IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1342 OF 2012
WITH
INCONE TAX APPEAL NO.1371 OF 2012
WITH
INCOME TAX APPEAL NO.1372 OF 2012
WITH
INCOME TAX APPEAL NO.1469 OF 2012
WITH
INCOME TAX APPEAL NO.1470 OF 2012
WITH
INCOME TAX APPEAL NO.1514 OF 2012
….

Commissioner of Income-Tax,
Central-II ...Appellant
v/s.
Shri Kiran Hirji Shah ...Respondent
…
Mr.A.R.Malhotra for the Appellant.
Mr.J.D.Mistri, Sr.Advocate i/b Atul K. Jasani for the Respondent.
...

CORAM : S.C.DHARMADHIKARI &
A.A. SAYED, JJ.
DATED : 20 NOVEMBER 2014

P.C.

All these Appeals by the Revenue question the order of the Income Tax Appellate Tribunal, Mumbai Bench in 10 Appeals and which pertain to Assessment Years 2000-01 to 2006-07.

We would for the purpose of disposal of all these Appeals take facts in Income Tax Appeal No.1371 of 2012.

2. The Assessee-Applicant before the Tribunal was one Mr.Kiran Shah. The Assessee challenged the order passed by the Commissioner under section 263 of the Income Tax Act, 1961 (for short IT Act).

3. The Commissioner of Income Tax (Central)-II, Mumbai referred to search and seizure account under section 132 (1) of the IT Act on 22 September 2005, that was at the residential premises of the Director/Partner of one M/s.Vijay Grihanirman Pvt.Ltd. and its sister concerns (Vijay Group). During the search, various documents and loose papers belonging to the Assessee Mr.Kiran H.Shah were seized. They have been referred to as A-1 to A-27 in the panchanama dated 22 September 2005. The Assessee was the main Director, according to the Revenue, of a Private Limited Company called M/s.Motta Construction Pvt.Ltd., which is engaged in construction business. As the warrant was in the name of the Assessee, proceedings under section 153C were initiated. The Return was filed on 29 September 2006 declaring the total income of Rs.19,94,038/-. Original Return under the same provision was filed on 29 March 2001 declaring the total income of Rs.4,97.038/-. The Assessment Order under section 143(3) read with section 153C was passed by the Asst.Commissioner of Income Tax Central

Circle-15 & 16, Mumbai on 4 May 2007 assessing total income of Rs.21,73,220/-.

4. The Commissioner referred to several expenses and examined the assessment records as also the seized materials. We are concerned in this case with the unaccounted expenses incurred by M/s.Motta Construction Pvt.Ltd. for the Assessment Years 2000-01, 2001-02 and 2004-05 in the hands of the Assessee. This Private Limited company was also issued notices under section 153C and in their Returns of Income filed in response to these notices, they have not declarded any unaccounted income in view of these expenses. The expenses made by M/s.Motta Construction and the assessments made on this account are referred to in para 4 of the order of the Commissioner and in para 5 he concludes that verification of the assessment records reveals that the assessee made a cash flow statement and tried to explain the source and application of income of Shri Kiran H. Shah for the period from 1 April 1999 to 31 March 2006. In this statement he had shown an amount of Rs.2,33,00,000/- as opening balance. Vide point No.21, the Assessing Officer raised a specific query in his letter of 12 April 2007 and which query has been referred by the Commissioner. Response to this query by the Assessee is then referred to in para

5.1 and the entire explanation is analyzed. The Commissioner concludes that from the verification of the relevant seized materials it is seen that there is no evidence to conclusively prove that the transactions written on these pages are pertaining to the period prior to 31 March 1999. In such circumstances, he disbelieved the Assessee and concluded that the Assessing Officer has not examined the source for Rs.2.33 crores. Even though he asked the Assessee to explain the same, during the assessment proceedings, the Assessee has not bothered to give any explanation for the same or produced any evidence to support his contention that this amount is opening balance available as on 31 March 1999. For all these reasons, the Commissioner concluded that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue and deserves to be set aside. The matter deserves to be restored to the file of the Assessing Officer for passing denovo assessment.

5. It is this order of the Commissioner dated 30 March 2010 which was challenged in Appeal before the Income Tax Appellate Tribunal and each of the Appeals of the Assessee have been allowed by the impugned order.

6. Mr.Malhotra, appearing in support of these Appeals submits that four questions of law raised by the Revenue at pages 6 and 7 of the Paper Book are all substantial question of law. He submits that the Tribunal has erred in interfering with the order of the Commissioner. The jurisdiction under section 263 of the Act was properly exercised by the Commissioner, inasmuch as, the Commissioner concluded that the Assessing Officer's order of assessment is erroneous and in so far as it is prejudicial to the interest of the Revenue. The Commissioner has explained in detail as to how it was not enough merely to accept the statement of the Assessee that there was an opening balance, but how that figure of Rs.2.33 crores has been derived as an opening balance on 31 March 1999 should have been carefully and properly examined by the Assessing Officer.

7. Mr.Malhotra submits that there was a definite design in picking and choosing the date of 31 March 1999/ 1 April 1999. That could have a relation with the date of the assessment namely 4 May 2007. That the Assessing Officer had restraints and limitations on the exercise of the powers and he could not have gone beyond a period stated in law that the Assessee deliberately chose this date

and thereafter explained as to how the figure was arrived at. In relation to that explanation given by the Assessee in response to the notice of 12 April 2007 discloses that entities mentioned therein, one Gala Group and Mr.Narendra Khetshi Shah took advance of Rs.26 lakhs from the Assessee. These are picked up for instance by the Commissioner. The Commissioner, therefore, was justified in holding that this explanation required a deeper probe and scrutiny by the Assessing Officer. That having not been done, the assessment order cannot be said to be taking any possible or plausible view. This is not a mere change of opinion, but a patently erroneous order and which is prejudicial to the interest of the Revenue.

8. Mr.Malhotra places strong reliance on the assessment order passed on 28 December 2010, pursuant to the Commissioner's direction under section 263, in which the Assessee admitted that there is no explanation for the advance of Rs.26 lakhs. If that is so, then the amount of Rs.2.33 crores as derived and thereafter expended has not been explained at all. In such circumstances, he relied upon two decisions, one of the Madras High Court in the case of CIT vs. Seshasayee Paper & Boards Ltd.

reported in (2000) 242 ITR 490 (Mad) and the other judgment of the same High Court in the case of Indian Textiles vs. CIT, reported in (1986) 157 ITR 112 (Mad).

9. On the other hand, Mr.Mistri, learned Senior Counsel appearing on behalf of the Assessee would submit that the Appeals do not raise any substantial question of law. He submitted that the Tribunal has correctly appreciated the controversy. It has not merely held that the view taken by the Assessing Officer is a possible view but has gone ahead and explained as to how that view is possible and plausible. The Tribunal has rested his conclusion only on the fact that the Assessee has explained that there was an opening balance. If there was indeed an opening balance, then, how it was dealt and the manner in which it has been dealt with by the Assessing Officer was scrutinized by the Tribunal. All this was to appreciate the argument of the Assessee that the Commissioner overstepped his limits and rather exceeded his jurisdiction in passing an order under section 263 of the IT Act. This was not a case where the order of the Assessing Officer was erroneous, insofar as it was prejudicial to the interest of the Revenue. The elaboration in the Tribunal's order has been referred to and Mr.Mistri

was at pains to point out as to how the Tribunal has considered the notice of the Assessing Officer dated 12 April 2007 and response thereto by the Assessee on 21 April, 2007, as also a letter addressed to the Asst.Director of Income-Tax (Inv.)Unit VIII (2) dated 5 December 2005 by the Assessee. It is, therefore, apparent that the responses by the Assessee were extensive, they were considered and this was not a case where the Assessing Officer had committed an error and to such extent as would enable the Commissioner to exercise his revisional power under section 263. Mr.Mistri submits that even if the assessment order later on passed and on 28 December 2010, was available on record that did not make any difference. In such circumstances and relying upon the judgment of this Court in the case of **Commissioner of Income-Tax vs. Gabriel India Ltd. 1993 (203) ITR 108**, Mr.Mistri submits that the Appeals deserve to be dismissed.

10. We have, with the assistance of the learned Counsel appearing for the parties, perused the order passed by the Commissioner and that of the Tribunal. We have also perused the decisions which have been brought to our notice under the statutory provisions. We must at once refer to the fact that out of 10 Income

Tax Appeals, which were before the Tribunal, Income Tax Appeal No.3168-M-09 to Income Tax Appeal No.3170-M-09 came to be withdrawn by the Assessee.

11. The Tribunal dealt with the remaining Appeals and which were seven in number. They all pertain to the challenge to the order passed by the Commissioner under section 263 with the above conclusion.

12. The effective ground was that the Commissioner's order was erroneous. The Tribunal referred to facts in brief from paras 5 to 9 of the order. To our mind, though the Tribunal observed that this a brief reference to the facts, it is quite elaborate to our mind and would denote that the Tribunal applied its independent mind to the controversy.

13. The rival contentions have been noted. The Commissioner essentially concludes that the source of Rs.2.33 crores was never explained and has been then scrutinized and with the assistance of the advocate, who made the submission. Before the Tribunal, the Assessee's advocate arguments have been

referred and that of the representative of the Department. Thereafter from para 14 the Departmental representative's contentions have been rejected by observing that there was an explanation given by the Assessee on 24 April 2007 in writing and in response to the letter of the Assessing Officer dated 12 April 2007. This itself means that the Assessing Officer raised a query and sought a reply. There was an application of mind by the Assessing Officer and which would be further apparent from the fact that the record reveals a letter dated 5 December 2005 addressed by the Assessee to the Asst.Director of Income Tax (Inv.) Unit-VIII (2). There explanation was given regarding source of Rs.2.33 crores. The Tribunal, therefore, concluded that there could be an explanation and which was later on furnished so as to explain the source of funds. The Tribunal also held that the Assessee offered a sum of Rs.2.47 crores as additional income in the returns filed after the search. The Tribunal held that if after examining the details the Assessing Officer accepts one of the possible views, then his order cannot be called erroneous and prejudicial to the interest of the Revenue.

14. This conclusion is based on the understanding of the legal provisions by the Tribunal and in that regard it makes reference to the judgment of the Delhi High Court in the case of **CIT v/s.Honda Siel Power Products Ltd. (2010) 235 CTR 336.**

15. Apart from that what we find is that throughout the legal position has been what is essentially pointed out by this Court in CIT v/s. Gabriel India Ltd. (supra). Inquiries have been made in regard to nature of the expenditure incurred by the Assessee, the explanation has been given and which the Assessee termed as a detailed explanation and in writing. This was a part of the record of the case. The claim was allowed by the Assessing Officer on being satisfied with this explanation of the Assessee. Such an order or assessment made by the Assessing Officer could not have been held to be erroneous simply because elaborate or better reasons could have been assigned. If the Commissioner initiates proceedings under section 263 and hears the Assessee, but on examination of the entire material what he upsets or rather interferes with is a possible view, then the course adopted by him was held to be impermissible in law.

16. The Tribunal did not deviate from these principles of law, but applied them to the facts of the present case and in doing that from para 16 it analyzes as to how the view taken by the Assessing Officer can be said to be a possible and plausible one. The Heads or Items in the explanation of 24 April 2007 have been scrutinized by the Tribunal. The Tribunal held that the Assessing Officer has made inquiry and which also appears to have been reflected in the figures. While it is true that against figures, year has not been mentioned, but that itself does not indicate that the explanation given by the Assessee is incapable of being accepted. The Tribunal has referred to the Heads and in relation to petroleum business. The Tribunal has examined the documents and which run into Hundreds of pages. The Assessee was carrying on petroleum and other business for more than 15 years and earned additional income. It is in these circumstances, that diary entries have been referred to and the Assessing Officer's conclusions have been eventually upheld. Once inquiry was made and how the view taken by the Assessing Officer is demonstrated to be possible and plausible one, then we do not think that the Tribunal's order can be termed as perverse or vitiated by any error of law apparent on the face of record.

17. True it is that Madras High Court has held that the Assessing Officer ought to make inquiry and if he is found to have made no inquiry, then the Commissioner is not prevented from taking recourse to section 263. The Commissioner's powers are very wide and he is only to indicate his prima facie opinion to support the conclusion that the order passed by the Assessing Officer was erroneous, insofar as it is prejudicial to the interest of the Revenue. The powers of the Commissioner are very wide. One cannot dispute this legal principle as is culled out in para 6 of the first decision of the Madras High Court relied upon by Mr.Malhotra.

18. In the second Madras case it is held that even on one item if the Commissioner is satisfied that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue, the initiation of the proceedings could not be questioned. Such was not the position here. There may have been a cover up or after thought or indeed an admission, but the Tribunal was to find out whether the Commissioner's exercise under section 263 was justified. It is in that regard and on this essential conclusion that the Tribunal faulted him. When inquiries were made by the Assessing Officer and responses were sought, which responses have also

been considered, then, the Tribunal found that the Commissioner did not make reference to the total and complete material before the Assessing Officer. He did not make any reference to the exercise undertaken by the Assessing Officer of referring the matter to the Investigation Branch and the Investigation Branch seeking further clarification. It is, therefore, essentially on facts that the Tribunal interfered with the order of the Commissioner.

19. We do not find that such a course adopted by the Tribunal and confined and peculiar to the facts of the Assessee raises any substantial question of law. The Appeals, thus, fail and are dismissed. No costs.

(A.A. SAYED, J.) **(S.C.DHARMADHIKARI,J.)**