

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 324 of 2002****With****TAX APPEAL NO. 326 of 2002****With****TAX APPEAL NO. 327 of 2002****With****TAX APPEAL NO. 328 of 2002****With****TAX APPEAL NO. 329 of 2002****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE JAYANT PATEL****and****HONOURABLE MR.JUSTICE S.H.VORA**

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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 or any order made thereunder ?
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SHRI BHAGWANDAS D. VACHHANI....Appellant(s)**Versus****A.C.I.T.....Opponent(s)**

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Appearance:**MR SN SOPARKAR FOR MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1**

MR MANISH BHATT FOR MRS MAUNA M BHATT, ADVOCATE for the
Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE JAYANT PATEL
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 03-04-11/02/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE JAYANT PATEL)

1. As in all the appeals, common questions are to be considered, they are being considered simultaneously.

2. The questions formulated at the time of admission of the appeals, read as under:-

“(1) Whether under the facts and circumstances of the case, the ITAT was right in law in confirming the additions under Section 69 of the Income-Tax Act, 1961 in the hands of the appellant – HUF on substantive basis?

(2) Whether, under the facts and circumstances of the case, the ITAT was right in law in confirming erroneous estimate of agricultural income made by the respondent and further confirming the quantum of agricultural income based on inaccurate method of calculating the same?”

3. Before we address ourself on the questions, we may briefly state the facts as under:-

4. The common facts are that the search operations were conducted by the Income Tax authorities under Section 132 of the Income Tax Act (hereinafter referred to as the ‘Act’) on

26.09.1996 at the residential as well as business premises of various members of the group resulting, *inter alia*, in seizure of documents and records. Various concerns of the Group were engaged in the business of manufacture of ceramic tiles and food products etc. The members of the appellant – HUF are the real brothers being sons of Shri Devrajbhai Vachhani and the details thereof, can be summarised as under:-

“1. Krishnadas D. Vachhani (appellant of Tax Appeal No.326 of 2002)(hereinafter referred to as Krishnadas);

2. Maganlal D. Vachhani (appellant of Tax Appeal No.327 of 2002) (hereinafter referred to as Maganlal);

3. Pravin Kumar D. Vachhani (appellant of Tax Appeal No.328 of 2002)(hereinafter referred to as Pravinkumar);

4. Bhagwandas D. Vachhani (appellant of Tax Appeal No.324 of 2002) (hereinafter referred to as Bhagvandas) and;

5. Vallabhdas D. Vachhani (appellant of Tax Appeal No.329 of 2002)(hereinafter referred to as Vallabhdas).”

5. These HUFs were filing their income-tax and wealth-tax returns at the Income Tax Office, Junagadh. During the course of search operations, it came to light that substantial agricultural income shown by the HUFs by way of cash deposits in their respective bank accounts in Bank of Baroda, Sayaji Gunj, Baroda were non-genuine. The cash deposits were made in the bank accounts of HUFs on day to day basis and subsequently, withdrawals were made for investments in the various group concerns as well as for advancing loans to the

family members. Over the entire block period, total such agricultural income introduced by all the five HUFs was aggregating to Rs.8,54,53,808/- and the details are as under:-

Asstt. Year	Krishnadas Rs.	Maganlal Rs	Pravin Kumar Rs.	Bhagwandas Rs.	Vallabhdas Rs.
87-88	374603	48828	599449	268719	373630
88-89	275205	194379	285349	403687	318200
89-90	392741	2522549	285125	434112	535973
90-91	694575	2343439	411425	334469	371826
91-92	1464677	2195751	1127731	864416	594875
92-93	2655111	6414199	2586072	3828112	3537935
93-94	744397	2730902	1232088	1536562	895861
94-95	2160820	2038557	3031050	2620260	3527896
95-96	2685806	2082450	1677362	2757708	2010328
96-97	3157642	6180366	1996276	1523194	1658727
97-98	350000	844528	107968	456000	275938
01.04.96 to 26.06.96					
	14955577	28029948	13339895	15027239	14101189

Total Deposits by the Five HUFs: = 8,54,53,808/-.

6. It appears that during the course of search and seizure, statements of the aforesaid brothers were recorded under Section 132(4) of the Act by the Authorised Officers from time to time wherein, inflation of the agricultural income was admitted. Such statements are also produced before us by learned counsel Mr.S.N. Soparkar appearing for some of the appellants and it appears that such statements were also produced before the Tribunal. We need not repeat the relevant portion of the statements but it appears that they have been considered by the Tribunal at paragraph Nos.6 to 10. The relevant for ready reference can be reproduced as under:-

"6. We may make a brief reference to such statements to bring out salient facts relevant for the

present appeals At page-92 of the paper book appears the statement of Shri Maganlal Vachhani recorded on 27.6.96. In answer to question No.3 Shri Maganlal Vachhani stated as under:

A.3. In this connection I have to state that it is very difficult for us to exactly identify the portion of the agricultural income which is not actually the agricultural income because our family members have been doing this for last many years, however, I admit that minimum of Rs.1.75 crores of our unaccounted income has been introduced to our books of accounts and returns of income in the form of agricultural income, this amount is to be collaborated with the assets generated out of these funds in the respective years which we shall verify on scrutiny of our books of accounts.

7. Shri Krishnadas D Vachhani vide his statement dated 27.6.96, placed at pages 88 to 91 recorded at the business premises of M/s.Western India Ceramic P.Ltd., admitted that non-genuine agricultural income was to the tune of Rs.3 crores. The relevant portion of the said statement being question No.7 and answer thereof is reproduced below:

Q.7. Your brother Shri M D Vachhani has stated u/s 132(4) on 27-6-96 that you are earning unaccounted income by way of

- a. Under Invoicing
- b. Inflation of expenses
- c. Over building of capital expenses.

Please give the details break-up of unaccounted income under the above heads.

A.7. I have consulted my brother Shri M D Vachhani, Shri V D Vachhani, Shri P D Vachhani and my CA Shri B N Gandhi and Shri J R Attarwala all of whom are present here and after due consultation, I state the followings:

We are not in a position to give detailed break-up of unaccounted income earned under the above heads by our group concern. However, we have approximately shown Rs.6 crores (Six crores) as agricultural income in respective HUFs and individuals of our family during last few years. Out

of which, Rs.3 crores (three crores) is our unaccounted income earned through the above mentioned three methods in our group concerns. The remaining Rs.3 crores (Three crores) is our genuine agricultural income. We accept this Rs.3 crores (Three crores) as out unaccounted income and we are prepared to pay taxes on this.

8. This statement has been further affirmed by his two brothers viz. Shri V D Vachhani and M D Vachhani who have put their signatures by way of affirmation thereof. Reference may further be made to the statement of Shri Krishnadas D Vachhani recorded u/s 131 by the ADI Investigation on 3-7-96 at the Income-tax Office, Baroda. This statement is placed at pages 97 to 100 of the above paper book. The relevant extracts, being answers to question Nos.2 and 3, read as under:

Q.2 During the course of search proceedings you and your brother, Shri M D Vachhani have admitted to having bogus agricultural income to the tune of Rs.3.00 crores. Please state in what assets this bogus income has been invested?

Ans. I have consulted my brother, Shri Pravin Vachhani and state that the above bogus income has been invested in the form of share capital of the following companies:

M/s.Western India Ceramics Ltd. –
Rs.3,00,00,000/-

I confirm that out of the total share capital of Western India Ceramic Ltd. Rs.3,00,00,000/- is out of bogus agricultural income.

Q.3. It is seen that you have shown agricultural income from land in Upleta and various lease lands in Chokari. Kindly give the bifurcation of the basis on which agricultural income was from the above land?

Ans. 20% of our agricultural income shown is from land owned by us at Nagvadar, Upleta and remaining 80% is from leaseland at Chokari. We do not have any record regarding the basis of bifurcation of this income. However, the above approximation is on the basis of area of land at

both the above places.

9. The Revenue Authorities have made detailed inquiries with regard to the ownership and cultivation of agricultural lands wherefrom agricultural income has been claimed by five HUFs of the group. There are mainly three categories of agricultural lands wherefrom agricultural income has been claimed by the five families.

(1) Agricultural income from lease land at Chokari and Kharkhadi villages

(2) Agricultural income from leased land at Upleta/Junagadh

(3) Agricultural income from lands owned by the HUF at Nagvadar/Upleta.

10. With regard to the leased lands at Chokari and Kharkhadi Villages, Shri M D Vachhani in his statement recorded on 26-6-96 claimed that the HUFs have taken on lease a vast track of agricultural land measuring about 600 bighas at village Chokari and Kharkhadi on lease basis from seven co-operative societies. However, no evidence with regard to the alleged lease could be produced on behalf of the assesses. The Income – tax authorities, on the other hand, made detailed inquiries and recorded the statements of Presidents of Co-operative Societies in the two villages as well as the statements of Talati and Sarpanch etc. From these statements it was revealed that no lands have been leased out by the Co-operative Societies in these villages to the Vachhani HUFs. It was further revealed that Vachhani family has merely procured their signatures on blank papers possibly for fabricating evidence of lease. The evidence so collected by the Income-tax authorities was confronted to Shri K D Vachhani on 4-7-96. Shri Vachhani admitted that no such lands have been leased by the family. His answer to question No.7, as per page 102 of the paper book Volume II reads as under:

A.3 The total agricultural shown by our HUFs (FIVE) basically belongs to places, one at Nagvadar, Upleta and others at Chokari, Kharkhadi, etc. Out of the above 2 agricultural income approximately 80% of the income

pertains to our two lease lands at Chokari, Karkhadi etc. I have partially produced some records before you and I am also trying to find out the complete records with respect to expenses vouchers, etc. However, I clearly state that the agricultural income shown as that of five respective HUFs pertaining to Chokari, Karkhadi grams is non-genuine. I further state that at this point of time I am not in a position to bifurcate exactly the agricultural income earned from Nagvadar, Upleta and what has been earned from lease land at Chokari, Karkhadi, etc. As I have stated earlier I have shown agricultural income in the last ten years of Rs.8,14,32,000/- and approx. Rs.30 to Rs.40 lacs in the current Financial Year which means we have approx. shown Rs.8.5 crores in the five HUFs. Out of the above agricultural income as I have stated earlier, the income from Chokari, Karkhadi etc., gram is not genuine and this is nearly 70% of our total agricultural income which works out to Rs.5,95,00,000/-. Out of the above I have already earlier admitted Rs.3.00 crores as non-genuine agricultural income and this amount of Rs.3.00 crores is included in the figures of Rs.5,95,00,000/- which I admit as non-genuine agricultural income."

7. It appears that the A.O. found that the claim based on the lease land was non-genuine. It is true that certain copies of the lease deeds in support of the claim were produced before the A.O. but the A.O. noticed that no proper addresses of the land owners were given and further that the original lease deeds could not be produced for verification. No record of expenses incurred in respect of agricultural inputs or day to day expenses or record pertaining to the sale of the agricultural produce was available with said Vachhani family. Further, spot inquiries made by the A.O. from Upleta reveal that no such lands were leased out to the aforesaid five HUFs of Vachhani family and the claim was found to be false.

8. It further appears that before the Tribunal, learned counsel for the aforesaid appellant-HUFs did concede that Vachhani family had not taken any land on lease basis either in Chokari or Karkhadi or in Upleta, as falsely claimed before the Income Tax authorities. The said part of the question made is recorded by the Tribunal at paragraph No.11.1 in the impugned order. It further appears that before the Tribunal, the question was agitated regarding the extent of the agricultural income from the lands owned by Vachhani family at Nagvadar, Upleta. The learned counsel for the appellant had contended before the Tribunal that the agricultural income shown by the HUFs of Vachhani family were admittedly inflated and even if it is considered that the claim based on the so called agricultural income taken by the family on lease basis at Chokari and Karkhadi villages of Taluka: Padra as well as lease lands at Upleta found to be non-genuine, yet a reasonable estimate of the agricultural income from the own land of the family would be required to be undertaken. The claim made on behalf of the appellant was considered and it appears that the A.O. worked out the average agricultural income of each of the Assessee – HUFs over seven assessment years i.e. A.Ys. 1980-1981 to 1986-1987 and the same was considered as net agricultural income for the F.Y. 1985-1986. Thereafter, on the basis of the rates of wholesale price of the agricultural products published by the Government of India and proceeding on the basis that the Index for the F.Y. 1985-1986 is 129.1, the A.O. proceeded to work out the agricultural income of the Assessee from own land at Upleta and worked out the inflation of the agricultural income in respect of the HUFs over the Block period as under. The A.O. also treated the inflation of the

agricultural income as undisclosed income in the Block Assessment. The same for ready reference, reads as under:-

Name of HUF	Total Agricultural Income shown	Total Agricultural income estimated by the AO.	Difference Taxed Substantively as undisclosed income
V D Vachhani-HUF	1,41,01,189	25,09,288	1,15,91,901
M D Vachhani-HUF	2,80,29,948	30,19,232	2,50,10,716
B D Vachhani-HUF	1,50,27,239	31,43,723	1,18,83,516
P D Vachhani-HUF	1,33,39,895	25,09,288	1,08,30,607
K D Vachhani-HUF	1,49,55,537	26,64,551	1,22,90,986
	8,45,53,808	1,38,46,082	7,16,52,533

9. It appears that the A.O., found that although the Assessee contended that the actual income related in the different group of companies through three different modes, but the Assessee failed to co-relate the generation of income in the group of companies with the cash deposits found to be made in the books/bank accounts of the respective HUFs. A.O., also found that since the actual cash has surfaced for the first time in the books of accounts of HUFs and their various bank accounts, the entire such non-genuine agricultural income is treated as unexplained and undisclosed income of HUFs and the tax assessment was made on substantive basis of the respective HUFs.

10. However, while making block assessment in the case of aforesaid seven companies, A.O., made protective assessment by bifurcating the aforesaid aggregate addition of Rs.7,16,52,533/- in proportion to the turnover of the respective companies.

11. Against the aforesaid assessment by the A.O., on substantive basis in the cases of all the aforesaid five HUFs as well as on protective basis in the cases of the aforesaid 7 companies, appeals were preferred before the Tribunal. Before the Tribunal, on behalf of the HUFs, it was contended that the quantum of addition on account of the inflation of agricultural income was not properly made, whereas on behalf of the revenue, it was contended that since unexplained investments in the form of bank deposits are appearing in the Bank Accounts of the HUFs, the substantive additions has rightly been made in the HUFs cases under the provisions of Section 69 of the Act. It may also be recorded that though protective assessment in respect of seven companies made by the A.O., was objected by preferring appeal by the respective seven companies, during the course of hearing, the learned Counsel appearing for the companies, who was also appearing for HUFs, except for one of the companies viz. Western India Ceramic Pvt. Ltd., made belated offer that the protective additions in the cases of the companies may be confirmed but such was objected by another learned Counsel appearing for Western India Ceramic Pvt. Ltd.

12. Whereas on behalf the revenue, it was contended that since HUFs have not discharged onus under Section 69 of the Act, substantive additions made in the case of HUFs be upheld and, as necessary corollary the protective additions in Companies' cases may be deleted.

13. In view of the aforesaid fact situation, the Tribunal in exercise of the appellate jurisdiction did consider the aspect of

discharge of burden by the HUFs of undisclosed income to the extent of Rs.7,16,52,533/- and after examining the record and the material, formed opinion that the onus cast under Section 69 of the Act is not discharged by the statement of Kartas of these HUFs that these amounts have been received on account of under-invoicing of sales, inflation of expenses by the group Companies. It was also found by the Tribunal that such statements by itself would not absolve the HUFs from the onus cast under the provisions of Section 69 of the Act. The Tribunal found that there are conflicting and contradictory versions on the issue have been given in the cases of the HUFs as well as Companies of the Group. So far as the Companies are concerned, the Tribunal found that nil figure in respect of undisclosed income is mentioned and such returns are also filed by Vachhani Brothers who are Directors of the Companies and are also karats of their respective HUFs. Further the Tribunal also found that in the appeals preferred by the group companies before the Tribunal, specific grounds have been taken against the protective additions made by the Assessing Officer challenging of under-invoicing of sales, inflation of expenses and over-billing of capital expenses. The Tribunal on record found that these group Companies have thus categorically denied earning of any income on account of under-invoicing of sales and inflation of expenses etc. while filing the returns of income as well as while filing the appeals before the Tribunal. The Tribunal also found that during the search operations, the Directors gave numerous statements, which were categorical and unequivocal, on sworn testimony to the effect that they have indulged in under-invoicing of sales and inflation of expenses in the cases of group Companies, yet while filing the returns in the cases of group

Companies on one hand as well as HUFs on the other, such undisclosed income has not been reflected. The Tribunal ultimately formed the opinion that the Assessee – HUFs have failed to discharge onus under Section 69 of the Act and, therefore, A.O., was fully justified in holding that no evidence has been furnished during the assessment proceedings of 5 HUFs for linking the cash deposits with the income and funds of the Companies of the group. The Tribunal also found that in view of the fact situation on record income has to be assessed substantively in the hands of the HUFs in the light of realities and actualities of the situation hereunder the assessee HUFs have received the income by utilizing instrumentality of corporate entity as mere puppets. The Tribunal also recorded that the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation. The Tribunal ultimately also found that the income has been earned by the HUFs and it has accordingly reached the corpus of HUFs.

14. The Tribunal further observed that if the funds invested by the Directors and family members with the Companies were out of concealed income of the Companies and belong to the Companies, why necessary entries changing the ownership of such funds have not been made in the books of the Companies in consonance with the sworn testimony of the Directors. The Tribunal in the ultimate conclusion maintained the substantive assessment in the hands of HUFs and deleted the protective assessment of the aforesaid amounts in the cases of respective companies. Under these circumstances, all the appeals have been preferred by the HUFs before this Court.

15. We have heard Mr.S. N. Soparkar, learned Sr. Counsel appearing with Mrs.Swati Soparkar, learned Counsel for the appellant(s) in Tax Appeal Nos.324, 327 and 329 of 2002, Mr.Manish R. Bhatt, learned Sr. Counsel appearing with Mrs.Mauna Bhatt, learned Counsel for the respondent(s) in Tax Appeal Nos.324, 326, 327, 328 and 329 of 2002, Mr.Manish J. Shah, learned Counsel for the appellant(s) in Tax Appeal Nos.326, 328 of 2002.

16. Mr.Soparkar as well as Mr.Shah, learned counsel appearing for the respective appellants raised two to four contentions. One was that the quantification of the agricultural income as made by the Tribunal is erroneous and much on the lower side. It was submitted that the Tribunal has averaged out the income and the said average agricultural income is treated as the basis and applied for the subsequent years forming part of the block period. It was submitted that even if the agricultural income was to be averaged out, the mean/middle year should have been considered and thereafter, the index ought to have been applied by the Tribunal to the said average agricultural income. It was also submitted that the aspect of rise in the prices of the agricultural product is also not properly considered. In the submission of learned counsel Mr.Soparker, the figure of agricultural income upheld by the Tribunal of the entire Vachhani family for the Block period at Rs.1,38,10,275/- is ex-facie erroneous and, therefore, the same cannot be maintained. As submitted by learned counsel Mr.Soparkar, minimum 10% rise or, in any case, more agricultural income than assessed by the A.O. as well as the Tribunal was required to be assessed and, therefore, this Court may consider in the present appeals. The second limb of argument of learned

counsel Mr.Soparkar was that the Tribunal has totally ignored the evidence on record through the statements of Vachhani brothers that the amount which was deposited in the respective bank account of the HUFs. was on account of under invoicing of sales of products and over invoicing of the capital goods of the respective companies and, therefore, in his submission, if the income were as that of the companies, liability to pay tax could be of the companies and not of the HUFs., in whose bank accounts, money was found. As per learned counsel Mr.Soparkar, once the income was earned by the company, the aspect of diversion of the amount would be totally irrelevant and he relied upon the various decisions to show that once the income is earned, irrespective of the aspect of money diverted to any third party or any person, the liability would be of the party, who earns the income. In his submission, there was no diversion of title but as per him, the income were as that of company, whether the Directors of the Company misappropriated or credited in their respective HUFs. account is irrelevant. In order to show that the income was found to be as that of the company, learned counsel for the Assessee relied upon the order passed by the A.O. for protective assessment wherein, the A.O. found that there was some evidence found of under invoicing of sales of the products and over invoicing of the capital goods. He, therefore, submitted that the said aspect is totally lost sight by the Tribunal and the Tribunal has wrongly confirmed the substantive assessment made by the A.O. in cases of all the appellants – HUFs. and has wrongly set aside the protective assessment made in case of the companies.

17. Whereas, Mr.Manish Bhatt, learned counsel appearing for

the Revenue contended that once the undisclosed money is found, Sections 68 and 69 of the Act would have role to play. The burden would be upon the Assessee from whose possession, the amount is found either in cash or by way of investment in any account to sufficiently explain. If the Assessee fails to give sufficient explanation, such amount so found can be treated as income of the Assessee from whose possession or in whose record, the investment is found. He submitted that the present appeals are having limited scope to the extent of substantial questions of law. If on facts, the A.O. as well as the Tribunal, which is the ultimate fact finding authority, has recorded that the sufficient explanation is not given and the explanation given is unsatisfactory, the substantive assessment made in cases of HUFs. is rightly confirmed by the Tribunal. He submitted that the attempt on the part of the appellant -Assessee is to undertake the exercise of re-appreciation of evidence on record including those of the statements made by Vachhani brothers, who were managing the H.U.F. and the money was found in the bank account of the respective HUFs. He submitted that exercise of appreciation of evidence for upsetting the findings of fact already arrived at by the Tribunal would be beyond the scope of the present appeals and, therefore, he submitted that if this Court is not inclined to interfere with the ultimate findings of fact arrived at by the A.O. as well as by the Tribunal, the second aspect of whose liability to pay tax would be inconsequential.

18. However, Mr.Bhatt, learned counsel for the Revenue did contend that the Tribunal, even on facts, had found that the corporate entity of the so called companies was dummy so far as the amount deposited in the HUFs.' accounts are concerned

and, therefore, the Tribunal rightly found it proper to lift the corporate veil as the so called companies, who were shown as the mask for the amount in question, the explanation has been rightly not accepted by the Tribunal and as the substantive assessment was maintained in the cases of the HUFs., the protective assessment in cases of the company has rightly been set aside by the Tribunal. He, therefore, submitted that all the appeals deserve to be dismissed. Mr.Bhatt, learned counsel for the Revenue also contended that there was no satisfactory material or no material whatsoever was produced by the co-relating to the entries in the books of account of the company with the amount deposited in the bank account of the HUFs. from time to time and, therefore, in absence of such evidence, it cannot be said that the findings recorded by the A.O. as well as by the Tribunal, could be said as perverse or contrary to the record.

19. Sections 68 and 69 of the Act read as under:-

“68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”

69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.”

20. The aforesaid provisions show that as per Section 68, if any sum is found credited in the books of accounts of the Assessee, and if the Assessee offers no explanation about nature and the source thereof, or explanation offered is not in the opinion of the Assessing Officer, is not satisfactory, the sum so credited may be charged to income tax as the income of the Assessee. Section 69 of the Act provides that when the Assessee has made investments which are not recorded in the books of account, if any, maintained by him for the source of income and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be treated as income of the assessee for the respective financial year.

21. At this stage, we may make useful reference to the decision of the Apex Court in case of Sumati Dayal V/s. Commissioner of Income Tax reported in (1995)214 ITR 801 (SC) wherein, the Apex Court, inter alia, observed at page 805 as under:-

“It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See :Parimiseti Seetharamamma (1965) 57 ITR 532. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature

and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably. (See : Sreelekha Banerjee's case (1963)49 ITR (SC) 112 at page 120."

22. The aforesaid shows that the burden would be upon the Assessee to give explanation and the Assessing Officer has to consider the explanation reasonably. The relevant aspect is that so far as the H.U.F. is concerned, it is not at all maintaining any books of account. Therefore, deposit of the amount in the respective bank accounts of the H.U.F. may be required to be considered by showing the corresponding entry as that of under invoicing or over invoicing of the capital goods or over invoicing of the expenses etc. if any. No evidence whatsoever is produced by the Assessee before the A.O. Mere statement of the partners is too vague and too general that the money credited in the respective bank accounts of the HUFs. is earned out of under invoicing of the sales and over invoicing of the expenses and over invoicing of the capital goods of the companies. In absence of any sufficient satisfactorily material produced by co-relating to the credit in the bank accounts of the HUFs. and transactions in the company, if not treated as the sufficient explanation by the A.O. or by the Tribunal, it could not be said that the officers while appreciating the evidence have over acted unreasonably or have not applied reasonable prudence for forming opinion about non-acceptance of the explanation. In our view, as observed earlier, the burden is upon the Assessee to give

sufficient explanation for the source of the amount. Moreover, after considering all the materials, namely, statement or the record, if any, produced or when no record of books of account is produced or when no transactions by showing co-relation are demonstrated, the opinion is to be formulated by the A.O. as to whether the explanation can be considered as sufficient or not? It is true that while forming the opinion, the A.O. has to apply reasonable prudence but thereafter, if the reasonable prudence is applied and the opinion is formed, such would be the ultimate finding of fact as to whether the explanation can be treated as sufficient or not? In our view, if such an opinion is formed by applying reasonable prudence by the A.O. and it is further confirmed by the Tribunal, which is the ultimate fact finding authority, this Court, in the further appeal, wherein, the judicial scrutiny would be limited to substantial question of law, only, would not interfere or upset such finding of fact as the same would be beyond the scope of the present appeal.

23. At this stage, we may refer to the decision of the Apex Court in case of *Thiagarajan and others V/s. Sri Venugopalaswamy B. Koil and others* reported in (2004)5 SCC 762 wherein, the Apex Court had an occasion to consider the scope and ambit of the jurisdiction in the Second Appeal by the High Court under Section 100 of the Code of Civil Procedure wherein, in paragraph No.26, it was observed by the Apex Court, inter alia, as under:-

“26. To say the least the approach of the High Court was improper. It is the obligation of the Courts of law to further the clear intentment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court

are based on evidence, the High Court in second appeal cannot substitute its own findings on reappraisal of evidence merely on the ground that another view was possible.”

24. In our view, as observed by us earlier, the findings of fact arrived at after considering the material on record with the reasonable prudence would be beyond the scope of judicial scrutiny in the present appeals which is limited to the substantial questions of law. In our view, it cannot be said that formation of opinion by the A.O. as well as by the Tribunal upon the facts on record, was not with the reasonable prudence which was expected to be was not applied more particularly, in view of the fact that vague statement of getting the amount from the under invoicing of the sales or over invoicing of the expenses or over invoicing of the capital expenses in absence of any corresponding material co-relating to the same in the respective books of account of the company.

25. In our view, opinion formed for no sufficient explanation by the H.U.F. - Assessee in respect of the amount in question cannot be said as perverse to the record. As such, formation of such opinion appears to be after consideration of the material on record and once the reasonable prudence is applied, it is not open for this Court to substitute the opinion by confirming with the findings of fact in exercise of powers of this Court, which is limited to substantial question of law.

26. The attempt made by the learned counsel for the appellant – HUFs. to contend that in the protective assessment made by the A.O. in cases of the companies, there are reasons

recorded by the A.O. that evidence was found for under invoicing of the sales and over invoicing of the expenses etc. and thereby, to contend that such finding of fact cannot be said to be by applying reasonable prudence or that such finding of fact is perverse, cannot be countenance for the reason that even if such position existed, it cannot be said that the very amount of the so called under invoice or so called over invoice had gone to HUFs.' account unless co-relating material by the respective company is produced or satisfactorily produced. Hence, we do not find any substance in the said contention.

27. The submissions made by the learned Counsel appearing for the Assessee(s) on the aspect of taxable liability, whether as that of the HUFs or the Company, in our view would not be required to be examined in view of the above referred conclusion recorded by us that the finding of facts arrived at by both the Authorities namely; A.O., as well as the Tribunal that no sufficient explanation has been given by the HUFs – Assessee(s), would be outside the scope of judicial scrutiny in the present appeals. We find that the submissions made by the learned Counsel appearing for the Assessee(s) as well as the Revenue on the point of taxable liability, whether as that of the HUFs or of the Company are on nonexistent premise. Once the explanation is not found to be satisfactory and the finding is recorded, as per the provisions of Section 69 of the Act, it would be the deemed income of the HUFs – Assessee(s). Once it is treated as to be deemed income of the HUFs – Assessee(s), naturally the taxable liability would be upon HUFs – Assessee(s). So long as the said finding that the explanation is not sufficient and it can be termed as deemed income of

HUFs remains, it is not necessary for us to further examine the aspect as to whether there was any income earned by the Company and as to whether there was diversion of money to the HUFs or not ? If it is found on facts that the income was as that of the Company, such question may be required to be examined as to whose liability would be to pay tax. Under these circumstances, we find that the decision upon which reliance has been placed by the learned Counsel for the Assessee(s) on the point of taxable liability would be of no help to the appellant(s).

28. The contention raised by the learned Counsel for the Assessee(s) on the quantification of the agricultural income of the HUFs as assessed by the A.O., and upheld by the Tribunal, in our view, could again be in the arena of appreciation and re-appreciation of evidences on record. After considering the material on record, once the ultimate fact-finding Authority has arrived at the reasonable assessment of the income, we do not find that the same should be upset by undertaking the process of re-appreciation of the evidence. At the level of A.O., earlier assessment returns filed by the Assessee(s) for agricultural income of HUFs are considered, the mode adopted is of the average income and thereafter index is applied. Such cannot be said to be as unreasonable approach on the part of the Assessing Officer, nor can it be said that the finding recorded by the Tribunal was unreasonable or perverse to the record, which may call for interference in the present appeals wherein the judicial scrutiny is limited to only substantial question of law.

29. In view of the above, we do not find any case for

interference to the impugned order passed by the Tribunal. Accordingly, both the questions are answered in favour of the Revenue, against the Assessee(s).

30. All the appeals are disposed of accordingly.

(JAYANT PATEL, J.)

(S.H.VORA, J.)

Hitesh/Vinod

