

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

INCOME TAX APPEAL NO. 1246 OF 2014

Director of Income Tax (IT)-I .. Appellant.
v/s.
M/s. Atomstroyexport .. Respondent.

Mr. Tejveer Singh, for the Appellant.
Mr. Nitesh Joshi with Mr. A.K. Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.**

DATE : 17th JANUARY, 2017.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 4th December, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 4th December, 2013 is in relation to Assessment Year 2006-07.

2 The Revenue urges the following question of law for our consideration:

“ Whether on the facts and in the circumstance of the case and in law, the Tribunal has erred in quashing the proceedings u/s. 148 on the basis that the order of the CIT(A) in earlier year is binding on the AO for later year for purpose of reopening u/s. 147?”

3 The Respondent-Assessee filed a return of income on 29th October, 2007, declaring a total income of Rs.10.99 Crores. The return of income was processed under Section 143(1) of the Act. Thereafter, on 9th

March, 2009, a notice under Section 148 of the Act was issued, seeking to re-open the Assessment for the Assessment Year 2006-07. The reasons recorded in support of the notice for re-opening dated 9th March, 2009 is entirely based upon the order of assessment for Assessment Year 2005-06, holding offshore services contract, is in the nature of Royalty and Contract for deputation of Specialist and Offshore Training Contract, are in the nature of fees for technical services.

4 The Assessment Order passed for Assessment Year 2005-06, has been set aside in Appeal by order dated 13th January, 2009 of the Commissioner of Income Tax (Appeals) [CIT(A)]. In fact, the aforesaid order of the CIT(A) was also given effect by the Assessing Officer on 5th March, 2009. Thereafter, on 9th March, 2009, the Assessing Officer issued notice for re-opening on the basis of the Assessment Order passed for Assessment Year 2005-06.

5 In the above view, the Tribunal in the impugned order records the fact that on 9th March, 2009 when the notice under Section 148 of the Act was issued, the Assessing Officer was aware of the order of the CIT(A) dated 13th January, 2009 as he himself gives effect to it on 5th March, 2009. Thus, at the time of issuing of impugned notice, the Assessing Officer could not in the face of the order dated 13th January, 2009 of the CIT(A) have any reason to believe that income chargeable to tax has escaped Assessment on the basis of the Assessment Order dated 31st December, 2007 for Assessment Year 2005-06.

6 Mr. Tejveer Singh, learned Counsel appearing for the Revenue submits that the Assessing Officer was entitled to issue a re-opening notice, notwithstanding the order of the CIT(A). This for the

reason that the order of the CIT(A) was subject to further appellate remedies.

7 We note that if the basis of the re-opening notice was recorded, was not the Assessment Order for Assessment Year 2005-06, the position would have been different. However, in this case, the reasons as recorded for reasonable belief, is only the Assessment Order for Assessment Year 2005-06 and this order had on the issues of re-opening of notice been set aside by the CIT(A) on the date of the issue of the re-opening notice. This order of the CIT(A) not having been stayed by the Tribunal, the Assessing Officer could not rely upon an Assessment Order for Assessment Year 2005-06 which on the issues involved is admittedly set aside.

8 We find that the issue arising for our consideration as raised by the Revenue stands concluded against the Revenue by the decision of this Court in *German Remedies Ltd., v/s. Deputy Commissioner of Income Tax & Others 285 ITR 26*. In the facts before this Court in *German Remedies (supra)*, the Assessing Officer had issued a notice dated 18th February, 2005, seeking to re-open the Assessment for Assessment Year 1999-2000. This re-opening notice was based upon the Assessment Order for Assessment Year 1996-97 with regard to processing charges. However, Tribunal had by order dated 1st September, 2004 had set aside the issue of processing charges as reflected in the order for Assessment Year 1996-97. This order of the Tribunal was brought to the notice of the Assessing Officer on 31st January, 2005. Nevertheless, the Assessing Officer on 18th February, 2005 issued the re-opening notice on the basis of the Assessment Order passed for Assessment Year 1996-97. This Court

held that Assessing Officer was bound to follow binding decision of the Appellate Authority and if not doing so, the re-opening notice becomes unsustainable.

9 In the present facts also as pointed out above, the Assessing Officer was aware of the order dated 13th January, 2009 of the CIT(A) as he gave effect for Assessment Year 2005-06 to the same by his order dated 5th March, 2009. Therefore, the Assessing Officer could not have reason to believe that income chargeable to tax has escaped Assessment on the basis of the Assessment Order relating to Assessment Year 2005-06, when he issued the re-opening notice dated 9th March, 2009.

10 As the issue urged by the Revenue in the present facts is covered against it by virtue of decision of this Court in German Remedies Ltd.,(supra), the the question as framed does not give rise to any substantial questions of law. Thus, not entertained.

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

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)