REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7689-90 OF 2022

The Commissioner of Income Tax Jaipur .Appellant

Versus

Prakash Chand Lunia (D)
Thr.Lrs. & Anr. ..Respondents

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 22.11.2016 passed by the High Court of Judicature for Rajasthan at Jaipur passed in DBITA No.96/2003

and DBITR No.6/1996 by which the High Court has allowed the said appeals, the Revenue has preferred the present appeals.

2. The facts leading to the present appeals in nutshell are as under:

2.1 A search was conducted by the Directorate of Revenue Intelligence (DRI) officers at the premises situated at A-11, 12, Sector - VII, NOIDA taken on rent by the assessee, Shri Prakash Chand Lunia. The DRI recovered 144 slabs of silver from the premises and two silver ingots from the business premises of the assessee at 1397, Chandni Chowk, Delhi. The assessee was arrested under Section 104 of the Customs Act for committing offence punishable under Section 135 of the Customs Act. The Collector, Customs held that the assessee Shri Prakash Chand Lunia is the owner of silver/bullion and the transaction thereof was not recorded in the books of accounts. The Collector of Customs, New Delhi ordered confiscation of the said 146 slabs of silver weighing 4641.962 Kilograms valued at Rs.3.06 Crores. The Collector Customs further imposed a personal penalty of Rs.25 Lakhs on Sh. Prakash Chand Lunia under Section 112 of the Customs Act. The Collector held that the silver under reference was of smuggled nature.

2.2 During the course of the assessment proceedings the Assessing Officer observed that the assessee was not able to explain the nature and source of acquisition of silver of which he is held to be the owner, therefore the deeming provisions of Section 69A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act, 1961) would be applicable. The investment in this regard was not found recorded in the books of accounts of the assessee that were produced before the then Assessing Officer. Accordingly, the Assessing Officer passed an assessment Order and made an addition of Rs.3,06,36,909/- under Section 69A of the Act, 1961. In appeals preferred by the Assessee against the assessment order, the CIT(A) dismissed the appeal of the assessee. Feeling aggrieved the assessee preferred the appeal before the ITAT. The ITAT, Jaipur also upheld the order of the CIT(A) so far as Section 69A is concerned, however, partly allowed the appeal of the assessee. As regards some other minor additions, the ITAT set aside some minor other additions and remanded the matter to the AO for fresh examination. The AO re-examined the issue and addition was made. The CIT(A) also upheld the order of the AO. The Assessee preferred the appeal against the fresh order passed by the CIT(A) before the ITAT. The ITAT, in the second round as well upheld the order of the authorities below. A reference was made by the ITAT to the High Court with the following questions of law:

(i) "Whether on the facts and in the circumstances of the case, the Tribunal after construing and interpreting the provisions contained in section 69A of the Income Tax Act, 1961 was right in law, in holding that the assessee was the owner of the 144 silver bars found at premises no A 11 & 12 , Sector - VII, Noida and two silver bars found at premises of M/s Lunia & Co Delhi and in sustaining addition of Rs.3,06,36,909/- being unexplained investment in the hands of the assessee under Section 69A of the Act?

(ii) If the answer to the above question is in affirmative then, whether, on the facts and in the circumstances of the case, the Tribunal was right in law in distinguishing the ratio laid down by their Lordships of the Supreme Court in the case of Piara Singh v/s CIT, 124 ITR 41 and thereby not allowing the loss on account of confiscation of silver bars?"

2.3 While the reference was pending before the High Court, penalty proceedings were initiated against the assessee. An order under Section 271 (i) (c) of the Act came to be confirmed by both the CIT (A) and the ITAT. Accordingly, the assessee filed an appeal under Section 260A of the Act against the Penalty order, before the High Court. The High Court while deciding both the cases together, qua the first question, decided in favour of the Revenue and the rental premises of the assessee, the same is to be added to his income as a natural consequence. However, with regard to the second question, the High Court held that loss of confiscation by the DRI official of Customs Department is business loss. While holding the High Court has relied upon the decision of this Court in the case of ***CIT, Patiala vs. Piara Singh reported in 124 ITR 41***. The impugned judgment and order passed by the High Court is the subject matter of the present appeal.

3. Shri Balbir Singh, learned ASG has appeared on behalf of the Revenue and Shri Arijit Prasad, learned Senior Advocate has appeared on behalf of the assessee.

3.1 Shri Balbir Singh, learned ASG appearing on behalf of the Revenue has vehemently submitted that in the facts and circumstances of the case and while dealing with the relevant provisions of the Act, 1961, the High Court has materially erred in relying upon the decision of this Court in the case of ***Piara Singh (supra).*** It is submitted that as such the AO, CIT(A) and ITAT have correctly distinguished the judgment in case of the ***Piara***

Singh (supra) as the same pertained to an assessee who was engaged in the business of smuggling of currency notes and for whom confiscation of the currency notes was a loss occasioned in pursuing his business, i.e., a loss which sprung directly from carrying on of his business and was incidental to it. It is submitted that due to this, the assessee in the aforesaid case was held entitled to deduction under Section 10(1) of Income Tax Act, 1922. It is submitted that however in para 7 of the aforesaid judgment which refers to three cases where an exception to the aforesaid rule was noted by the Court. It is submitted that in the said decision this Court noted earlier decisions of this Court as well as the Andhra Pradesh High Court and the Bombay High Court. It is submitted that in the case of ***Haji Aziz & Abdul Shakoor Bros. v. CIT, AIR 1961 SC 663***, the assessee's claim for deduction of fine paid by him for release of his dates confiscated by customs authorities, was rejected on the ground that the amount paid by way of penalty for breach of law was not a normal course of business carried on by it. In the other two cases, customs authorities had confiscated gold from assessees otherwise engaged in legitimate businesses. It is submitted that in two relied upon cases of Andhra Pradesh High Court and the Bombay High Court the assessees claimed the value of gold seized as a trading/business loss which is identical to the Respondent-Assessee's claim in the facts of the present SLP. It is submitted that therefore the decision of this Court in ***Haji Aziz & Abdul Shakoor Bros. v. CIT, AIR 1961 SC 663***, of the Andhra Pradesh High Court in the case of ***Soni Hinduji Kushalji & Co. vs. CIT, (1973) 89 ITR 112(AP)*** and of the Bombay High Court in the case of ***JS Parkar v. VB Palekar, (1974) 94 ITR 616 (Bom)*** shall be applicable with full force to the facts of the case on hand.

3.2 It is submitted that the Andhra Pradesh High Court observed in para 10 of the judgment in case of **Soni Hinduji *Kushalji* (supra)** that when a claim for deduction is made, the loss must be one that springs directly from or is incidental to the business which the assessee carries on and not every sort or kind of loss which has absolutely no nexus or connection with his business. In paras 11 and 12, the High Court relied on various judgments to state that confiscation of contraband gold is an action in *rem* and not a proceeding in *personam* and thus, a proceeding in rem in the strict sense of the term is an action taken directly against the property (i.e., smuggled gold) and even if the offender is not known, customs authorities have power to confiscate the contraband gold. In view of the aforesaid, the Court stated that confiscation of contraband gold by customs authorities cannot be said to be a trading or commercial loss connected with or incidental to assessee's business. The High Court further relied on ***Haji Aziz (supra)*** and various other judgments to state that such confiscation of smuggled/contraband goods which results in infraction of law and has no incidence/connection to the business of assessee, cannot be allowed as a business loss. Thus, the aforesaid case which has been referred to and distinguished in ***Piara Singh (supra)***, squarely applies to the facts of the present case herein. Similarly, the case of ***JS Parkar (supra)*** would also be applicable to the present case as in the former case, the assessee not only claimed the value of the gold confiscated as a trading loss but also set off of the said loss against his assumed and assessed income from undisclosed sources. Furthermore, the value of gold was sought to be taxed U/s.69/69A by the tax authorities. However, in this case also the Bombay High Court rejected the contention that Section 110 of the Evidence Act (where a person found in possession of anything, the onus of proving that he was not the owner is on the person who affirmed that he was not owner) was inapplicable to taxation proceedings and agreed that tax authorities had rightly inferred assessee to be owner of seized gold based on circumstantial evidence and assessee was not entitled to claim value of such gold as a trading loss.

3.3 Shri Balbir Singh, learned ASG has further relied upon the decisions of this Court in the case of ***Chuharmal v. CIT, (1988) 3 SCC 588*** and ***CIT v. K Chinnathamban, (2007) 7 SCC 390***, on onus of proving ownership being on the person who denies ownership and who is in possession. It is submitted that ownership of confiscated silver fell on the Respondent-Assessee in the present case which he failed to discharge and which accordingly rendered the tax authorities' concurrent findings on his ownership to be valid. It is submitted that when the assessee has been unable to deny possession and ownership and in fact admitted the same before the Settlement Commission as well as the High Court, and further claimed the value of confiscated silver as a trading loss before AO, CIT(A) and ITAT, to alternatively argue to the contrary and deny ownership in order to state that

Section 69A cannot be applied in his case may not be accepted.

3.4 It is submitted by learned ASG that assessee shall also not be permitted to claim such loss as a business expenditure in view of the express prohibition under Explanation 1 to Section 37(1) of the Act which was added w.e.f.01.04.1962. Reliance is placed on the decisions of this Court in the case of ***TA Quereshi (Dr.) v. CIT, (2007) 2 SCC 759*** as well as ***Apex Laboratories (P) Ltd. v. CIT, (2022) 7 SCC 98***. It is submitted that Explanation 1 to Section 37(1) of the Act expressly disallows any expenditure incurred by an assessee for any purpose which is an offence or is prohibited by law, which may be claimed as an expenditure incurred for the purpose of business/profession.

3.5 It is submitted that in the case of ***TA Quereshi (supra),*** this Court clarified that the facts of the said case pertained to business loss and not business expenditure. It is submitted that in the said case, ITAT found the assessee engaged in the business of manufacturing and selling heroin and thus, this Court held that assessee's claim of business loss was allowable as he was in the business of heroin. It is submitted that the case of ***Apex Laboratories (supra)*** distinguishes the judgment in ***TA Quereshi (supra)*** and states that the case relating to the assessee bribing doctors, did not deal with business loss but business expenditure which was disallowable under Explanation 1 to Section 37(1). It is submitted that thus either way, neither can the Respondent-Assessee claim business loss due to him not being in the smuggling business nor can he claim business expenditure as the same is prohibited under Explanation 1 to Section 37(1).

3.6 Making above submissions and relying upon the above submissions, it is prayed to allow the present appeals and restore the ITAT orders.

4. Shri Arijit Prasad, learned Senior Advocate appearing on behalf of the assessee has vehemently submitted that in the present case the respondent – assessee is engaged in the business of purchase and sale of silver. Total sales of Rs.1,46,07,314/- of Silver was declared by the respondent – assessee with a gross profit of Rs.1,32,712/- for the assessment year in question. Search was conducted by the officers of DRI when unaccounted 146 slabs of silver was recovered. The Collector of Customs ordered absolute confiscation of the said 146 slabs of silver valued at Rs.3,06,036,909/- was proposed to be added as deemed income under Section 69A of the Act. The respondent – assessee disputed being the owner of the slabs. In the alternative, the respondent also requested that 146 silver slabs having been absolutely confiscated by the Customs Department, the value of such tradable silver slabs should be allowed as loss. However, the Assessing Officer made the addition of Rs.3,06,036,909/- as income under Section 69A of the Act being a value

of 146 silver bars seized from the possession of the respondent. The said order of addition came to be confirmed upto ITAT, however by the impugned judgment and order the High Court has answered the reference in favour of the assessee by holding that when the value of material is added to the income of the respondent, as a natural consequence, the loss by confiscation of the said material is required to be allowed as business loss. It is submitted that it is through that before the High Court, the assessee did not press the argument regarding the ownership of the silver slabs and therefore, the said question was not answered by the High Court.

4.1 It is submitted that therefore present case is one where set off is claimed of the value of the 146 silver slabs as loss on account of absolute confiscation rather than claim of expenditure of any penalty and/or fine imposed for infraction of law.

4.2 It is submitted that as such the issue in the present appeals is fairly covered in favour of the assessee in view of the decision of this Court in the case of ***TA Quereshi (Dr.) (supra).*** In the said decision, it is held that the judgment of the High Court applying Section 37 of the Act to the case of business loss on account of absolute confiscation of the goods was erroneous. It is submitted that the submission of the assessee therein that Section 37 of the Act related to business expenditure whereas case of absolute confiscation was one of business loss has been accepted.

4.3 It is submitted that in the present case, upon search, 146 silver slabs were found to be in possession of the assessee. The value of the said silver slabs was determined to be Rs. 3,06,036,909/- and the same was added to the computation of income of the assessee under Section 69A of the Act as undisclosed valuable article which was not recorded in the books of account of the assessee.

4.4 It is submitted that however as the respondent – assessee was engaged in the business of trading of silver and the said silver slabs were in possession of the assessee for the purpose of trading, absolute confiscation of the said silver slabs would result in loss of stock in trade and the value thereof would be available as deduction as business/trading loss. It is submitted that therefore the decision of this Court in the case of ***T.A. Quereshi (Supra)*** shall be clearly applicable.

4.5 It is submitted that in the case of ***T.A. Quereshi (Supra)*** this Court has drawn a distinction between claim of deduction as expenditure of penalty/fine as against claim of business loss on account of confiscation of goods which are unaccounted stock in trade. It is submitted that in case of claim of deduction as expenditure of any fine and/or penalty, the Courts have held that such deduction would not be available to the assessee as it would defeat the very purpose behind such penal action. Whereas, in case of claim of set off as business loss, the unaccounted goods though added to the income of assessee but is not available to the assessee for his trade. It is submitted that while extending the benefit of such set off, this Court in the case of ***Piara Singh (supra)*** and ***T.A. Quereshi (Supra)*** have held that the assessee shall be entitled to the set off as business loss.

4.6 It is submitted that unlike a case of imposition of redemption fine where the confiscated goods are released on payment of such amount, absolute confiscation of the goods results in the said goods vesting with the Central Government. In such cases, though the value of the goods is added to the income of the assessee, but the assessee has no option of redeeming the goods for its onward trade. Thus, there is an evident distinction between a case where deduction is sought of any penalty and/or fine as allowable expenditure and a case where business loss is claimed on account of absolute confiscation of the goods which results in loss of stock in trade. It is submitted that present one is a case where the set off is claimed as business loss on account of absolute confiscation of the silver bars and not of any penalty and/or fine. The judgments cited during the course of hearing by the Petitioner are therefore rendered on distinct and distinguishable facts and would not be applicable to the facts of the present case.

4.7 It is submitted that the said distinction has also been statutorily recognized. As highlighted by the appellant, Section 37 which deals with allowance and deduction of expenditure, was amended vide Finance Act, 1998 w.e.f. 01.04.1962 whereby Explanation 1 was added to clarify that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure. In contrast thereto, consciously no such restriction has been brought in law with regard to set off of the value of the unaccounted stock in trade which have been absolutely confiscated.

4.8 Making above submissions it is prayed to dismiss the present appeals.

5. Heard learned counsel for the respective parties at length.

6. The short question which is posed for consideration before this Court is whether the High Court has erred in law in allowing the respondent – assessee the loss of confiscation of silver bars by DRI officials as a business loss, relying upon the decision of this Court in the case of ***CIT Patiala vs. Piara Singh, 1980 Supp SCC 166***?

6.1 While considering the aforesaid question, at the outset, it is required to be noted that the provisions of Section 37(1) under the Act has been amended by Finance (No.2) Act, 1998 by introducing

Explanation 1 thereto w.e.f. 01.04.1962 wherein any expenditure incurred by the assessee for any purpose which is an offence or prohibited by law is not an allowable business expense. It is true that in the present case the respondent - assessee did not claim value of silver bars confiscation as business expenses thus claimed as business loss. However, the amendment to Section 37 might have some bearing on the issue involved.

6.2 On going through the impugned judgment and order passed by the High Court, it appears that the High Court has simply relied upon the decision of this Court in the case of ***Piara Singh (supra).*** Having gone through the decision of this Court in the case of ***Piara Singh (supra),*** we are of the opinion that the High Court has materially erred in relying upon the decision of this Court in the case of ***Piara Singh (supra).***

6.3 In the case of ***Piara Singh (supra)*** the assessee was found to be in the business of smuggling of currency notes and to that it was found that confiscation of currency notes was a loss occasioned in pursuing his business i.e. a loss which sprung directly from carrying on of his business and was incidental to it. Due to this, the assessee in the said case held entitled to deduction under Section 10(1) of the Income Tax Act, 1922. In view of the above fact situation this Court in the case of ***Piara Singh (supra)*** distinguished the decisions of this Court in the case of ***Haji Aziz & Abdul Shakoor Bros.*** reported in ***AIR 1961 SC 663***, and the decision in the case of ***Soni Hinduji Kushalji & Co. vs. CIT, (1973) 89 ITR 112(AP)*** and not agreed with the decision of the Bombay High Court in the case of ***J.S. Parkar vs. VB Palekar, (1974 94 ITR 616 (Bom).*** It is to be noted that in all the aforesaid three cases which were relied upon by the Revenue in the case of ***Piara Singh (supra)*** were found to be involved in legitimate businesses and not smuggling business but however they were found to have smuggled goods contrary to law which resulted in an infraction of law and resultant confiscation by customs authorities.

6.4 In the case of ***Haji Aziz (supra)*** the assessee claimed for deduction of fine paid by him for release of his dates confiscated by customs authorities was rejected on the ground that the amount paid by way of penalty for breach of law was not a normal business carried out by it. In the case of ***Soni Hinduji Kushalji (supra)*** and ***JS Parkar (supra),*** the customs authorities had confiscated gold from assessees otherwise engaged in legitimate businesses. In the aforesaid two cases the assessee claimed the value of gold seized as a trading/business loss. It was held that the assessees are not entitled to the deductions as claimed as business loss.

6.5 In the case of **Soni Hinduji (supra),** the Andhra Pradesh High Court held that when a claim for deduction is made, the loss must be one that springs directly from or is incidental to the business which the assessee carries on and not every sort or kind of loss which has absolutely no nexus or connection with his business. It was observed that confiscation of contraband gold was an action in *rem* and not a proceeding in *personam* and thus, a proceeding in *rem* in the strict sense of the term is an action taken directly against the property (i.e. smuggled gold) and even if the offender is not known, the customs authorities have power to confiscate the contraband gold.

6.6 In the case of ***JS Parkar (supra),*** the assessee not only claimed the value of the gold confiscated as a trading loss but also set off of the said loss against his assumed and assessed income from undisclosed sources. The value of gold was sought to be taxed under Section 69/69A of the Act by the tax authorities. However, the Bombay High Court held the assessee to be the owner of the smuggled confiscated gold and the assessee was not entitled to claim value of such gold as a trading loss.

6.7 In the present case the ownership of the confiscated silver bars of the assessee now cannot be disputed and even the assessee is not disputing the same. Even on that also there are concurrent findings by all the authorities below and including the customs authorities. Therefore, the next question which is posed for consideration before this Court is whether the assessee can claim the business loss of the value of the silver bar confiscated and whether the decision of this Court in the case of ***Piara Singh (supra)*** would be applicable?

6.8 To answer to the aforesaid question, it can be seen that in the present case the main business of the assessee is dealing in silver. His business cannot be said to be smuggling of the silver bars as was the case in the case of ***Piara Singh (supra).*** As observed hereinabove in the assessee's case he was carrying on an otherwise legitimate silver business and in attempt to make larger profits, he indulged into smuggling of silver, which was an infraction of law. In that view of the matter the decision of this Court in the case of ***Piara Singh (supra)*** which has been relied upon by the High Court while passing the impugned judgment and order and it has been relied upon by the assessee shall not be applicable to the facts of the case. On hand or the other hand the decision of this Court in the case of ***Haji Aziz (1961) 41 ITR 350 (SC)*** and the decisions of the Andhra Pradesh High Court and the Bombay High Court which were pressed into service by the Revenue in ***Piara Singh (supra)*** would be applicable with full force.

7. In view of the above and for the reason stated above and looking to the business of the assessee namely silver business and was not in the business of smuggling silver, the decision of this Court in the case of ***Piara Singh (supra)*** shall not be applicable and therefore the impugned judgment and order passed by the High Court quashing and setting aside the order passed by the Assessing Officer, CIT(A) and the ITAT rejecting the claim of the

Assessee to treat the silver bars confiscated by the customs authorities as business loss and consequently value allowing the same as business loss is unsustainable and the same deserves to be quashed and set side.

8.1 In view of the above and for the reason stated above present appeals succeed. The impugned judgment and order passed by the High Court is hereby quashed and set aside and the order passed by the assessing officer, CIT(A) and the ITAT are hereby restored.

Present appeals are accordingly allowed. No costs.

……………………………J.
(M. R. SHAH)

……………………………J.
(M.M. SUNDRESH)

New Delhi,
April 24, 2023