IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.877 OF 2013

The Commissioner of Income
Tax-8, Room No.214, Aayakar
Bhavan, M.K. Road,
Mumbai – 400 020. .... Appellant

- Versus -

M/s. Lok Housing & Constructions
Limited, Lok Bhawan Lok Bharti
Complex, Marol Maroshi Road,
Andheri (E), Mumbai-400 059.
PAN: AAACL1881B .... Respondent

Mr. Arvind Pinto for the Appellant.
Mr. Kevic Setalwad, Senior Counsel with
Mr. Awais Ahmedji and Mr. Aziz Khan
i/b M/s. Divya Shah Associates for the
Respondent.

**CORAM:** S.C. DHARMADHIKARI &
A.K. MENON, JJ.

**DATE:** APRIL 13, 2015

P.C:

1. This Appeal by the Revenue challenges the order passed by the Income Tax Appellate

Tribunal Bench at Mumbai in Income Tax Appeal No.8485 of 2011. The Assessment Year is 2007-08. By the order under challenge and pronounced on 23-10-2012, the Tribunal has partly allowed the Appeal of the respondent-assessee.

2. Mr. Pinto, learned counsel appearing on behalf of the Revenue in support of this Appeal submits, that the questions at page Nos.5 and 6 of the paper-book are substantial questions of law.

3. He submits that this is a case of survey action carried out on the assessee's business premises on 11-9-2008. Subsequent to the survey, a Notice under Section 142(1) of the Income Tax Act, 1961 (for short, “the I.T. Act”) was issued to the assessee calling for its return of income for the Assessment Year

2007-08. That was not filed by the assessee. In response to this Notice, the assessee filed a return of income on 23-9-2008, declaring income of Rs.1,35,47,15,708/-. In this return of income, the assessee-company *inter alia* declared income on account of sales of land/FSI to five parties which were its associates/sister concerns. Subsequently, on 1-1-2009 the assessee-company filed another return declaring nil income. It claimed that the income declared in the original return in respect of the five transactions of sale of land/FSI to the five parties stands withdrawn due to cancellation of the five Sale Agreements. The second return was claimed to be a revised return. It was argued that the assessee discovered an omission of cancellation of the Sale Agreements which was not disclosed in the original return and hence the revision of the same by filing a revised return of

income.

4. An order of assessment has been passed by the Assessing Officer under Section 143(3) of the I.T. Act on 29-12-2009. The Assessing Officer taxed the income of sale of land/FSI. The assessee was aggrieved by this order of the Assessing Officer and filed an Appeal before the Commissioner of Income Tax (Appeals). The Commissioner dismissed the Appeal by his order dated 31-10-2011.

5. An Appeal was filed before the Income Tax Appellate Tribunal against this order, which has been partly allowed.

6. Mr. Pinto would submit that in allowing this Appeal, the Tribunal lost sight of the legal provisions and particularly, Section 139(4) and Section 139(5) of the I.T.

Act. He submits that a revised return cannot be filed routinely and when the assessee had not filed its return of income earlier. The assessee filed it pursuant to the Notice issued under Section 142(1) of the I.T. Act and that could not have been revised and assuming it can be so, still the requirement under sub-section (4) and sub-section (5) of Section 139 of the I.T. Act having not been fulfilled, there was no obligation to consider the revised return. In considering it, the Tribunal has committed an error of law apparent on the face of the record.

7. We will dispose of this first contention of Mr. Pinto as, in our opinion, the same does not deserve to be accepted. Section 139, which falls under Chapter XIV, deals with return of income. Sub-section (1) thereof contemplates furnishing of a return of income

in the prescribed form and on or before the due date.

8. By sub-section (4) of Section 139, it is clarified that any person who has not furnished a return of income within the time allowed to him under sub-section (1) of Section 139, or within the time allowed under a notice issued under sub-section (1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year or from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. The proviso to sub-section (4) need not be referred to in this case.

9. Section 139(5), in clearest terms, states that if any person, having furnished a return under Section 139(1), or in pursuance of

a notice issued under sub-section (1) of Section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. This is conditional upon discovery of omission or any wrong statement in the return of income furnished in pursuance of a notice under Section 139(1) or in pursuance of a notice under sub-section (1) of Section 142. There is, thus, no legal bar in furnishing a revised return and within the time stipulated by sub-section (5), if there is discovery of any omission or any wrong statement in the return originally filed. Thus, a return of income could be filed under Section 139(1) or in pursuance of a notice under Section 142(1). Both such returns can be revised upon

fulfillment of the conditions under sub-section (5). Once this is the clear legal position and the only inquiry before the Tribunal was whether there was indeed a discovery of any omission or wrong statement in the original return, then, the first and second questions at page 5 of the paper-book are not substantial questions of law.

10. In relation to the third question, what we have noticed is that the Revenue is seeking re-appreciation and re-appraisal of the factual material on record. That is a course permissible, provided the factual findings can be termed as perverse or vitiated by any error of law apparent on the face of the record. In the present case, the argument was, that this income which was declared could not have been thereafter termed as such. It not being realised as the Sale Agreements have been

cancelled.

11. In that regard, we find that the Tribunal was informed by the Revenue that there is a doubt about the cancellation of the relevant Agreements. That cancellation is not genuine and bona fide. The other argument was that these are Agreements with sister concerns and therefore in the first place, there was some deliberate exercise and with a view to avoid paying the legitimate taxes. In any event, the Agreements being subsequently cancelled supports the Revenue's version as above.

12. On both counts, the Tribunal has in a detailed discussion of more than 40 paragraphs found that there is no substance in the objections of the Revenue. If the Revenue is trying to show that the relevant transactions

were sham and not real, then it has to bring in satisfactory material. The Tribunal found in paras 37 to 40 of the impugned order that the income which was earlier disclosed was not as such because the Agreements were terminable or could have been cancelled. Once they were cancelled, the properties have reverted back to the assessee. They are duly reflected in the balance sheet and as assets of the assessee. There were revised accounts and which were also scrutinized. They were found to be in order and meeting the accounting practice adopted. Therefore, the accounting policy also could not have been faulted. In para 42 of the impugned order, the Tribunal held that income could not have really accrued because of the fact that these Agreements were cancelled. Then the issue of their cancellation has been gone into, and in extensive details. The correct legal principles were applied and a finding of fact

is arrived at in para 48, that no income could be said to have really accrued to the assessee as a result of the five transactions in the immovable properties and which income was chargeable to tax in the year under consideration. Once income had not accrued to the assessee in the real sense, then the original return represents wrong statement which was corrected by the assessee by filing a revised return. Therefore, no hypothetical income of the assessee could have been brought to tax.

13. The Tribunal has also found that the requirement of sub-section (5) of Section 139 is thus complied with. It is also found on merits of the revised return that a scrutiny thereof reveals no income accruing to the assessee from the five transactions in the immovable properties, which were cancelled

subsequently.

14. Such findings of the Tribunal are essentially on facts. They are consistent with the material placed on record. We do not find that any re-appreciation or re-appraisal thereof is permissible, as such findings of fact are neither perverse nor vitiated by any error of law apparent on the face of the record. The Appeal does not raise any substantial question of law. It is, therefore, dismissed. No costs.

(A.K. MENON, J.) (S.C. DHARMADHIKARI, J.)