessing Officer assessed the income under section 43(3) at Rs.814.66 crore and restricted the deduction claimed to the sum or figure quoted in paragraph 3 of the order. The Commissioner noticed on verification of the records that the expenditure having a bearing on the profits of the units had not been considered for allocation. The Commissioner found that in the exercise carried out by the Assessing Officer there was indeed an error and the order of the Assessing Officer, therefore, is erroneous insofar as it is prejudicial to the interest of the Revenue. The rival contentions

have been noted and in dealing with them, the Division Bench found that the Tribunal has interfered with a finding by proceeding on the basis that during the course of assessment, the Assessing Officer made a specific query. This query was with reference to the deduction under the three sections, that assessee gave reply for each and every item qua this deduction which was enquired into by the Assessing Officer. That was replied one by one. It is only thereafter that the Assessing Officer accepted the claim of the assessee. According to the Division Bench, there was patent fallacy in the approach of the Tribunal inasmuch as the Assessing Officer sought explanation on why certain expenditure should not be allocated and the reply of the assessee contained virtually no material or details to establish that there was no direct nexus between the expenditure incurred under the heads in question and the business of the undertakings with reference to which the deduction was claimed. If there was a general explanation given that the expenditure, namely, capital on scientific research had not been incurred at the undertakings and is not directly linked to the operations of the undertakings but the facts to the knowledge of the assessee were not revealed, then, that was no explanation at all. Once that was no

explanation, much less acceptable, then, the Assessing Officer should not have proceeded on the lines indicated by the Commissioner as that was a complete error. That resulted in his order being erroneous and prejudicial to the interest of the Revenue. It is in dealing with that situation so also the contention raised by the assessee of having supplied the relevant details and giving a point to point reply that the observations relied upon by paragraph 17 by Mr. Tejveer Singh have been made. That must be seen in the backdrop of the facts. In such circumstances, when the order in that case was found to be erroneous insofar as it is prejudicial to the interest of the Revenue that the Commissioner rightly stepped in.

10. In the case before us, the concession of the assessee's authorized representative apart, what the Tribunal found and on all the three items highlighted by Mr. Tejveer Singh is that there were materials before the Assessing Officer. The Assessing Officer made enquiries about the above referred aspects and which have been noted by the Commissioner. The assessee made submissions by placing all relevant documents before the Assessing Officer. Thus the case does not fall within the

parameters laid down in the decision of the Hon'ble Supreme Court and other High Courts. The mere fact that the Assessing Officer did not make any reference to these three issues in the assessment order cannot make the order erroneous when the issues were indeed looked into. The entire details were filed and the order itself indicates that it can be inferred that the Assessing Officer not only made enquiries, but satisfied himself with the assessee's replies furnished from time to time in support of its stand. When the Tribunal concludes in this manner and finally in paragraph 16 holds that the Assessing Officer took a perfectly correct or a possible view, then, the order passed by him cannot be termed as erroneous insofar as it is prejudicial to the interest of the Revenue. The Commissioner of Income Tax was not, therefore, justified in invoking section 263 of the Act.

11. We are of the view that the Tribunal's order and conclusions are essentially on facts. They cannot be termed as perverse and after it adverted to the rival contentions and all the materials on record. The Tribunal's order cannot thus be held to be vitiated by an error of law apparent on the face of record so as to call for interference in our further appellate jurisdiction. The appeal,

therefore, does not raise any substantial questions of law, but the attempt of the Revenue is to have a reappreciation and reappraisal of the same factual material. That is impermissible. The appeal is, therefore, devoid of merits and is dismissed. No order as to costs.

*G.S. KULKARNI, J.*

*S.C. DHARMADHIKARI, J.*