IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 195 of 2016
with
TAX APPEAL NO.196 of 2016

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PR.COMMISSIONER OF INCOME-TAX-2....Appellant(s)

Versus

D AND H ENTERPRISES....Opponent(s)

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Appearance:
MR SUDHIR M MEHTA, ADVOCATE for the Appellant

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 22/03/2016

ORAL ORDER

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. These appeals under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") at the instance of the revenue, are directed against the common order dated 24.06.2015 passed by the Income Tax Appellate Tribunal, "C" Bench, Ahmedabad (hereinafter referred to as "the Tribunal"), by proposing the following questions stated to be substantial questions of law:

Tax Appeal No.195 of 2016 *:*

"[1] Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in deleting

the addition of Rs.1,62,50,000/- made u/s 68 of the I. T. Act in A.Y. 2006-07 on the ground that assessee submitted copy of return of income, bank statement, etc. before the Assessing Officer, even though the persons could not be traced at the given addresses as the summons issued by the AO were returned back or could not be served as those persons were not available at the given addresses?

[2] Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in doubting the attempt made by the official of the Department in serving the Summons in A.Y. 2006-07, when the Summons were sent through Speed Post and the Postal authorities have not been able to find even one address of the alleged depositors?"

Tax Appeal No.196 of 2016 *:*

"[1] Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in deleting the addition of Rs.81,00,000/- made u/s 68 of the I. T. Act in A.Y. 2007-08 on the ground that assessee submitted copy of return of income, bank statement, etc. before the Assessing Officer, even though the persons could not be traced at the given addresses as the summons issued by the AO were returned back or could not be served as those persons were not available at the given addresses?

[2] Whether on facts and in the circumstances of the

case and in law, the Hon'ble ITAT is justified in doubting the attempt made by the Department in serving the summons in A.Y. 2007-08, when the AO had issued summons not only during the course of assessment proceeding on 18.12.2009 but also during the course of remand proceedings on 25.10.2010 to verify the identity of the alleged depositors through Ward Inspector and Notice Server and in both the occasions, it was found that none of the persons resided in the given addresses?"

2. The assessment years are 2006-07 and 2007-08. For the sake of convenience, reference is made to the facts relating to assessment year 2007-08. The respondent – assessee filed returns of income on 11.10.2006 and 19.03.2008 declaring total income at Rs.1,04,98,191/- and Nil for assessment years 2006-07 and 2007-08 respectively. In relation to assessment year 2007-08, the case of the assessee came to be selected for scrutiny assessment and a notice under section 143(2) of the Act was issued on 26.09.2008, which was duly served upon the assessee. In assessment year 2006-07, the assessment was completed under section 143(3) of the Act on 18.12.2008, determining the income of the assessee at Rs.1,05,52,580/-. On the basis of the findings recorded in relation to assessment year 2007-08, the Assessing Officer reopened the assessment for assessment year 2006-07 by issuance of a notice under section 148 of the Act.

3. A survey under section 133A of the Act was carried out in the business premises of the assessee on 16.12.2005. The assessee firm was engaged in the business of land

development and construction at the relevant time. On scrutiny of the accounts, it was revealed that the assessee had shown advances of Rs.2,43,50,000/- from eighty four persons towards investment in land. The assessee firm had filed confirmations from the investors. However, vide order sheet dated 04.12.2009, the Assessing Officer has directed the assessee to produce following details, namely, name, address, PAN, of all the persons who had made advances to the assessee and also to produce all these persons before him. Such exercise was to be carried out by the assessee before 11.12.2009. The Assessing Officer observed that on 18.12.2009, no one had attended on behalf of the assessee, therefore, he issued summons under section 131 of the Act to the investors. The summons could not be served upon the investors by the process server and he reported that the addresses submitted by the assessee were incomplete. The Assessing Officer issued notice dated 22.12.2009 calling upon the assessee as to why these advances should not be treated as unexplained credit of the assessee. In response thereto, the assessee contended that section 68 of the Act is not applicable to these advances, because these were received by the assessee as advance booking amounts in the ordinary course of business. The assessee had submitted confirmations from all the persons, copies of their PAN with the Income Tax Department, copies of their bank statements and copies of the income tax returns for assessment year 2007-08. The assessee also submitted a list of forty persons who had filed their returns for assessment year 2008-09. It was further contended that the persons who had booked the plots in the project of the assessee were its prospective customers at the time of booking and therefore, the assessee used to note their

addresses and PAN and did not carry out any inspection of the authenticity of the addresses submitted by them. It was submitted that the addresses were reflected in the three documents, namely, income tax returns, PAN and bank statements and that the payments had been received through account payee cheques. The Assessing Officer was not satisfied with the explanation of the assessee and made addition of Rs.81,00,000/- in assessment year 2007-08 being the amount received during the accounting period relevant to this assessment year and the balance amount of Rs.1,62,50,000/- received in the accounting period relevant to assessment year 2006-07 was added to the income of that year. The assessee carried the matters in appeal before the Commissioner (Appeals), who allowed the appeals. The revenue carried the matters in appeal before the Tribunal, but did not succeed.

4. Mr. Sudhir Mehta, learned Senior Standing Counsel for the appellant, assailed the impugned order by submitting that the Tribunal has failed to appreciate that mere filing of copy of acknowledgment of return filed and bank statement does not prove the creditworthiness of the transaction. It was pointed out that all the summons were issued to the alleged parties at the address mentioned in their respective latest return of income, however, none of them were found at the given address, not only by the employee of the Department, but also by the postal authorities. It was submitted that the assessee had failed to produce any of such persons before the Assessing Officer. It was submitted that it is by now well settled that merely because payments are made by cheques would not establish the genuineness of the transactions. In support of his

submissions, the learned counsel placed reliance upon the decision of this court in the case of ***Manoj Kumar Saraf v. Income Tax Officer, ODS-II****, [2014] 45 taxmann.com 63 (Gujarat)*. It was, accordingly, urged that the impugned order passed by the Tribunal does give rise to a substantial question of law, as proposed or as may be formulated by this court.

5. This court has considered the submissions advanced by the learned counsel for the appellant and has perused the orders passed by the authorities below. A perusal of the order passed by the Commissioner (Appeals) reveals that he has, upon appreciation of the material on record, found as a matter of fact that during the assessment proceedings, the assessee had furnished all the customers' details like name, address, PAN, copy of income tax returns, bank statement, etc. and had, thus, discharged its primary onus as has been held by the Supreme Court in the case of ***Commissioner of Income Tax v. Orissa Corporation (P) Ltd.****, (1986) 159 ITR 78 (SC)*. He was further of the opinion that it was the duty of the Assessing Officer to verify the genuineness of these transactions by strictly enforcing the provisions of section 131 of the Act if at all those customers were required to be produced before him. According to the Commissioner (Appeals), the physical presence of the customers was not required at all as all the relevant details related to them were available with the Assessing Officer and merely because the parties did not appear before him, the transactions cannot be held to be non-genuine. He was further of the opinion that the advances remained unproved but not disproved as held by the Jurisdictional High Court in the case of ***National Textiles v. Commissioner of Income Tax****, (2001) 249 ITR 125,* wherein

the court held that if an assessee gives an explanation which is unproved but not disproved, that is, it is not accepted but circumstances do not lead to a reasonable and positive inference that the assessee's case is false, the explanation cannot help the department because there will be no material to show that the amount in question was the income of the assessee. The Commissioner (Appeals) was of the view that all the transactions, that is, advances received were through bank only and that the Assessing Officer should have verified these transactions with the relevant banks and should have made further inquiries in this regard, which he has failed to do so. He further took note of the fact that in most of the cases, the customers were filing their returns on regular basis and that during the appellate proceedings, the assessee had produced copies of the returns of income for assessment year 2009-10 for verification in support of his case. He further observed that it was not the case of the revenue that any evidence had been brought on the record which even remotely indicated that the money originally belonged to the assessee and it had returned back to the assessee again. In the light of the above findings of fact recorded by him, the Commissioner (Appeals) allowed the appeal and set aside the additions made by the Assessing Officer.

6. The Tribunal, in the impugned order, has concurred with the above findings recorded by the Commissioner (Appeals) and has noted that the solitary grievance of the Assessing Officer was that he had tried to serve the notice upon the investors but failed to serve them. The Tribunal, after considering the material on record, was of the view that as to how the Assessing Officer could not serve the notices upon

these persons was not specifically discernible. It took note of the fact that there were two sets of evidences. The alleged assertions of the Assessing Officer on the basis of the alleged report of the process server which has not been placed on record by the revenue, nor reproduced by the Assessing Officer in the assessment. The Assessing Officer has not even made reference to any particular witness in whose presence the process server had tried to locate the alleged investors. Whereas on the other hand, the assessee has furnished copies of the income tax returns, bank statement, PAN coupled with the fact that the amounts have been returned through account payee cheques, which had been accepted by the Commissioner (Appeals). Considering the material on record, the Tribunal found that the findings recorded by the Commissioner (Appeals) were required to be accepted and accordingly, upheld his order.

7. Thus, from the facts noted hereinabove, it is evident that the assessee had produced all relevant details in its possession, namely, names, permanent account numbers, income tax returns, and bank statements of all the investors. The amounts in question had been received by way of account payee cheques. Having regard to the fact that the permanent account numbers and the income tax returns of all the investors had been furnished by the assessee, the Assessing Officer could have easily verified the same. He, however, placed reliance upon the fact that the summons issued to the parties under section 137 of the Act could not be served and hence, did not accept the genuineness of the transactions. In the opinion of this court, taking into account the concurrent findings of fact recorded by the Commissioner (Appeals) and

the Tribunal, it cannot be said that the conclusion arrived at by the Tribunal is, in any manner, contrary to the record or that the same suffers from any legal infirmity so as to give rise to any question of law, much less a substantial question of law warranting interference.

8. The appeals, therefore, fail and are, accordingly, dismissed.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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