IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 661 of 2009
and
TAX APPEAL NO.662 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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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, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX-I - Appellant(s)
Versus
RATANLAL VYAPARILAL JAIN - Opponent(s)

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Appearance :
MR MR BHATT with MRS MAUNA M BHATT for Appellant
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 19/07/2010

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. In this appeal under section 260A of the Income Tax Act, 1961 (the Act), appellant-revenue had originally proposed the following questions :

Tax Appeal No.661 of 2009:

"[A] Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in restricting the addition of Rs.3,46,668/- made on account of undisclosed investment in jewelery to Rs.1,01,145/-?

[B] Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in restricting the addition of Rs.3,77,498/- made on account of unexplained interest payments?

[C] Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in restricting the addition of Rs.63,51,540/- made on account of disallowance of payments by invoking the provisions of section 40A(3) of the Act?"

Tax Appeal No.662 of 2009:

"[A] Whether the Appellate Tribunal is

right in law and on facts in reversing the order passed by the CIT(A) and thereby deleting addition of Rs.30,17,029/- made by the Assessing Officer in respect of income from adat commission?

[B] Whether the Appellate Tribunal is right in law and on facts in reversing the order passed by the CIT(A) and thereby deleting addition of 15,93,600/- as income from bill discounting?

[C] Whether the Appellate Tribunal is right in law and on facts in reversing the order passed by the CIT(A) and thereby deleting addition of Rs.11,85,000/- made in respect of unexplained expenditure incurred on renovation of house property?"

2. Subsequently, learned advocate for the appellant-revenue has reframed the questions as follows :

Tax Appeal No.661 of 2009:

"[A] Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.3,46,668/- made on account of undisclosed investment in jewelery?

[B] Whether the Appellate Tribunal is right in law and on facts in deleting the

addition of Rs.3,77,498/- made on account of unexplained interest payments?

[C] Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.63,51,540/- made on account of disallowance of payments by invoking the provisions of section 40A(3) of the Act?

[D] Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to adopt gross profit rate @ of 5% as against 10% adopted by the Assessing Officer?"

Tax Appeal No.662 of 2009:

"[A] Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.3,46,668/- made on account of undisclosed investment in jewelery?

[B] Whether the Appellate Tribunal is right in law and on facts in sustaining addition of Rs.9,52,746/- out of the addition made by the Assessing Officer in respect of undisclosed income from cheque discounting?

[C] Whether the Appellate Tribunal is right in law and on facts in deleting the

addition of Rs.15,93,600/- as income from bill discounting?

[D] Whether the Appellate Tribunal is right in law and on facts in sustaining addition of Rs.3.20 lacs out of the addition of Rs.11,85,000/- made in respect of unexplained expenditure incurred on renovation of house property?"

3. Since both these appeals arise out of consolidated order dated 12.9.2008 made by the Income Tax Appellate Tribunal (the Tribunal), the same were taken up for hearing together and are disposed of by this common judgement.

4. Before the Tribunal, there were two appeals, one by the revenue and the other by the assessee. Tax Appeal No.661 of 2009 arises out of the appeal filed by the revenue, whereas Tax Appeal No.662 of 2009 arises out of the appeal preferred by the assessee.

5. The assessee is engaged in the business of sales and purchase of guwar, wheat etc., issue of bills, bill and cheque discounting. A search and seizure operation came to be carried out at the residence of the assessee on 30.6.1998 under section 132 of the Act. In response to notice under section 158BC of the Act, the assessee filed a return showing undisclosed income of Rs.30 lacs against which total undisclosed income was assessed at Rs.1,68,79,830/-

6. The assessee carried the matter in appeal before Commissioner (Appeals), who partly allowed the appeal. Being aggrieved by the order of Commissioner (Appeals), both the assessee as well as the revenue preferred appeals before the Tribunal. Both the appeals came to be partly allowed.

7. In relation to proposed question [A] in both the appeals, during the course of search, jewellery to the extent of 1632.8 grams came to be seized from the residence of the assessee. The Assessing Officer treated 567 grams gold ornaments in the hands of Anjudevi, Badlidevi and Godavaridevi as explained and also accepted 227.1 grams belonging to the family members, consisting of his son and two daughters, as having been explained. The Assessing Officer accepted lump sum gold ornaments weighing 800 grams as explained and the balance 655 grams valued at Rs.3,46,668/- were treated as unexplained and taxed as undisclosed investment and added to the income of the assessee. In assessee's appeal, Commissioner (Appeal) restricted the addition to Rs.1,01,145/-, holding that the claim for 40 grams of the jewellery belonging to the assessee's wife, sister and 223.4 grams jewellery belonging to Smt. Badlidevi was unacceptable. In assessee’s appeal the said addition came to be fully deleted by the Tribunal.

8. Mr. M. R. Bhatt, learned Senior Advocate for the appellant revenue invited attention to the impugned

order of the Tribunal to submit that the Tribunal has deleted the entire addition by placing reliance upon the CBDT circular No.1916 dated 11.5.1992. It was urged that the said circular merely lays down guidelines for seizure of jewellery and ornaments in the course of search and the same does not lay down that the quantity of jewellery mentioned therein is deemed to be explained.

9. As can be seen from the impugned order of the Tribunal, the Tribunal has referred to the CBDT circular No.1916 and observed that in an earlier decision of the Tribunal, the Tribunal has accepted the applicability of the circular and has held that having regard to the circular and size of the family, the ornaments to the extent specified in the circular should be accepted as reasonable. The Tribunal, accordingly, found that the jewellery held by the assessee and his family members was well within the limit laid down under the CBDT circular and accordingly, deleted the whole addition on the ground that the jewellery held by each of the family members was below the limits specified in the said circular.

10. Though it is true that the CBDT circular No.1916 dated 11.5.1994 lays down guidelines for seizure of jewellery and ornaments in the course of search, the same takes into account the quantity of jewellery which would generally be held by family members of an assessee belonging to an ordinary Hindu household. The approach adopted by the Tribunal in following the said

circular and giving benefit to the assessee, even for explaining the source in respect of the jewellery being held by the family is in consonance with the general practice in Hindu families whereby jewellery is gifted by the relatives and friends at the time of social functions, viz., marriages, birthdays, marriage anniversary and other festivals. These gifts are customary and customs prevailing in a society cannot be ignored. Thus although the circular had been issued for the purpose of non-seizure of jewellery during the course of search, the basis for the same recognizes customs prevailing in Hindu society. In the circumstances, unless the revenue shows anything to the contrary, it can safely be presumed that the source to the extent of the jewellery stated in the circular stands explained. Thus, the approach adopted by the Tribunal in considering the extent of jewellery specified under the said circular to be a reasonable quantity, cannot be faulted with. In the circumstances, it is not possible to state that the Tribunal has committed any legal error so as to give rise to a question of law.

11. In relation to proposed question [B] in Tax Appeal No.661 of 2009, on the basis of the seized paper page No.31, the Assessing Officer noted that there was an account without name for two periods. In the first account, total amount credited was Rs.84,34,000/- and for the second account, it was Rs.53,23,939/-. The Assessing Officer also noted that in these accounts, interest of Rs.1,68,680/- and Rs.1,06,489/- was debited. The Assessing Officer, ignoring the submission

of the assessee that the interest represented the debit interest and the assessee has not claimed any interest as deduction and even the entry does not represent the credit entry; that the paper has not been in the hand writing of the assessee, disallowed the same. In assessee's appeal, Commissioner (Appeals) deleted the addition. The Tribunal confirmed the order of Commissioner (Appeals) in revenue's appeal.

12. Learned advocate for the appellant revenue has assailed the impugned order of the Tribunal by contending that the Tribunal was not justified in holding that even if the payment is considered under section 69C of the Act, since the same represents expenditure relating to business, an identical amount has to be deducted and thus, there will not be any income.

13. As can be seen from the impugned order of the Tribunal, the Tribunal has noted that before Commissioner (Appeals), the assessee had submitted that there was no claim made by the assessee for such payment of interest and hence, there was no question of disallowing the same. The Tribunal further noted that assuming that the said payment is considered under section 69C of the Act, since it represents expenditure relating to the business, an identical amount has to be deducted and thus, there will not be any income.

14. For the present, it is not necessary for this Court to

adjudicate the issue as to whether the Tribunal is right or not, that even if payment is considered under section 69C of the Act, the same represents expenditure relating to business, hence, an identical amount has to be deducted. In the light of the concurrent findings of fact by both Commissioner (Appeals) and the Tribunal, that the assessee had not made any claim for payment of such interest, it cannot be stated that the Tribunal was not justified in confirming the order of Commissioner (Appeals), holding that there was no question of disallowing the same.

15. In relation to proposed question [C] in Tax Appeal No.661 of 2009, the Assessing Officer noted that the total turnover of Rs.63,51,64,000/- was required to be divided in trading and adat business. 95% thereof was for adat business and 5% for trading business. Thus, the adat business turnover was Rs.60,34,05,000/- on which the commission at the rate of 0.5% was worked out at Rs.30,17,000/-. In respect of trading turnover of Rs.3,17,58,200/-, the gross profit was estimated at 10% i.e. Rs.31,75,820/- against which unaccounted expenditure was estimated at Rs.15,87,910/- (50%) and the net income was Rs.15,87,910/-. The Assessing Officer, in respect of trading turnover of Rs.3,17,58,200/-, worked out as above, estimated the cash purchases of Rs.3 crores and disallowed 20% thereof under section 40A(3) of the Act and accordingly, worked out the disallowance at Rs.63,51,540/-. In assessee's appeal, Commissioner

(Appeals) deleted the addition which came to be confirmed by the Tribunal in revenue's appeal.

16. As can be seen from the impugned order of the Tribunal, the Tribunal has noted that it was an admitted fact that the undisclosed income had been estimated in the case of the assessee after rejecting the books of account maintained by the assessee. The Assessing Officer had merely estimated the cash payment over the specified amount. No specific case had been brought on record whether the assessee had made any payment in this case in excess of Rs.20,000/-. According to the Tribunal, the onus is on the revenue to prove that the assessee had incurred the expenditure in excess of the specified limit as provided under section 40A(3) during the year so that the disallowance can be made. The Tribunal held that no disallowance under section 40A(3) can be made as disallowance had been made merely on estimate basis and accordingly, dismissed the appeal.

17. In the light of the findings of fact recorded by the Tribunal that the revenue had not been able to produce any material on record to indicate that the assessee had made any payment in excess of Rs.20,000/- and that the Assessing Officer had merely estimated the cash payment for the specified amount, it cannot be stated that the Tribunal has committed any legal error in holding that no disallowance could have been made under section 40A(3) of the Act merely on the basis of estimate.

18. In relation to proposed question [D] in Tax Appeal No.661 of 2009, the Assessing Officer had applied the rate of 10% for working out the gross profit from trading activity and allowed the deduction at the rate of 5% towards expenses. In assessee's appeal, Commissioner (Appeals) reduced the gross profit at the rate of 6% and allowed the deduction towards expenses at the rate of 3%. The Tribunal upon appreciation of the evidence on record has found that the gross profit had been merely estimated but there was no basis for such estimation in respect of gross profit or expenses in the assessment order. According to the Tribunal, whatever income the assessee may have earned from unaccounted business, the same would be held by the assessee as an investment or would have been spent towards personal expenses. During the course of search, no material had been brought on record to prove the investment of such undisclosed amount although the addition on the basis of undisclosed business was made by the Assessing Officer. The Tribunal further recorded that the assessee had also surrendered the income coupled with the investment to the extent of Rs.30 lakhs. The Tribunal also noted that Commissioner (Appeals) had observed that in the case of some of the manufacturers of Guar, Dal and Gram, the gross profit rate works out to 8% to 9%, but he has not given any specific instances. Keeping in view the totality of the facts and the surrounding circumstances of the case, the Tribunal found it appropriate that the gross profit

should be adopted at the rate of 5%.

19. Thus, on the same set of facts, Commissioner (Appeals) has worked out gross profit at the rate of 6% whereas the Tribunal has adopted the rate of 5%. Thus, two authorities have on the same set of facts made different estimates. Thus, on these facts, the order impugned does not give rise to a question of law so as to warrant interference because that would only be a case of replacing one estimate by another estimate.

20. In relation to proposed questions [B] and [C] in Tax Appeal No.662 of 2009, the Assessing Officer had noted that the assessee was engaged not only in cheque discounting, but also in bill discounting business. He noted that the assessee had shown Rs.9,52,746/- on turnover of Rs.95,27,462/- as cheque discounting income. According to the Assessing Officer, the period of discounting was two days. He, therefore, estimated income from cheque discounting at Rs.11,43,295/-. The average of two figures was worked out at Rs.10,48,020/- which was taken as the cheque discounting income. In respect of bill discounting, the total turnover of Kamal Trading, Jai Ambe Trading Co. and Arihant Sales Corporation was shown to be Rs.13.28 crores. Accordingly, the Assessing Officer worked out the bill discounting income at Rs.15,93,600/-. The total income from discounting of bill and cheque was determined at Rs.26,41,600/- (Rs.10,48,020/- + Rs.15,93,600/-). In assessee's appeal, Commissioner (Appeals) confirmed

the said addition. In further appeal by the assessee, in relation to cheque discounting, the Tribunal noted that it was an admitted fact that the assessee had admitted undisclosed income from cheque discounting and had accordingly shown part of the income in the block return relating to cheque discounting, though no separate bifurcation had been given in the return. The Tribunal noted that the assessee had itself shown income from cheque discounting at Rs.9,52,746/-, but the Assessing Officer had estimated the same at Rs.10,48,020/-, taking the average period for the discounting two days. According to the Tribunal, since there was no large variation in the estimation made by the Assessing Officer and what was worked out by the assessee, the basis being merely an estimation, the Tribunal sustained the addition to the extent of Rs.9,52,746/-.

21. In relation to addition in respect of bill discounting, the Tribunal has held as follows :

> *"[25] So far as the estimate of the addition in respect of bill discounting is concerned, we noted that the AO has estimated the bill discounting income on the basis of cheques being deposited in the accounts of Kamal Trading, Jai Ambe Trading Co. and Arihant Sales Corporation and others amounting to Rs.13.28 crores. The observations of the AO clearly denote that this also relates to the discounting of*

the cheques, that is why the assessee has deposited the cheques in these accounts. We have already held in the preceding para that the figures of these cheques discounted relating to Kamal Trading, Jai Ambe Trading Co. and Arihant Sales Corporation should also include in the sum of Rs.95,27,46,200/- and since we have already confirmed the addition of Rs.9,52,746/- on account of income from cheque discounting. Therefore, we are of the view that no separate addition can be made estimating as income from bill discounting. Accordingly, we delete the addition of Rs.15,93,600/-. Thus, Ground No.6 is partly allowed and the total addition in respect of bill discounting / cheque discounting are sustained only to the extent of Rs.9,52,746/-."

22. Thus, it is apparent that the conclusions arrived at by the Tribunal are based upon the findings of fact recorded after appreciation of evidence on record. Nothing is pointed out on behalf of the revenue to indicate that the findings arrived at by the Tribunal are based upon irrelevant material or that relevant material has been ignored. In the circumstances, the controversy involved being based purely upon findings of fact, does not give rise to any question of law.

23. Proposed question [D] in Tax Appeal No.662 of 2009

relates to addition of Rs.11,85,000/- in respect of expenditure incurred on renovation of the house property. The Assessing Officer noted that during the search proceedings, the assessee had stated that the premises belonged to Smt.Anjudevi, wife of the assessee and Rs.5 to Rs.6 lakhs were spent on repairs of the same premises for which the assessee had advanced Rs.2.5 lakhs out of his bank accounts. Smt. Anjudevi stated that the assessee had made a disclosure of Rs.30 lakhs covering the unexplained investment in this regard also. The Assessing Officer noted that the bills and vouchers were in the name of the assessee, and therefore, he considered this issue in the hands of the assessee. The assessee made a disclosure of Rs.4.92 lakhs in this regard in his hands, which was included in total disclosure of Rs.30 lakhs. In the case of Smt. Anjudevi, the assessee claimed that the total renovation expenditure was of Rs.13.5 lakhs which was incurred through [1] Ratanlal – Rs.4.92 lakhs, [2] Anjudevi – Rs.4.85 lakhs and [3] Kantadevi – Rs.3.73 lakhs. Smt. Kantadevi was filing her separate return and she had disclosed a sum of Rs.3.73 lakhs in the return. The Assessing Officer further noted that the expenditure incurred was to the extent of Rs.17,58,503/- and since Smt. Anjudevi has spent only Rs.4.85 lakhs, therefore, after giving a discount of 0.5%, he made an addition of Rs.11,85,000/-. Commissioner (Appeals) confirmed the additions in assessee's appeal, against which the assessee preferred appeal before the Tribunal.

24. Before the Tribunal, it was contended on behalf of the assessee that the property in respect of which the expenditure had been incurred was joint property; that Smt. Kantadevi had spent Rs.3.37 lakhs which was duly shown in her income tax return in the balance sheet relating to assessment years 1991-92 to 1997-98, hence, the assessee should be allowed the credit for the same. It was also pointed out that the assessee had already disclosed a sum of Rs.4.92 lakhs in the total disclosure of Rs.30 lakhs, hence, there should not be any further addition to that extent as the same would tantamount to double addition. The Tribunal held that it being an undisputed fact that the property in respect of which renovation expenses had been incurred was a joint property and Smt. Kantadevi had also made payment of Rs.3.73 lakhs which had been duly shown in her balance sheet submitted along with her return, hence, the Assessing Officer was bound to give credit of Rs.3.73 lakhs out of the unexplained expenditure incurred on the renovation of house property. The Tribunal further held that since the assessee had disclosed Rs.4.92 lakhs while submitting his return for the undisclosed income, the addition to that extent was also required to be reduced. Accordingly, the Tribunal held that the addition was required to be reduced by Rs.8.65 lakhs and sustained the addition only to the extent of Rs.3.2 lakhs.

25. Thus, it is apparent that the expenditure to the extent of Rs.3.73 lakhs for renovation of the house property had been incurred by Smt. Kantadevi. The said

expenditure was disclosed in the return filed by said Smt. Kantadevi, hence, the Assessing Officer could not have disregarded the same. Besides, insofar as the expenditure of Rs.4.92 lakhs incurred by the assessee is concerned, the assessee had already made a disclosure of the said amount in the total disclosure of Rs.30 lakhs. In the circumstances, no infirmity can be found in the view taken by the Tribunal in holding that the addition was required to be reduced to the said extent.

26. For the foregoing reasons, no infirmity can be found in the impugned order of the Tribunal so as to warrant interference. In absence of any question of law, much less a substantial question of law, the appeals are dismissed.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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