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

INCOME TAX APPEAL NO. 2171 OF 2013

The Commissioner of Income Tax -I
Pune .. Appellant

v/s.
Gera Developments Private Limited, Pune ..Respondent

Mr.Suresh Kumar i/b Mr.Vipul Bajpayee, for the appellant.
Mr.Mihir Naniwadekar, for Respondent.

CORAM : M.S. SANKLECHA &
B.P. COLABAWALLA, J.J.
DATED : 29th FEBRUARY, 2016.

P.C.

. This Appeal by the Revenue under Section 260-A of the Income Tax Act, 1961 (the Act) assails the order dated 08/03/2013 passed by the Income Tax Appellate Tribunal (ITAT). The assessment year involved is Assessment Year 2007-2008.

2. Mr.Sureshkumar, learned Counsel for the Revenue proposes the following re-framed question of law for our consideration.

> *"whether on the facts and on the circumstances of the case the ITAT is correct in setting aside the order passed by the Commissioner of Income Tax under section 263 of the IT Act, 1961 with regards to transfer of development rights and warranty expenses and holding that the order of AO is not erroneous and prejudicial to the interest of the Revenue with respect to the above item ?"*

3. For the assessment year 2007-2008, the respondent-assessee filed its return of income declaring total income of Rs.19.97 Crores. Amongst the issues which arose for consideration during the assessment proceedings were:

i) whether the consideration of Rs.41 Crores received on transfer of development right is to be taxed in the subject assessment year or not; and

ii) whether an amount of Rs.68.24 lakhs should be allowed as warranty expenses.

The Assessing Officer in his order dated 29/12/2009 on issue of transfer of development right held that the amount of Rs. 41 Crores received by the respondent – assessee was subject to performance of certain obligation relating to environmental clearance and in the absence of performing the obligation, the amounts had to be returned. On consideration of facts, the Assessing Officer held that an amount of Rs. 5.86 Crores could alone be taxed in the subject assessment year and the balance amount of Rs. 35.14 Crores were considered as deposit. So far as the warranty expenses are concerned, the Assessing Officer called for various details and justification for claiming warranty expenses. The respondent – assessee responded to this by filing a reply and on satisfaction, the Assessing Officer allowed the warranty expenses as claimed in the assessment order.

4. The Commissioner of Income Tax in exercise of his power under Section 263 of the Act, by an order dated 31/10/2011 held that the conclusion of the Assessing Officer on the above 2 issues namely transfer of development right and warranty expenses is erroneous and prejudicial to the interest of the Revenue. Moreover, the Commissioner

also held that set off of short term capital loss without taking into account Section 94 of the Act was also erroneous and prejudicial to the interest of the Revenue. In these circumstances, he set aside the assessment order dated 29/12/2009 and directed the Assessing Officer to complete the assessment proceedings in accordance with law as discussed in his order.

5. Being aggrieved, the respondent – assessee has carried the issue in appeal to ITAT. The grievance of the petitioner was to the order dated 31/10/2011 of the Commissioner of Income Tax holding that the order dated 29/12/2009 of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue on the following three issues.

(a) Consideration received as transfer of Development Right.

(b) Warranty expenses and

(c) Set off of short term capital loss.

So far as issue (a) above is concerned, the impugned order reproduced the order of the Assessing Officer dated 29/12/2009. In the Assessment Order, on consideration of all facts, he had come to the conclusion that out of an amount of Rs.41 Crores received, an amount of Rs.35.14 Crores was in the nature of deposit as the receipt was subject to environmental clearance. Only Rs. 5.86 Crores could be treated as income for the subject assessment year. In view of above, the impugned order of the ITAT records that the finding cannot be treated as erroneous.

So far as the issue (b) above with regard to warranty expenses is concerned, the impugned order holds that the questions were posed during the assessment proceedings to the respondent – assessee. The same were responded to by the respondent – assessee justifying the warranty expenses claimed. On satisfaction, the Assessing Officer accepted the claim of expenditure made by respondent – assessee. Thus, in this case also a view was taken that it cannot be said to erroneous.

So far as issue (c) above with regard to the set off of the short term capital loss is concerned, the ITAT upholds the order dated 31/10/2011 of the Commissioner of Income Tax holding the same is erroneous and prejudicial to the Revenue.

6. The Revenue is aggrieved by the order of the ITAT insofar as it set aside the order dated 31/10/2011 of the Commissioner of Income Tax i.e. on issues (a) and (b) above viz. taxability of consideration received on transfer of development right and allowing of warranty expenses is in appeal.

7. We have considered the rival submissions. With regard to issue (a) i.e. taxability of the transfer of development right, we find that the impugned order of the ITAT records findings of Assessing Officer in detail from which it is evident that the Assessing Officer applied his mind to the above claim and on the basis of the facts before him, came to the conclusion that an amount of Rs.5.86 Crores out of Rs. 41 Crores received could alone be subjected to the tax as income during the subject assessment year. The balance amount Rs.35.14 Crores has to be treated as deposit as the same is subject to being refunded in the absence of the environmental clearance. Thus, we find

that the Assessing Officer has taken a view/formed an opinion on the facts before him and such a opinion cannot be said to be an erroneous as it does not proceed on the incorrect assumption of facts or law and the view taken is a possible view. Therefore, as held by the Apex Court in **Malabar Industrial Co. Ltd Vs. Commissioner of Income Tax, 243 ITR page 83** where two views are possible and the Income Tax Officer has taken one view with which the Commissioner of the Income Tax does not agree, cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is itself unsustainable in law.

So far as issue (b) i.e. warranty expenses claimed by the respondent – assessee is concerned, we find that the ITAT has recorded the fact that a specific query with regard to the same was made by the Assessing Officer during the assessment proceedings. This query was responded to by the respondent – assessee justifying the warranty expenses. The Assessing Officer being satisfied with regard to the justification offered, allowed the claim of warranty expenses as made by the respondent – assessee. It is thus clear that the Assessing Officer had considered the issue by raising questions during the assessment proceedings. The mere fact that it does not fall for discussion in the assessment order would not ipso facto lead to the conclusion that the Assessing Officer did not apply his mind. It is clear that if the Assessing Officer is satisfied with the response of the assessee on the issue and drops the likely addition, it cannot be said to be non application of mind to the issue arising before the Assessing Officer. In fact this issue was a subject matter of the consideration by this Court in **the Commissioner of Income Tax-8 V/s. M/s. Fine Jewellery (India)**

Ltd., Income Tax Appeal No. 296 of 2013 rendered on 03rd February, 2015. In the above case, an identical submission made on behalf of the Revenue was negatived in the context of exercising of power under Section 263 of the Act to hold that if a query is raised during the assessment proceedings and responded to by the assessee, the mere fact that it has not been dealt with in the assessment order would not lead to a conclusion that the Assessing Officer has not applied his mind to the issues.

8. We thus find that on the issues (a) and (b) viz. consideration received on transfer of development right and warranty expenses are concerned, the impugned order of the ITAT has applied the principle of law laid down in **Malabar Industrial Co. Ltd** *(supra)* and **M/s. Fine Jewellery (India) Ltd.** *(supra)*. Thus, the question as proposed does not give rise to any substantial question of law. Thus, the question as framed are not entertained.

9. Accordingly, appeal is dismissed. No order as to costs.

(B.P. COLABAWALLA, J.) **(M.S. SANKLECHA, J.)**