

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 56 of 2004****With****TAX APPEAL NO. 1452 of 2005****With****TAX APPEAL NO. 1453 of 2005****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI****and****HONOURABLE MR.JUSTICE K.J.THAKER**

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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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SHRI MAHNEDARA R. PATEL (HUF) PROP. USHMA
INDUSTRIES....Appellant(s)

Versus

INCOME TAX OFFICER....Opponent(s)

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Appearance:

MR. S.N. SOPARKAR, SENIOR ADVOCATE WITH MRS SWATI SOPARKAR,

ADVOCATE for the Appellant(s) No. 1

MR KM PARIKH, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 09/12/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Tax appeal No.56 of 2014 is filed against the judgment and order dated 13.08.2003 passed by the Income Tax Appellate Tribunal, Ahmedabd [for short "*the Tribunal*") in ITA No.1015/Ahd/2001, whereby the appeal filed by the assessee was partly allowed by the Tribunal.

2. Tax Appeal Nos. 1452 of 2005 and 1453 of 2005 are filed against the common judgment and order dated 05.05.2005 passed by the Tribunal in ITA Nos. 2637 and 2638/Ahd/2004, whereby the appeal for the assessment year 1987-88 i.e. ITA No.2637/Ahd/2004 was partly allowed and the appeal for the Assessment Year 1988-89 i.e. ITA No.2638/Ahd/2004 was dismissed by the Tribunal.

3. The facts of Tax Appeal No.56 of 2004 are that the assessee had filed its returns for the Assessment Year 1987-88. The return submitted by the assessee under the Amnesty Scheme were accepted under Section 143(1) of the Income Tax

Act. The returns for Assessment Years 1984-85, 1985-86 and 1986-87 submitted under the Amnesty Scheme had also been accepted vide order dated 27.10.1987. The returns for Assessment Years 1987-88 and 1988-89 were submitted in the normal course. The assessee declared income of Rs.1,11,110 in Assessment Year 1987-88 and also disclosed net agricultural income of Rs.99,600/-. The return of income was also accepted vide order dated 143(1) dated 09.03.1988. The return of income for Assessment Year 1988-89 was filed declaring total income of Rs.1,93,940/- in which agriculture income of Rs.87,500 had also been declared. The said return of income was accepted vide order under Section 143(1) dated 22.11.1988.

3.1. Subsequently, the Assessing Officer at the time of assessment in respect of Assessment Year 1990-91, observed that the agricultural income declared by the assessee in earlier assessment years are not genuine and it in fact was the assessee's income derived from unexplained/undisclosed sources. Therefore, the Assessing Officer issued notice under Section 148 of the Income Tax Act. It was the contention of the assessee before the Assessing Officer, that no notice under Section 148 of the Act were served upon it. However, the Assessing Officer

completed the assessment proceeding for the assessment year 1984-85 to 1988-89 on 27.3.1997.

3.2. Against the said order, the assessee filed appeal before the CIT(A). The CIT(A) quashed and set aside the order of assessment and directed the Assessing Officer for passing de-novo assessments for all the five years under consideration. Pursuant to the direction of the Commissioner Income Tax (Appeals), the respondent, passed the assessment order and assessed the total income of the appellant-assessee at Rs.28,19,070/-. Against the said order, the appellant-assessee filed an appeal before the Commissioner of Income Tax(Appeals). The CIT(A) vide order dated 28.03.2001 partly allowed the appeal of the appellant-assessee. Being aggrieved by the same, the appellant-assessee filed an appeal before, the Tribunal. The Tribunal vide order dated 13.08.2003 partly allowed the said appeal. Hence, this appeal is filed at the instance of the assessee.

4. The facts of Tax Appeal Nos.1452 of 2005 and 1453 of 2005 are that the assessee had filed its return for the assessment Years 1987-88 and 1988-89. The assessment under Section 143(3) of the Income Tax Act, 1961 was completed on 27.03.1997 on a total income of Rs.28,19,070/-

and Rs.10,90,630/- respectively. The total income so computed was comprising of profit from business and disallowance such as gross profit addition and agriculture income. The gross profit addition of Rs.1,55,442/- and Rs.87,500/- was made. The CIT(A) set aside the assessment order for the limited purpose of verification and the genuineness of agricultural income by a consolidated order for all the years. The set aside issue of verification and issue of agricultural income was decided in favour of the revenue as agricultural income disclosed by the assessee has not been proved.

4.1. Against the said order, the assessee filed appeals before the CIT(A), which were dismissed by the CIT(A). Being aggrieved by the said order the assessee filed appeals before the Tribunal. The Tribunal vide judgment and order dated 5.5.2005 partly allowed the appeal for the Assessment Year 1987-88 and dismissed the appeal for the assessment year 1988-89. Hence, these appeals are filed at the instance of the revenue.

5. While admitting Tax Appeal Nos. 56 of 2004, the Court had formulated the following substantial questions of law:-

“(i) Whether, in the facts and circumstances of the case the ITAT was right in law in holding that the agriculture income earned by the appellant in the past and duly declared in the Amnesty Scheme amounting to Rs.25.50 lakhs, is not agriculture income and entire income is required to be assessed in the the year under consideration

(ii) Whether, in the facts and circumstances of the case the ITAT right in law in holding that the agriculture income of Rs. 25.50 lakhs earned by the appellant from A.Ys. 1978-79 to 1986-87 is required to be assessed in the year under consideration as undisclosed income ?.”

6. While admitting Tax Appeal Nos. 1452 of 2005 and 1453 of 2005, the Court had formulated the following substantial questions of law:-

“Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in upholding the levy of penalty under section 271(1)(c) of the Income Tax Act,

1961”

7. Learned advocate for the appellant-revenue has contended that the Tribunal has committed an error in imposing the penalty under Section 271(1)(c) of the Act on the appellants. He further submitted that the Tribunal has not appreciated the fact that where the revised return is filed under the “Amnesty Scheme” and taxes are paid within the prescribed time, the assessee is entitled to get the benefit of the “Amnesty Scheme”.

7.1. Learned senior counsel for the appellants has contended that the levy of penalty is not valid in view of the decision of the Apex Court in the case of **Assistant Commissioner of Income Tax Vs. Gebilal Kanhailal HUF** reported in **[2012] 348 ITR 561**.

7.2. By making such submissions, learned senior advocate for the appellants has urged that the present appeals deserve to be allowed and the question of law raised in this appeals may be answered in favour of the appellants.

8. On the other hand learned advocate for the respondent-revenue has supported the impugned judgment and order of the Tribunal and submitted

that the Tribunal after appreciating the material on record has passed the impugned judgment and order, therefore, there is no germane reason to interfere with the impugned judgment and order of the Tribunal.

9. We have heard learned counsel appearing for both the parties and perused the material on record. We find that the Tribunal while deciding the appeals considered the issue in depth and given cogent and convincing reasons in arriving at the conclusion and there is concurrent finding of facts of all the authorities. Therefore, we would not like to disturb the order of the Tribunal regarding quantum. Therefore, for quantum, we are in complete agreement with the view taken by the Tribunal. However, we find that the penalty imposed in Tax Appeal No.1452 of 2005 and 1453 of 2005 is erroneous. It appears that the revenue has accepted the Income Tax and Wealth Tax from the appellants-assessee for the relevant years and after ten years, the revenue has taken the matter under review. Therefore, it will be difficult for us to uphold the penalty imposed on the appellants-assessees.

10. Further, the Apex Court in the case of **Gebilal Kanbhaialal (HUF)(supra)**, has observed in paragraph No.6 as under :-

"6. Explanation 5 is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous Year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purpose of imposition of penalty under Section 271(1)(C). The only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to Section 271(1)(C). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on August 1, 1987. It is not in dispute that condition No.1 was fulfilled. The second

condition for availing of the immunity from penalty under Section 271(1)(C) was that the assessee should specify, in his statement under Section 132(4), the manner in which income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the department, the assessee was not entitled to immunity under Clause (2) as he did not satisfy the the condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee concealed on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause(2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause(2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4)."

11. For the forgoing reasons, Tax Appeal No.56 of 2004 is hereby

dismissed. Both the questions raised in Tax Appeal No.56 of 2004 are answered in affirmative i.e. favour of the revenue and against the assesseees. Accordingly, we hold that the Tribunal was right in law in holding that the agriculture income earned by the appellant in the past and duly declared in the Amnesty Scheme amounting to Rs.25.50 lakhs, is not agriculture income and agriculture income of Rs. 25.50 lakhs earned by the appellant from A.Ys. 1978-79 to 1986-87 is required to be assessed in the year under consideration as undisclosed income.

12. So far as Tax Appeal Nos. 1452 of 2005 and 1453 of 2005 are concerned, the same are allowed. The question of law raised in these appeals is answered in negative i.e. in favour of the assessee and against the revenue. Therefore, we hold that the Tribunal was not right in upholding the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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