**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 12764 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 12765 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 12766 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 12768 of 2017**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE AKIL KURESHI**
**and**
**HONOURABLE MR.JUSTICE BIREN VAISHNAV**

==========

| | | |
|---|---|---|
| 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 ? | |

==========

HITECH ANALYTICAL SERVICES....Petitioner(s)

Versus

PR. COMMISSIONER OF INCOME TAX - 3, AHMEDABAD &
1....Respondent(s)

==========

Appearance:
MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1
MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 2

==========

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
**HONOURABLE MR.JUSTICE BIREN VAISHNAV**

**Date : 19/09/2017**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. This group of writ petitions arise in similar background. We may record facts from Special Civil Application No. 12765 of 2017 and 12764 of 2017. Petitioner of Special Civil Application No. 12765 of 2017 is a partner of one M/s. Hitech Analytical Services and she would hereafter to be referred to as 'a partner of the said firm'. For the assessment year 2012-13, she had filed the return of income on 30.09.2012 declaring a total income of Rs. 2.82 lacs. The return was taken in scrutiny. During the assessment, the Assessing Officer noted that the petitioner, as partner of the firm, had claimed expenses of Rs. 10.70 lacs (rounded off) which comprised of the following:

| | | | |
|---|---|---|---|
| 1 | Audit fees | Rs. | 28,090/- |
| 2 | Bank Charges | Rs. | 3,091/- |
| 3 | Car Loan interest | Rs. | 1,04,814/- |
| 4 | Depreciation | Rs. | 6,12,567/- |
| 5 | Petrol expenses | Rs. | 1,03,396/- |
| 6 | Travelling expenses | Rs. | 2,18,150/- |
| | **Total** | **Rs.** | **10,70,108/-** |

2. According to her, these expenditures were incurred for the

partnership business. The Assessing Officer was, however, of the opinion that the petitioner's share of the profit of the partnership was exempt from payment of tax. The expenditure she had claimed was thus for the purpose of earning exempt income and therefore, not allowable under section 14A of the Act. The Assessing Officer, therefore, issued a show-cause notice to the partner on 20.10.2014 why such expenditure should not be disallowed. In this notice itself, he had observed that she could claim certain expenses like travelling expenses, car depreciation, car petrol etc in the firm.

3. The petitioner replied to such notice under a communication dated 31.10.2014 justifying the claim. The petitioner wrote yet another letter to the Assessing Officer in which, she took an alternative stand pointing out to the Assessing Officer's suggestion that the expenditure could be claimed in the hands of the partnership firm. In the said further communication, she conveyed as under:



"However you are of the view that the below expenses is not allowable in the hand of the assessee and are allowable in the firm itself so you are herewith requested to please be allowed the following expenses against the total income of the firm as below:

| **Particular of Expenses** | **Amount** | |
|---|---|---|
| Car loan Interest | Rs. 1,04,814/- | Claimed proportionately in the two firm "Hitech Outsourcing Services" and "Hitech Analytical Services" |
| Depreciation | Rs. 6,12,567/- | |
| Petrol Expenses | Rs. 1,03,396/- | |
| Travelling Expenses | Rs. 2,18,150/- | |

| | | |
|---|---|---|
| | Rs. 10,38,927/- | |

Since the assessee is not willing to go for further litigation and to purchase of mental peace hereby request yourself to kind do the needful and allow the above expenses in the firm.

And accordingly after considering your respective views the assessee is claiming the above expenses in the respective firm and file revised computation statement of income of his both partnership firm and claiming the above expenses."

4. Resultantly, in the assessment of the partner, such expenditure was not allowed when the Assessing Officer passed the order of assessment on 13.01.2015.

5. By the time this order of assessment was passed on 13.01.2015 in case of the partner, the assessment of the firm was still pending. On behalf of the firm, which is the petitioner of Special Civil Application No. 12764 of 2017, therefore, under a letter dated 27.02.2015, a revised computation of income was presented by the Assessing Officer in which, the said sum of Rs. 10.38 lacs was claimed by way of expenditure. The Assessing Officer completed the assessment of the firm under section 143(3) of the Act on 26.03.2015. In such order of assessment, he did not grant the firm's claim for expenditure, however, without assigning any reason. In fact, he did not even refer to such claim in the order of assessment.

6. The partner as well as the firm both therefore filed two separate

revision petitions before the Commissioner under section 264 of the Act. Their case jointly put-forth was that the expenditure was incurred for the business of the partnership firm and such expenditure therefore should have been allowed either in the hands of the partner or in the hands of the firm. Special Civil Applications No. 12766 and 12768 of 2017 are filed by partnership and the partner respectively involving identical facts which are therefore not recorded separately. The Commissioner disposed of the four revision petitions by separate orders on 09.03.2017 which are challenged in these petitions. In case of the partners, the Commissioner confirmed the view of the Assessing Officer that the expenditure was in relation to earning exempt income and therefore, not allowable deduction. In case of the firm, the Commissioner was of the opinion that the expenditure cannot be allowed for three reasons viz.(i) That the assessee firm had not revised the return and merely presented the revision of statement. This cannot form the basis of a new claim. The expenditure could not have been claimed without filing the revised return. (ii) There was no evidence to establish that the expenditure was incurred by the partner wholly for earning the business income. The claim was not verified. The expenses incurred by the assessee firm and its partners being distinct, the expenditure by the partner cannot be allowed in the hands of the firm. (iii) The claim of the firm was against the principle of accountancy. The accounts of the firm did not reflect the expenditure and therefore, cannot be granted.

7. Having heard learned counsel for the parties and having perused the documents on record, we see no error in the view of the Commissioner when he holds that the expenditure could not have been allowed in the hands of the partners. Even the petitioners are unable to point out any manifest error in the view of the Assessing Officer and the Commissioner since in the hands of the partners, the expenditure would be related to earning exempt income. Nevertheless, the claim of the petitioners was not confined to the expenditure being allowed in the hands of the partners. An alternative claim was put forth by the partners and the firm that at any rate such expenditure cannot be disallowed in the hands of the firm. In this regard, we may recall that even during the assessment of the partner, a stand was taken that the Assessing Officer of the firm may allow such expenditure. Therefore, after the Assessing Officer passed the order of assessment in case of the partner on 13.01.2015, the partnership firm had filed a revised computation of income before the Assessing Officer before whom the assessment of the firm was still pending. To the extent, when the Commissioner holds that such expenditure would not be allowed in the hands of the firm also, we are unable to accept the stand. We have noted the three objections of the Commissioner in granting such expenditure. We may deal with these objections seriatim.

8. The non-filing of the revised return by the firm could not have been the ground for rejection of the claim. Even if the powers of

the Assessing Officer could be seen to be restricted in absence of any revised return, nothing prevented the Commissioner from examining the issue and if need be to have further inquiries made. In case of ***C.Parikh & Co. vs. Commissioner of Income Tax, Baroda*** reported in ***122 ITR 610,*** the Division Bench of this Court considered the scope of the powers of the Commissioner under section 264 of the Act. In the said case, after the assessment was completed, the assessee discovered that a mistake had been committed in its books of account in totaling the purchases as a result of which the assessee had under-totalled the purchases and on account of this, the gross profit of the assessee had gone-up. When the Commissioner refused to allow the assessee to correct such mistake, the issue reached the High Court. The Court observed that the powers are very wide. Subject to the limitation prescribed in the section itself, the Commissioner in exercise of his revisional powers could pass such order as he thinks fit which is not prejudicial to the assessee. It was further observed that there is nothing in section 264 placing any restriction on the Commissioner's revisional powers to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over-assessed, after the assessment was completed even where such over-assessment was due to a mistake detected by the assessee after completion of the assessment. The Commissioner could entertain even a new ground not urged before the lower authorities while exercising such revisional powers.

9. In case of ***Parekh Brothers vs. Commissioner of Income Tax, Kerala-II Ernakulam and ors*** reported in ***150 ITR 105***, the Division Bench of Kerala High Court, referring to and relying upon the judgement of this Court in case of ***C.Parikh & Co.*** (supra) observed that the powers of the Commissioner under section 264 are wider than under section 263 and not confined to correcting the erroneous orders. It was held that deduction not claimed during assessment proceedings or appeals can be considered by CIT on an application under section 264 of the Act.

10. In case of ***Digvijay Cement Company Limited vs. Commissioner of Income Tax and anr*** reported in ***210 ITR 797,*** the assessee had not claimed a weighted deduction on certain expenditure before the Assessing Officer carrying a belief that no such deduction could be claimed. In the appeal before the Appellate Commissioner also, no such claim was made and therefore such claim was not examined by the Appellate Commissioner. In further appeal before the Tribunal, this question did not arise. The assessee, thereafter, filed a revision petition before the Commissioner under section 264 of the Act claiming deduction which revision petition was rejected by the Commissioner. The High Court held that the Commissioner ought to have entertained the claim and decided it on merits. The High Court referring to and relying upon the decision of this Court in case of ***C.Parikh & Co.****(supra)* held

thus:

"In the alternative, it was submitted that the assessee not having made any claim before the Income tax Officer, there was no order of the Income tax Officer in this behalf and, therefore, section 364 could not have been invoked by the assessee. What was submitted was that a revision application would lie only against the order of the Income tax Officer and if there was no order of the Income tax Officer with respect to the claim made before the Commissioner, the revision would not be maintainable. We are concerned in this case with the order of assessment and not with any other type of order. What in fact the assessee did by filing the revision application before the Commissioner was to challenge the order of assessment on the ground that it was erroneous. It may be that the error was committed not by the Income tax Officer but by the assessee and that error was detected by the assessee later on. But that certainly cannot preclude the assessee from challenging the order of assessment on the ground that the order was erroneous inasmuch as, under the law, deduction under section 35B ought to have been granted to the assessee. The power of revision under section 264 cannot be restricted to such erroneous orders which have become erroneous as as result of some error committed by the Income tax Officer while passing the orders. Independently of any decision or absence of any decision on the part of the Income tax Officer, the order of assessment can be challenged as erroneous if, for example, some provision was overlooked not only by the assessee but also by the Income tax Officer. Even in such a case, the order of assessment can be challenged by filing a revision application before the Commissioner. Therefore, even this contention raised on behalf of the Revenue deserves to be rejected."

11. In case of **Vijay Gupta vs. Commissioner of Income Tax and anr** reported in **386 ITR 643**, the Division Bench of Delhi High Court observed that the powers conferred upon a Commissioner under section 264 are very wide. The

Commissioner is bound to apply his mind to the question whether the assessee was taxable on a particular income. Section 264 uses the expression 'any order'. It would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by the assessee. There is nothing in section 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detects mistakes after the assessment is completed because of which he is over-assessed. First objection of the Commissioner was therefore not valid.

12. Second objection of the Commissioner appears to be that there was no evidence to prove that the expenses claimed by the partner in the return were incurred wholly for earning business income of the firm. Merely because the claim of the expenditure being incurred wholly for the purpose of the partnership business was not verified, cannot be the ground for rejecting the claim. The occasion arose before both the Assessing Officers, that of the partner as well as of the firm to examine the veracity of the expenditure and the claim of the petitioners that it was expended wholly for the purpose of the business of the firm. In case of the partner the claim was rejected not on the ground that the expenditure was not wholly for the purpose of business of the firm but on entirely different ground. In case of the firm the claim was not even examined, despite which, if the Commissioner desired to examine it or have it examined, it was

always open for him to call for a remand report or place the issue back before the Assessing Officer for passing an appropriate order.

13. The last objection of the Commissioner was that the expenditure was not shown in the account of the firm and therefore allowing the expenditure would run counter to the accountancy principle. The Act proceeds on the fundamental principle of taxing real income. The accounts cannot change taxability or non-taxability of a certain receipt which depends on the nature of the receipt and the legal principles applicable. In case of **Tuticorin Alkali Chemicals and Fertilizers Ltd vs. Commissioner of Income Tax** reported in **227 ITR 172** the Supreme Court observed that income tax is attracted at the point when the income is earned.

14. In the result, Special Civil Application Nos. 12765 of 2017 and 12768 of 20174 are dismissed. Special Civil Application Nos. 12764 of 2017 and 12766 of 2017 are allowed by setting aside the impugned orders passed by the Commissioner under section 264 of the Act. It is held that the expenditure in question, if found to be wholly and exclusively incurred for the purpose of business of the firm and by or on behalf of the firm, the same would be allowed in the hands of the firm. To verify this aspect, the proceedings are placed before the Commissioner who shall pass a fresh order on the revision petitions of the firm, if need be, after calling for

remand report from the Assessing Officer. This may be done preferably within four months from the date of receipt of copy of this order. Petitions are disposed of accordingly.

**(AKIL KURESHI, J.)**

**(BIREN VAISHNAV, J.)**

Jyoti