

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 9157 of 2024

FOR APPROVAL AND SIGNATURE:

**HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

=====

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

=====

SURAT TRADE AND MERCANTILE LIMITED

Versus

PRINCIPAL COMMISSIONER OF INCOME TAX SURAT 1 & ANR.

=====

Appearance:

MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1

MRS KALPANA K RAVAL(1046) for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

=====

CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MRS. JUSTICE MAUNA M. BHATT

Date : 01/10/2024

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Advocate Mr. Tushar

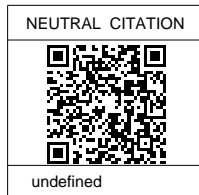
Hemani with learned advocate Mr. Vaibhavi Parikh for the petitioner and learned Senior Standing Counsel Mr. Karan Snaghani for Kalpana K. Raval for the respondent.

2. Rule returnable forthwith. Learned Senior Standing Counsel Mr. Karan Sanghani waives service of notice of rule on behalf of the respondent.
3. Having regard to the controversy which is in narrow compass with the consent of the learned advocates for the respective parties, the matter is taken up for hearing.
4. By this petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 30.03.2024

passed by the respondent No.1-Principal Commissioner of Income Tax, Surat-I under section 264 of the Income Tax Act,1961 [for short 'the Act'] for the Assessment Year 2021-2022.

5. Brief facts of the case are that the petitioner filed return of income for A.Y. 2021-2022 on 18.02.2022 declaring total income of Rs. 14,30,22,235/-.

6. It is the case of the petitioner that the person, who was responsible for filing return of income, forgot to claim 'Long Term Capital Loss' (for short 'LTCG') arising on account of extinguishment of shares of Garden Silk Mills Ltd which were acquired by the petitioner since 1994. The National Company Law Tribunal [NCLT for



short] passed the order in the beginning of the Financial Year 2020-2021 relevant to the year under consideration the petitioner had 4,80,878 shares of the said company. The said company was subjected to the proceedings under the Insolvency and Bankruptcy Code, 2016 [for short 'IBC'] before the NCLT who, by order dated 01.01.2021 in IA No. 661/2020 CP(IB) 453/2018, directed the extinguishment of the equity shares of the said Company.

7. According to the petitioner, Fair Value of the investment in 4,80,878 shares of Garden Silk Mills Ltd at the commencement of the year under consideration was Rs. 25.25 lakhs which was reduced to Nil at the end of the year under consideration on account of the order passed by the NCLT

and corresponding adjustments were made in relation to such investment in the books of accounts reflected in Notes 3 and 26 forming part of the audited account for the Financial Year 2021.

8. The petitioner, upon realizing that the legitimately allowable claim/carried forward was left out to be claimed in the return of income for the year under consideration, filed application under section 264 of the Act before respondent No.1 but by that time, the intimation under section 143(1) of the Act dated 22.11.2022 was already issued whereby, refund due to the petitioner was determined at Rs. 18,50,310/-.

9. The petitioner therefore, by letter dated 16.02.2023 filed on 28.02.2023 approached respondent No.1 in the application under section 264 of the Act contending inter alia as under:

- "All the relevant facts (as discussed hereinabove) were categorically stated.
- Inadvertently, legitimate LTCL of Rs.32,72,77,339/-was left out to be claimed in the return of income.
- Section 264 uses the expression "any order" which implies that section is not limited to the power to correct errors committed by "subordinate authorities" but also cover errors committed by the "assessee". Accordingly, it would also cover a situation where an assessee, because of an error, has not put forth a legitimate claim at the time of filing

the return which is discovered subsequently and is raised for the first time in an application under section 264 of the Act.

- Accordingly, the respondent was requested to pass necessary orders or give necessary direction to allow the petitioner to claim and carry forward legitimate LTCL (arising on extinguishment of shares of GSML) to subsequent years."

10. Respondent No.1 issued the notice dated 27.10.2023 calling upon the petitioner as to why the revision application filed by the petitioner should not be rejected.

11. Respondent No.1 thereafter passed the impugned order dated 30.03.2024 rejecting the revision application filed by the petitioner under section 264 of the Act

and declined to interfere with intimation dated 22.11.2022 passed under section 143(1) of the Act for the year under consideration.

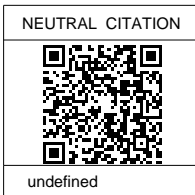
Being aggrieved, the petitioner has preferred this petition challenging the aforesaid order.

12. Learned Senior Advocate Mr.Hemani for the petitioner submitted that admittedly, the petitioner did not claim the LTCG arising out of the extinguishment of the shares of the Garden Silk Mills Ltd in the return of income. Pursuant to the order dated 01.01.2021 passed by the NCLT, the same was given effect in the audited balance sheet for the year under consideration.

13. Learned Senior advocate Mr.Hemani invited attention of the Court to Note No.3 in the notes annexed forming part of the financial statement as well as Note No.26 where the loss was claimed by the petitioner of Rs. 121.88 lakhs on account of extinguishment of the shares of the said company.

14. It was therefore submitted that respondent No.1 was required to consider the prayer made by the petitioner to permit the petitioner to claim such loss in the return of income and adjudicate the same whether the petitioner is eligible or not as per the provisions of section 254 of the Act. It was submitted that respondent No.1 rejected the revision application merely on the ground that the application

is not maintainable as the LTCG claimed by the petitioner is not emanating due to some disallowance/additions made in order under section 143(1) of the Act nor it is the case where error is observed in the said order. It was submitted that the petitioner has not filed revision application on the ground that the order/intimation under section 143(1) of the Act was erroneous to the interest of the petitioner and the respondent No.1 therefore, ought to have entertained the claim of the petitioner on merits. It was further submitted that the respondent No.1 in paras 4.2 to 4.4 of the impugned order has misinterpreted provisions of section 2(22) (d) of the Act as there is no distribution of profit on account of reduction of capital but the share capital



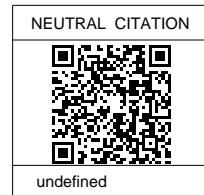
of the company in liquidation before the NCLT under IBC was extinguished and as such, the petitioner was entitled to claim LTCG on account of extinguishment of the value of the investment as per the settled legal position. It was further submitted that the respondent No.1 ought to have entertained the claim and adjudicate the same taking into consideration the submissions which were made by the petitioner the revision application.

15. In support of his submissions, reliance was placed on the decision of the Bombay High Court in case of **Pramod R. Agrawal vs. Principal Commissioner of Income Tax** reported in (2023) 156 taxmann.com 126 as well as decision of this Court in case of

C.Parikh & Co. vs. Commissioner of Income Tax reported in [1980] UTR 610 (Guj).

16. On the other hand, learned Senior Standing Counsel Mr. Karan Sanghani for the respondent No.1 submitted that the respondent No.1 has rightly rejected the revision application under section 264 of the Act as there is no error in the order/intimation passed under section 143(1) of the Act and merely because the petitioner has erroneously not claimed the LTCG in the return of income, the petitioner cannot be allowed a second inning to revise the return of income which is beyond the purview of provisions of section 264 of the Act.

17. It was also submitted that the petitioner filed its return of income for A.Y 2021-2022 on 18.02.2022 declaring total income of Rs. 14,30,22,235/- and deemed income under section 115JB of the Act of Rs. 17,42,70,133/- and the petitioner also claimed LTCG of Rs. 51,76,068/- has brought forward from A.Y. 2020-21 and therefore, it cannot be said that the petitioner had forgotten to claim the LTCG while filing return of income which can be considered as bona fide mistake so as to enable the petitioner to file a revised return beyond the period of limitation. It was further submitted that the so called bona fide mistake or error committed at the stage of filing of return of income cannot entitle the petitioner to revise the return as the petitioner did not claim

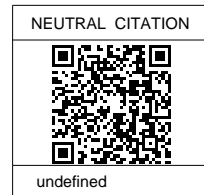


such LTCG in the original return filed under section 139(1) of the Act. It was further submitted that when the petitioner has not claimed any loss of the Garden Silk Mills Ltd in the original return, such loss cannot be allowed while exercising the jurisdiction under section 264 of the Act and the respondent No.1 has therefore, rightly rejected the revision application.

18. It was further submitted that respondent No.1 has also adjudicated the claim of the petitioner on merits after considering the provisions of section 2(22)(d) of the Act as the same is applicable in the facts of the case as the extinguishment of the shares is akin to the reduction in capital and therefore the provision of section

2(22) (d) of the Act would be applicable. It was further submitted that on bare perusal of the provision of section 264 of the Act, the respondent No.1 has rightly not exercised the jurisdiction vested in it for revising the intimation/order under section 143(1) of the Act and therefore, no interference be made while exercising extraordinary jurisdiction under Article 227 of the constitution of India.

19. Learned advocate Mr. Sanghani submitted that respondent No.1 has rightly rejected revision application as the petitioner failed to submit the requisite documents in support of the claim of loss on account of extinguishment of the shares of the company in liquidation.



20. Having heard Learned advocates for the respective parties and considering the facts of the case it is apparent that the petitioner has not claimed LTCG on extinguishment arising on account of loss arising on account of extinguishment of shares of Garden Silk value of shares of Garden silk pursuant to order dated 01.01.2021 passed by the NCLT. Respondent No.1 is however supposed to consider merits of the case while entertaining revision petition filed by the petitioner under section 264 of the Act and it is not in dispute that the petitioner has availed the remedy of revision within the prescribed period of limitation and the respondent therefore ought to have considered the claim of the petitioner for

loss on account of extinguishment of the value of shares in the investment of shares of Garden as per the order passed by the NCLT which was not claimed by the petitioner in the original return of income. The Hon'ble Bombay High Court in case of Pramod R. Agraval (supra) has considered the scope of power under section 264 of the Act as under:

"12 In Asmita Damle (Supra) also the court held that the Commissioner while exercising revisionary powers under Section 264 of the Act has to ensure that there is relief provided to assessee where the law permits the same. Paragraphs 3 and 4 read as under:

"3 In view thereof, assessee filed the application under Section

154 for rectification of the assessment order. This application was rejected. Against that order, the petitioner filed a revision under [Section 264](#) of the Act to the Commissioner of Income Tax, for refund. The Commissioner of Income Tax, by the impugned order held that there was no mistake apparent from record. He held that the provisions of [Section 264](#) were not attracted.

4 There is no dispute regarding the petitioner's entitlement to the benefit. The only question is whether the petitioner is entitled to enforce that remedy in the manner in which she has done. In a similar matter, a Division Bench of this Court in the case of [Devdas Rama Mangalore v/s The Commissioner of Income Tax²⁶ and Ors](#) in writ petition no.2422 of 2013 dated 15th January 2014, granted complete relief, including an order of



refund. The only difference between this case and that case is that, in that case, the petitioner had made an application for condonation of delay under [Section 119 \(2\) \(b\)](#) of the Income Tax Act, which was rejected, in view of the circular issued by the CBDT. In the case before us, the course adopted was under [Section 264](#) of the Act. In view of the judgment of the Division Bench of this Court in [Hindustan Diamond Company Pvt Ltd v/s Commissioner of Income Tax](#) reported in (2003) 175 Taxation 91(Bom), the course adopted by the petitioner in the facts and circumstances of the present case was valid."

13. In [Selvamuthukumar](#) (Supra) paragraphs 6 to 11 and 13 read as under:

"6. The language of [section 264](#) provides ample powers to the Commissioner of Income Tax to make



or cause such inquiry to be made as he thinks fit in dealing with an application for Revision under [section 264](#). This would include taking into consideration relevant material that would have a bearing on the issue for consideration, which, in this case, includes the order under [section 144A](#) of the Act dated 31.12.2007.

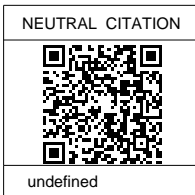
7. Mr. Swaminathan would object on the ground that the inquiry contemplated under [section 264](#) is restricted to the record of any proceeding under this Act and has, necessarily to refer to the specific assessee alone. He would also refer to [Section 263](#) dealing with Meera Jadhav 10/12 904-wp-2435-17.doc revision of orders prejudicial to the revenue and to the explanation thereto wherein 'Record' is defined as being all records relating to any proceeding

under this Act available at the time of examination by the Principal Commissioner or Commissioner. In the absence of such definition in [section 264](#), he would urge that 'record' for the purpose of [section 264](#) would be limited to such records as were available at the time of assessment. We are not impressed with the distinction. The necessity for the insertion of a definition of 'record' by the [Finance Act 1988](#) has been explained in a Circular issued by the Central Board of Direct Taxes No. 528 dated 16.12.1998 to the following effect.

39.1 Under the existing provisions of [section 263](#) of the Income-tax Act, the Commissioner of Income-tax is empowered to call for and examine the record of any proceeding and if he considers that the order passed by the Assessing Officer is erroneous insofar as it is



prejudicial to the interest of revenue, he may pass an order enhancing or modifying the assessment or cancelling the same with a direction to make it afresh. The provisions as presently worded have given rise to two areas of controversy. The first is relating to the interpretation of the word "record" and the second is regarding the issue relating to merger of the order of the Assessing Officer with the order of the appellate authority. Courts have held in some cases that the word 'record' occurring in [section 263](#) could not mean the record as it stood at the time of examination by the CIT but the record as it stood at the time when the order was passed by the Assessing Officer. Limiting the power of the CIT only to the situation that was existing at the time of making the assessment is to make the provision too restrictive, as many times information comes on



record from various sources which indicate that the order of the Assessing Officer is erroneous and prejudicial to the interests of revenue. The above interpretation of the term "record" by some court besides being against the legislative intent also defeats the very objective sought to be achieved which is to revise the orders on the basis of records as is available to the CIT at the time of examination. With a view to clarifying the legislative intent of the term "record", a definition of the term "record" has been inserted in the Explanation to sub-section (1) of [section 263](#) by the [Finance Act](#) to include all records relating to any proceedings under the Act available at the time of examination by the CIT. This has been carried out for removal of doubts." (emphasis supplied)

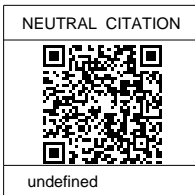


8. Useful reference can also be made to a judgment of the Supreme Court in the case of [Commissioner of Income Tax v. Sri. Manjunathesware Packing Products and Camphor Works](#) (231 ITR 53), wherein the Supreme Court, while considering the import of the word 'record' in [section 263](#) of the Act states as follows:--

'If the material, which was not available to the Income-tax Meera Jadhav 11/12 904-wp-2435-17.doc Officer when he made the assessment could thus be taken into consideration by the CIT after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him.'

9. The view of the department as reflected in the above Circular is thus to the effect that what constitutes 'record' cannot be limited to the return of income or order of assessment, but should be extended to include information from other sources that would impact the issue in question.

10. Mr. Swaminathan would refer to the judgment of the Division Bench of the Andhra Pradesh High Court in [M.S Raju v. Deputy Commissioner of Income Tax](#) (298 ITR 373) which has expressed a view to the effect that the import of the word 'record' as set out in the Circular (supra) would be restricted to the power under [section 263](#) only and not [section 264](#). The distinction noted by the Division Bench in that case was that the power of revision under [section 263](#) of the Act was intended to be exercised in cases where the interests of revenue were



prejudiced and it was for this reason that the inquiry of the Commissioner of Income Tax was not limited only to material available before the assessing officer, but also material obtained subsequently. The power under [section 264](#) of the Act is, in fact as wide a power, and one that is intended to prevent miscarriage of justice. Courts have consistently taken a view that the conferment of powers under [section 264](#) of the Act is to enable the Commissioner to provide relief to an assessee, where the law permits the same. Reference may be made to the decisions of the Gujarat High Court in [C. Parikh and Co. v. Commissioner of Income Tax](#) (122 ITR 610); [Ramdev Exports v. Commissioner of Income Tax](#) (251 ITR 873); Kerala High Court in [Parekh Brothers v. Commissioner of Income Tax](#) and Calcutta High Court in [Smt. Phool Lata Somani v. Commissioner of Income Tax](#) (276 ITR 216). In this view of the

matter, we see no reason to take a different view on the interpretation of the word 'record' occurring in [section 264](#) of the Act from that expressed by the Central Board of Direct Taxes in the Circular extracted above. The order under [section 144A](#) dated 31.12.2007 is thus part of the record and ought to have been take into consideration in deciding the petition under [section 264](#) of the Act.1

11. In fact the objection raised by the Department is hyper technical and runs counter to the stand taken by it in the assessment of this appellant in the three earlier assessment orders. Thus even applying the principles of consistency the treatment accorded to an issue arising in a continuing transaction should be consistent for the entire period in question.

12*****

13. Mr. Swaminathan would submit that the appellant ought to have filed a revised return under [section 139\(5\)](#) since there was sufficient time available and not having done so, he cannot seek remedy under [section 264](#) of the Act. He would urge that both reliefs cannot run concurrently and one can be availed of only when the other is exhausted as otherwise an assessee who misses the time limit for Meera Jadhav 12/12 904-wp-2435-17.doc filing a revised return would take recourse to the provisions of [section 264](#) and seek a revision."

14 At this stage, Mr. Suresh Kumar submitted that assessee should produce documents to prove his share of the indexed renovation expenses of Rs.2,95,859/-. In our view, it is not required because in the assessment order dated 30th December 2010 passed under [Section 143\(3\)](#) of the Act in the case of Ravi R Agarwal, the other co-

owner of the flat, the assessing officer has accepted the amount of Rs.2,95,859/- as the cost of renovation of indexation. Therefore, this figure has to be accepted as correct and suitable allowance should be made while arriving at the long term capital gain.

15 In the circumstances, we hereby quash and set aside the impugned order dated 22nd March 2017 and remand the matter to respondent no.1 for denovo consideration. Before passing any order, personal hearing shall be given, notice whereof shall be given atleast five working days in advance. The order to be passed shall be a reasoned order dealing with all submissions of assessee. The application under [Section 264](#) of the Act shall be disposed within 8 weeks from today. Mr. Gandhi assures the court that so long as five working days notice is given, petitioner shall not seek any adjournment on any ground."

21. The aforesaid decision of the Bombay high Court is followed by this Court in case of **Jindal Worldwide Limited vs. The Principal Commissioner of Income Tax** in Special Civil Application No. 14230/0020 as well as in case of **Shree Rudra Technocast Private Ltd vs. The Principal Commissioner of Income Tax, Rajkot and anr** in Special Civil Application No. 8472 of 2022 wherein, in somewhat similar circumstances, the order passed by the Principal Commissioner of Income under section 264 of the Act was quashed and set aside and the matter was remanded back for reconsideration of the claim of the petitioner which was left out in the original proceeding to be decided on merits. Adopting similar course of action, impugned order dated 30.03.2024 passed by

the respondent No.1 is hereby quashed and set aside and the matter is remanded back to the Principal Commissioner Surat-I respondent No.1 to decide the revision petition filed by the petitioner under section 264 of the Act on merits after giving opportunity of hearing to petitioner to submit requisite documents which the petitioner is intended to submit. Such exercise shall be completed within a period of 12 weeks from the date of receipt of copy of this order. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(MAUNA M. BHATT, J)

JYOTI V. JANI