

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13TH DAY OF JANUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.115 OF 2010

BETWEEN:

M/S. SUTURES INDIA PVT. LTD.,
REP. BY ITS MANAGING DIRECTOR
SRI. L.G. CHANDRASEKHAR
NO.118, 3RD PHASE, 13TH CROSS
PEENYA INDUSTRIAL AREA
BANGALORE-560058.

... APPELLANT

(BY SRI. A. SHANKAR, SP. COUNSEL FOR
SRI. M. LAVA, ADV.,)

AND:

THE COMMISSIONER OF INCOME-TAX
BANGALORE-III, C.R. BUILDING
QUEENS ROAD, BANGALORE-560001.

... RESPONDENT

(BY SRI. K.V. ARAVIND, ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 13.11.2009 PASSED IN ITA NO.1261/BANG/2008 FOR THE ASSESSMENT YEAR 2003-04, PRAYING TO:

(i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN.

(ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA NO.1261/BANG/2008, DATED 13.11.2009, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2003-04. The appeal was admitted by a bench of this Court vide order dated 19.04.2020 on the following substantial questions of law:

"(i) Whether the Tribunal was justified in holding that the Commissioner of Income Tax was fully justified in invoking the provisions of Section 263 of the Income Tax Act, 1961?

(ii) Whether the Tribunal was justified in holding that the deduction under Section 80HHC of the Act is to be allowed after deduction of the amount of profit allowed as deduction under Section 80IB of the Act?

(iii) Whether the Tribunal was justified in law in not following the decision of Madras High Court in the case of SCM Creations Vs. ACIT (2008) 304 ITR 319 (Mad), but followed the decision of the Tribunal in the case of ACIT Vs. Hindustan Mint and Agro Products (P) Ltd. (2009) 199 ITD 107 (Delhi)?

(iv) Whether the Tribunal was justified in holding that at the time of filing audit report in form 10CCB along with the return was mandatory in nature on the facts and circumstances of the case?"

2. Facts leading to filing of this appeal briefly stated are that the assessee is a private limited company and is engaged in the business of manufacture and sale of surgical products. The assessee filed its return of income for the Assessment Year 2003-04 and declared a total income of Rs.84,06,640/-. The return was processed under Section 143(1) of the Act. Thereafter, the case of the assessee was selected for

scrutiny. The assessment was completed under Section 143(3) of the Act by the Assessing Officer by order dated 14.06.2005 and disallowances to the tune of Rs.17,96,250/- were made and demand of Rs.9,85,514/- was made on the assessee. Thereafter, the Commissioner of Income Tax invoked the powers under Section 263 of the Act and a show cause notice dated 23.10.2007 was issued by the Commissioner of Income Tax. In the notice, it was stated that the order dated 14.06.2005 passed by the Assessing Officer was erroneous and was prejudicial to the interest of revenue. The assessee filed a response to the aforesaid show cause notice and also submitted objections on 07.03.2008. The Commissioner of Income Tax by an order dated 11.03.2008 rejected the objections filed by the assessee and denied the deduction under Section 80IA of the Act and directed the Assessing Officer to re-compute the deduction under Section 80HHC of the Act subjecting the same to the provisions of Section 80IA(9)

of the Act if necessary. The assessee thereupon filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). The tribunal by an order dated 23.11.2009 has dismissed the appeal preferred by the assessee. In the aforesaid factual background, the assessee has filed this appeal.

3. Learned Senior counsel for the assessee submitted that the assessee had claimed deduction of Rs.11,44,832/- under Section 80HHC of the Act and of Rs.40,93,489/- under Section 80IA of the Act. It is further submitted that Commissioner of Income Tax vide order dated 11.03.2008 inter alia held that the deduction under Section 80IA of the act is not allowable as the assessee had not filed the Form No.10CCB as required under Section 80IA(7) of the Act along with the return of income. It is pointed out that the assessee had filed the aforesaid form along with the written submissions before the Commissioner of Income Tax, which was duly acknowledged in the order dated

11.03.2008. It is also submitted that the deduction under Section 80IA of the Act should be allowed even in cases as such Section 80IA(7) does not cast any obligation on the assessee that return must be accompanied by the audit report. It is further submitted that there is no bar in claiming the deduction under Section 80IA as well as Section 80HHC of the Act simultaneously. It is further submitted that the invocation of Section 263 of the Act was impermissible in the fact situation of the case and the Commissioner of Income Tax ought to have appreciated that the Assessing Officer had taken one of the plausible views . In support of aforesaid submissions, reliance has been placed on decisions in '**SRI.B.R.MURTHY (HUF) VS. ITO IN ITA NO.686/2009 DATED 30.11.2009, 'CIT VS. A.N.ARUNACHALAM', (1994) 208 ITR 481 (MADRAS), 'CIT VS. MILLIPORE INDIA P. LTD.', 341 ITR 219 (KAR.), 'ACIT VS. MICRO LABS LTD.', (2016) 380 ITR 1, 'MALABAR INDUSTRIAL CO.**

LTD. VS. CIT 243 ITR 83 (SC), 'COMMISSIONER OF INCOME-TAX VS. G.M.MITTAL STAINLESS STEEL (P.) LTD', 263 ITR 255 (SC) AND 'CIT VS. M/S SARAVANA DEVELOPERS IN ITA NOS.68/2014 C/W 67/2017 (KARNATAKA).

4. On the other hand, learned counsel for the revenue submitted that the controversy is pending before the larger bench of the Supreme Court, which is evident from perusal of 380 ITR 1 (SC) and therefore, hearing of this appeal should be deferred till the matter is adjudicated by the larger bench of the Supreme Court. It is further submitted that Section 263 of the Act provides for revisional order by the Commissioner if the same is erroneous and is prejudicial to the interest of the revenue. In the instant case, the assessee had not filed Form No.10CCB as required under Section 80IA(7) of the Act along with the return of income which is mandatory and therefore, assessee is not entitled to deduction under Section 80IA of the Act. However, the

Assessing Officer without examining the aforesaid aspect permitted the deduction and therefore, the order passed by the Assessing Officer is erroneous and is prejudicial to the interest of the revenue. It is also urged that Section 80IA (9) of the Act mandates deduction to the extent of such profits and gains which has been allowed under the heading 'deductions in respect of certain incomes'. The Assessing Officer had allowed the deduction under Section 80HHC of the Act without reducing the deduction allowed under Section 80IA of the Act, which is mandated under Section 80IA(9) of the Act. It is further submitted that the order of assessment is erroneous and is prejudicial to the interest of the revenue.

5. It is also argued that as the assessee is questioning the invocation of power of revision under Section 263 of the Act, the correctness of the order subjected to the revision has to be tested on the basis of situation and position of law and compliance of the same

by the assessee. It is submitted that audit report in Form No.10CCB which was mandatorily required to be filed was not filed in the course of assessment proceeding. The order passed by the Assessing Officer suffers from the vice of non application of mind. It is further submitted that twin conditions for invoking powers under Section 263 of the Act are satisfied due to incorrect application of law and without any application of mind. It is further submitted that failure conduct enquiry into the issues would also justify invoking powers of revision under Section 263 of the Act. In support of aforesaid submissions, reliance has been placed on decisions in **'NATURAL STONES EXPORTS LTD. VS. ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE - 11(1)', (2014) 42 TAXMANN.COM 467 (KARNATAKA), 'INCOME TAX OFFICER VS. SMT. MANDIRA D. VAKHARIA', (2001) 117 TAXMAN 236 (KARNATAKA), 'COMMISSIONER OF INCOME TAX, MUMBAI VS. AMITABH BACHCHAN,**

(2016) 69 TAXMANN.COM 170 (SC), "MALABAR INDUSTRIAL COMPANY VS. CIT', 243 ITR 83

6. We have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further it is apposite to deal with the submission made by learned counsel for the assessee made with regard to deferment of hearing of the appeal. A bench of this court by an order dated 20.11.2018 in view of submission made by learned counsel for the revenue that question of law which would arise for consideration in this appeal has been referred to a larger bench of the Supreme Court, directed that the appeal be listed after disposal of the special leave petition. Thereafter the counsel for the assessee filed an application for modification of the order dated 20.11.2018 on the aforesaid application the following order was passed by this court on 04.12.2020 the relevant extract of which reads as under:

"Learned counsel for the assessee submits that by order dated 20.11.2018, the hearing of the appeal was deferred on the ground that the substantial question of law involved in the appeal is pending consideration before the Larger Bench of the Hon'ble Supreme Court. However, it is submitted that the learned counsel for the assessee does not intend to address arguments on the issue which is pending before the Hon'ble Supreme Court and it is contended that the appeal may be disposed of as the Assessing Officer has adopted one of the views which is possible and therefore, the invocation of Section 263 of the Income Tax Act by the Commissioner of Income Tax in the facts and circumstances was not justified. The aforesaid fact has not been disputed by the learned counsel for the Revenue. For the aforesaid reason and in view of the statement made by the learned counsel for the assessee, we deem it appropriate to modify the ad interim order dated 20.11.2018 and direct that the appeal be listed for hearing"

The aforesaid order has not been challenged by the Revenue before the Supreme Court. Therefore the aforesaid order binds us and the submission made by learned counsel for the Revenue that the hearing of the appeal needs to be deferred does not deserve acceptance.

7. The conditions precedent for invocation of power under Section 263 of the Act namely that an order passed by an assessing officer must be prejudicial to the interest of the Revenue and must be erroneous have to be fulfilled before power under section 263 of the Act is invoked. It is equally well settled legal proposition that where the view taken by assessing officer is one of the possible views the powers under section 263 of the Act would not be invoked [See: **'MALABAR INDUSTRIAL CO. LTD. V. COMMISSIONER OF INCOME TAX', 243 ITR 83 (SC), CIT V. MAX INDIA LTD., 295 ITR 282 AND ULTRATECH CEMENT LTD. V. STATE OF**

RAJASTHAN, (2020) 117 TAXMANN.COM 807 (SC)].

8. In the backdrop of aforesaid well settled legal position, we may advert to the facts of the case. The assessee had filed Form No.10CCB of the Act along with written submissions before the Commissioner of Income Tax (Appeals), which was acknowledged by him in the order dated 11.03.2008. A bench of this court in '**CIT V. ACE MULTITAXES SYSTEMS (P.) LTD., (2009) 317 ITR 207 (KAR.)**' has taken a view that assessee is entitled to deduction under Section 80IA of the Act even if the audit report is filed at the appellate stage. Similar view has been taken by Madras High Court in A.N. Arunachalam (supra). Thus, the view taken by the assessing officer with regard to eligibility of the assessee to claim deduction under section 80IA of the Act was one of the possible views. We are fortified in our aforesaid conclusion in view of the order passed by the

Commissioner of Income Tax under section 263 of the Act. The relevant extract of which reads as under:

"The order u/s. 143(3) dated 14-06-2005 is, therefore, modified to the extent that deduction claimed u/s. 80IA is withdrawn and for the purpose of computing deduction u/s. 80HHC, deduction allowable u/s. 80IA has to be reduced from the business profits. Since deductions u/s. 80IA is being denied, there will be no change in the computation of deduction u/s. 80HHC for the time being. However, in case it is held by the appellate authority that the assessee is entitled to deduction u/s. 80IA, the deduction u/s. 80HHC will have to be recomputed keeping in mind the provisions of section 80IA(9)".

9. Thus the order passed by the Commissioner of Income Tax itself discloses that two views are possible. Therefore it is not necessary for us to deal with various contentions made by learned counsel for the parties. In the result the substantial questions of law are answered in favour of the assessee and against the

revenue. In the result, the order dated 11.03.2008 passed by the Commissioner of Income Tax and order dated 23.11.2009 passed by the Tribunal are hereby quashed.

In the result, the appeal is allowed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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