

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2955 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE K.A.PUJ

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- 1 Whether Reporters of Local Papers may be allowed to see the judgement?
  - 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, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?

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M/S NIKO RESOURCES LTD - Petitioner

Versus

UNION OF INDIA, THRO SECRETARY & 1 - Respondents

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**Appearance** :

MR PERCY PARDIWALA, SENIOR ADVOCATE, WITH MR.HARDIK P MODH for Petitioner.

NOTICE SERVED BY DS for Respondent(s) : 1 - 2.

MR M.R. BHATT, SENIOR ADVOCATE, WITH MRS MAUNA M BHATT for Respondent : 2,

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**CORAM :** HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 16/06/2009

**ORAL JUDGMENT**

**(Per : HONOURABLE MR. JUSTICE A.L.DAVE**

Rule. Learned advocate Mrs. Mauna Bhatt waives service of notice of rule for the respondents.

2. The only short question that arises for our consideration in this petition is, whether, the Assistant Director of Income-tax (Intl.Taxn.), Ahmedabad, could have, while giving effect to the order of the ITAT, Ahmedabad, dated 1.8.2008 in the matter of Niko Resources Limited (petitioner herein) for Assessment Year 2002-03, taken a view that a claim allowed by the ITAT, Ahmedabad under Section 80IB(9) of the Income-Tax Act, could not have been allowed, unless a revised return of income-tax is filed by the petitioner.

3. We have heard learned Senior Advocate Mr. Percy Pardiwala appearing for learned advocate Mr. Hardik Modh for the petitioner, and learned Senior Advocate Mr. M. R. Bhatt appearing for learned advocate Mrs. Mauna Bhatt for the respondents.

4. It is not in dispute that the petitioner, while filing return of income for A.Y.2002-03, did not make any claim for deduction under Section 80IB (9) of the Income-Tax Act, but, claimed the same subsequently by addressing a communication. The said claim ultimately came to be allowed by the ITAT, Ahmedabad, though the earlier authority had rejected the same on this ground.

While giving effect to the order of ITAT, Ahmedabad, the following observations were made :-

From the perusal of records, it is found that in the return of income, the assessee has not made any claim u/s.80IB (9) of the I.T.Act. The same is also mentioned in para 12.1 of assessment order dtd. 28.2.2005. The Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT reported at 157 Taxmann 1 has held that the claim for deduction cannot be claimed by the assessee otherwise than by filing a revised return. Since, the assessee did not make any claim u/s.80IB(9) of the Act in the return of income and also the assessee did not file any revised return to claim deduction u/s.80IB(9) of the Act, the deduction cannot be given to the assessee as per law.

5. Thus, it is clear that though the claim was allowed by ITAT, Ahmedabad, by the impugned order the authority disallowed the claim virtually setting aside the order of ITAT as if he was sitting in appeal over the order.

6. In **Bhopal Sugar Industries Ltd. vs. Income-Tax Officer, Bhopal, 40 ITR 618**, a similar situation arose when Judicial Commissioner took a similar stand, where the Hon'ble Apex Court held that Judicial Commissioner erred in doing so.

7. It is indicated by learned Senior Advocate Mr. Bhatt that the order of ITAT, Ahmedabad is already under challenge by preferring a Tax Appeal before this Court and the appeal is pending for admission.

8. It is thus clear that a jurisdictional error is committed by the authority while passing the impugned order, which cannot be permitted to stand, although it was passed in reference to a view taken by the Hon'ble Supreme Court in **Goetze (India) Ltd. v. Commissioner of Income-tax, (2006)284 ITR 323 (SC)**.

8.1 We do not propose to enter into the merits of the case, since we find that the order impugned is passed without jurisdiction by the authority concerned. Whether, the Tribunal could not have allowed the claim in the light of the decision in **Goetze (India) Ltd.** (supra) would be a matter to be considered in the Tax Appeal preferred by the respondent authorities pending before this Court, or the ITAT, whom the respondent authorities propose to move as per the statement made by learned Senior Advocate Mr. Bhatt. The impugned order dated 3<sup>rd</sup> March, 2009 is hereby set aside. It is clarified that it would be open for the parties to raise all available contentions in the appeal or in the Misc. Application, if so filed, on merits. Needless to add that since the order is set aside by us, as a corollary, the authority shall pass a fresh order for giving effect to the order of the ITAT. Rule is made absolute accordingly.

[A.L.Dave,J.]

[K.A.Puj,J.]

(patel)