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

INCOME TAX APPEAL NO. 1245 OF 2015

Ashish Estates and Properties Pvt. Ltd., .. Appellant.
v/s.
Commissioner of Income Tax .. Respondent.

Mr. Madhur Agrawal with Mr. Bharat Damodar i/b. Kanga & Co., for the Appellant.
Mr. Suresh Kumar, for the Respondent.

CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.
DATE : 6th JUNE, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 23rd June, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 23rd June, 2015 is in respect of Assessment Year 2008-09.

2 The Appellant-Assessee urges only the following questions of law, for our consideration:

"(a) Whether on a true and proper construction of section 254(1) of the Act, the Tribunal was justified in not giving any reasons and in not deciding the issue relating to disallowance under section 14A of the Act qua strategic investments made in the firms and companies for executing various projects?

(b) Whether on a true and proper construction of sections 36(1)(iii) read with section 14A of the Act, the Tribunal was justified in confirming disallowance under section 14A in respect of strategic investments made in Special Purpose Vehicle

(SPV) namely in the firms and companies for executing various projects in the course of its business?"

3 Mr. Agarwal, learned Counsel in support of the Appeal, at the very out set pointed out that in view of the decision of the Apex Court in ***Maxopp Investments Ltd., v/s. CIT reported in 402 ITR 640*** – the issue on merits as reflected in the two above questions, stands concluded against the Respondent-Revenue. Therefore, in order to challenge the findings of the Tribunal, he seeks to re-frame the question of law and tenders draft proposed question of law which reads as under:-

> *" Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the disallowance of Rs.50,44,792/- u/s. 14A of the Act?"*

4 It is submitted on behalf of the Appellant-Assessee that on the date the appeal was filed before the Tribunal and also when the impugned order was passed, the original questions as framed in respect of strategic investment stood adjudicated in favour of the Appellant-Assessee by the decision of this Court in ***CIT v/s. India Advantage Securities Pvt. Ltd., 380 ITR 471.*** (*prima facie,* it does not appear to deal with the issue of strategic investment). Nevertheless, it is the case of the Appellant-Assessee that in the aforesaid circumstances, the Appellant-Assessee did not urge the alternate without prejudice ground before the Tribunal – namely – that the disallowance under Section 14A of the Act on application of Rule 8-D of the Act could not be in excess of total exempt income.

5 It is an undisputed position before us that, the aforesaid alternate contention was not urged before the Tribunal. In the above view, we pointed that in view of the decisions of this Court in ***CIT v/s.***

Tata Chemicals Pvt. Ltd., 256 ITR 395 and ***CIT v/s. Smt. Lata Shantilal Shah 323 ITR 297*** – an appeal under Section 260-A of the Act, can only be in respect of issues which were raised before the Tribunal. Admittedly, the issue of the disallowance in excess of the total exempt income was not an issue urged before the Tribunal. Therefore, it would be not possible for us to entertain this appeal as the issue being urged before us now, is not, an issue of jurisdiction.

6 In fact, the Apex Court in ***CIT v/s. Scindia Steam Navigation Co. Ltd., 1961 SCC 1633*** had while dealing with the scope of a Reference under Section 256 of the Act, has held that a question not raised before the Tribunal nor independently opined on by the Tribunal will not be a question arising out of the order of the Tribunal.

7 In response, Mr. Agarwal, learned Counsel for the Appellant in support, places reliance upon – ***Santosh Hazari v/s. Purshottam Tiwari 251 ITR 84*** and ***Chitturi Subbanna v/s. Kudapa Subbanna AIR 965 SCC 1325*** – to contend that question of law which does not require any further investigation into facts, should be entertained even at the stage of second appeal. Both these decisions were rendered not in the context of Section 260-A of the Act but under Section 100 of the Code of Civil Procedure, 1908.

8 Mr. Agarwal, learned Counsel next places reliance upon the decision of the Apex Court in ***CIT v/s. Distillers Co. Ltd., 290 ITR 419.*** In the above case, the Apex Court upheld the view of the Karnataka High Court on merits of inapplicability of Section 43B of the Act in the facts of that case. However, Apex Court did not opine on the Karnataka High

Court, disagreeing with the view of this Court in Tata Chemicals (supra) prohibiting an Appellant from raising a question which was not urged before the Tribunal. Thus, the Apex Court in the above case had no occasion to deal with the issue arising herein. Thus, we continue to be bound by the orders of this Court in Tata Chemicals Ltd.,(supra).

9 Thereafter, the Appellant placed reliance upon the decision of the Apex Court in ***CIT v/s. Jhabua Power Ltd., 217 Taxman 399*** – wherein Apex Court allowed the question to be raised for the first time before it even though it was not urged before the Tribunal. However, in the aforesaid case, the question which was urged before the Apex Court, was on an issue of jurisdiction. Undoubtedly, an Appellate Court even in the second appeal, would entertain a question relating to jurisdiction. A jurisdictional issue going to the root of the matter can be raised at any time, even before the Apex Court for the first time.

10 Our Court has taken a view that in Tata Chemicals Ltd., (supra) and Smt. Lata Shah (supra) that the question of law not raised before the Tribunal would not be allowed to be urged before the High Court in appeal under Section 260-A of the Act. This, of course, does not preclude this Court from entertaining an appeal on issue of jurisdiction even if the same has not been raised before the Tribunal. However, in this case, admittedly, the proposed question is not one of jurisdiction.

11 In view of the above, the question as framed does not give rise to any substantial question of law.

12 Accordingly, **Appeal dismissed.** No order as to costs.

(SANDEEP K. SHINDE,J.) **(M.S.SANKLECHA,J.)**