IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 104 of 2003
With
TAX APPEAL NO. 105 of 2003
With
TAX APPEAL NO. 106 of 2003
With
TAX APPEAL NO. 107 of 2003
With
TAX APPEAL NO. 108 of 2003
With
TAX APPEAL NO. 109 of 2003
With
TAX APPEAL NO. 110 of 2003

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-

and

HONOURABLE MR.JUSTICE K.J.THAKER Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
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 ?	No
5	Whether it is to be circulated to the civil judge ?	No

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C.I.T.....Appellant(s)

Versus

KANTILAL HARILAL FAMILY TRUST....Opponent(s)

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Appearance:

MR PRANAV G DESAI, ADVOCATE for the Appellant(s) No. 1

RULE SERVED for the Opponent(s) No. 1

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

Date : 11/11/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Heard learned Advocate Mr. Pranav G. Desai for the appellant. On a request made by the learned Advocate, all the above appeals are taken up and heard together.

2. Though served, no one appears for the respondent in all these matters.

3. While admitting the matters on 21.04.2003, the following common substantial question of law was framed :-

> “Whether on the facts and circumstances of the case, the Tribunal has committed an error in construing the provisions of the Explanation – 2 to Section 164 of

> the Income-tax Act, 1961 and in directing the Assessing Officer to assess the income of the assessee otherwise than by the uniform application of the maximum marginal rate (including surcharge on income, if any) as contemplated by Explanation-2?”

4. The case in brief is as follows :-

The appellant herein is the Commissioner of Income Tax, Jamnagar for the respondent-assessee. The assessee is a discretionary beneficiary Trust and is running business in the name of Ojas Hotel at Gandhidham. In this case a survey u/s. 133A was carried at the premises of the Hotel on 09.10.1991 wherein it came to the notice of the Department that Shri Jagnesh H. Thakker was working as a Manager. Hence, the entire income of the Hotel activity required to be clubbed with the income of the Trust, as against the said income returned by Shri Jagnesh H. Thakker in his personal return of income and the same was treated as trust's income. During the course of assessment proceedings, the Assessing Officer was of the opinion that the trustees and the beneficiary of the trust together was an AOP who joined hands together to run the Hotel business. Accordingly, the interest paid to various beneficiaries during the year under consideration were held to be disallowed. In the course of appeal proceedings before the DCIT (Appeals), in the present case, an appellate order of CIT(A) passed in the case of another beneficiary trust was produced wherein the facts of the case were identical. It was pointed out that the beneficiaries had no interest in the running of business. Their interest was to enjoy the beneficiary interest in the income of the trust. The trust was empowered to carry on the business as per the trust deed. The CIT(A)'s decision in the case of Shree Sevaram Hariram Trust was agitated in Appeal in ITA No.1949/AHD/93 filed by the Department. The said appeal was decided by the ITAT. The ITAT upheld the decision reached by the CIT(A) on the basis of the facts discussed therein. While deciding the present appeal, the ITAT observed that there was no distinguishing features in the facts of the present case. Accordingly, the ITAT upheld the order of CIT(A).

5. Learned Advocate for the appellant has drawn our attention to the judgment of the High Court of Kerala in the case of **Commissioner of Income-tax v. C.V.**

Divakaran Family Trust reported in **[2002] 122 Taxman 405 (Kerala)**. Relevant part of the decision reads as under :-

> "There is no dispute that section 164 is the relevant section under which the assessee has to be assessed. It is the charging section by itself and all that it says is that 'maximum marginal rate' of tax is to be applied on the computed income. 'Maximum marginal rate' is defined as the rate of tax applicable in relation to the highest slab of income provided for association of persons in the relevant Finance Act. We feel that the definition is not capable of any doubt, and the only meaning that it admits is that the rate on the maximum slab of income for association of persons is to be treated as the maximum marginal rate of tax for the purpose of section 164. The Finance Act for each year prescribes various slabs for each category of assessees and the corresponding rates of tax applicable. We find that the rate of tax on the highest slab for association of persons under the relevant Finance Act is 55 per cent and, therefore, the Assessing Officer rightly levied the same. The interpretation placed by the Tribunal for providing marginalisation is against the definition contained in *Expla-*

nation2 to section 164(3). When the statute says that the 'maximum marginal rate' is the rate applicable on the highest slab of income, there is no scope for enquiry into the meaning of 'marginal' and we feel the Tribunal committed an error by assigning a literal interpretation of the definition clause contained in *Explanation 2.* We, therefore, find that the Assessing Officer has rightly applied the 'maximum marginal rate' at 55 per cent which was the rate applicable on the highest slab of income for association of persons under the relevant Finance Act. We find that the Calcutta High Court in *Surendranath Gangopadhyaya Trust v. CIT* [1983] 142 ITR 149 and the Madhya Pradesh High Court in *Piarelal Sakseria Family Trust v. CIT* [1982] 136 ITR 583 have taken a similar view in the matter. In view of our interpretation, the questions have necessarily to be answered in favour of the revenue and against the assessee and we do so."

Learned Advocate for the appellant has submitted that the authorities below had committed an error by dismissing the appeals.

6. Having heard learned Advocate for the appellant and relying on the decision of

the High Court of Kerala, we are of the view that the facts of the case, i.e. **Commissioner of Income-tax v. C.V. Divakaran Family Trust (supra)** are akin to the facts of the present case/s and hence, we are satisfied that there was an error apparent on the face of the record. Therefore, we are of the opinion that the authorities have committed an error in partly allowing the appeals.

7. The fact that the Tribunal did not consider the ratio of the authorities cited above, we feel that the authorities have committed an error while partly allowing the Appeals. As we have decided against the Kantilal Harilal Family Trust, who though served have chosen not to appear in this group of matters, we deem it fit to direct the Assessing Officer to decide all these matters afresh in light of the provisions of the law and if they are applicable to the case of the opponent after issuing a Notice and hearing the respondent/s.

8. The above Tax Appeals are allowed to the aforesaid extent.

Sd/-

(K.S. JHAVERI, J.)

Sd/-
(K.J.THAKER, J)

CAROLINE