IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 271 of 2002
With
TAX APPEAL NO. 267 of 2002

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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I.T. OFFICER....Appellant(s)
Versus
SMT.MUKTABEN J. PATIRA....Opponent(s)

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Appearance:
MR PRANAV G DESAI, ADVOCATE for the Appellant(s) No. 1
MR RK PATEL, 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 : 14/10/2014

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. The present appeals have been filed under section 260A of the Income Tax Act, 1961 (for short 'the Act') by the revenue relevant to the block year from 01.04.1985 to 08.09.1995 against the order dated 13.09.2001 passed by the Income Tax Appellate Tribunal, Rajkot in ITSSA No. 2/RJT/97 whereby the appeals filed by the assessee is partly allowed by the Tribunal.

2. The background facts may be noticed in brief.

2.1 The assessees filed their return of income on 18.08.1997 in response to notice issued u/s 158-BC read with section 158-BD of the Act showing nil income. The Assessing Officer after receipt of the said return issued notices u/s 143(2) and 142(1) of the Act and initiated assessment proceedings. After hearing the parties the Assessing Officer passed an order on 29.09.1997 assessing the income of the assessee as undisclosed income to the tune of Rs. 4,56,454/- and 3,48,316/-.

2.2 Being aggrieved by the order passed by the Assessing Officer, the assessees filed appeal before the Tribunal and the Tribunal after hearing the parties vide order dated 13.09.2001 partly allowed the appeal and deleted addition of Rs. 4,03,954/- and 2,31,816/- being undisclosed income received by the assessees from M/s. Patira Packaging. Hence the present appeals are filed on behalf of the revenue.

3. These appeals have been admitted on the following substantial question of law:

> **"Whether the Income Tax Appellate Tribunal is right on facts of the case and in law in deleting the addition of Rs. 4,03,954/- as undisclosed income of the assessee received from M/s. Patira Packaging on the ground that the assessee had filed return for three assessment years and therefore, the said returns were on the record of the Income Tax Department and the said income cannot be treated as undisclosed income of the assessee in view of the provisions of Section 158BB of the Income Tax Act, 1961."**

4. Heard Mr. Pranav Desai, learned advocate appearing for the appellant – revenue and Mr. R.K. Patel, learned advocate appearing for the respondents – assessees.

5. Mr. Pranav Desai, learned advocate appearing for the appellant – revenue submits that a search and seizure proceedings u/s 132 of the Act had taken place at the residence of Shri Jaisukhlal C. Patira on 08.09.1995 who is the husband of assessee in Tax Appeal No. 271 of 2002 and father-in-law of the assessee in Tax Appeal No. 267 of 2002. The assessees are also partners in M/s. Patira Packaging. He submitted that during the course of search at the residence, certain jewelleries as mentioned in the panchnama dated 09.09.1995 were found and the same was claimed by the assessees. He submitted that after completion of the assessment of Shri Jaisukhlal, notices were issued to the assessees as the jewellery was found to be acquired from undisclosed income and there was an income from the firm of Patira Packaging received by the assessees for which returns were not filed within prescribed time-limit.

5.1 Mr. Desai submitted that the conclusion arrived at by the Tribunal is contrary to the provisions contained in Section 158-BB(1)(c) of the Act. He submitted that in the said provision it is categorically provided that when the date for filing the return has expired but no return of income is filed, the income will be considered to be Nil and no credit will be given while computing the undisclosed income of the assessees.

5.2 Mr. Desai submitted that in the present case the return filed by the assessees for the assessment years 1989-90, 1991-92, 1992-93 were filed beyond the prescribed time limit and the assessees has never made any prayer to the Central Board of Direct Taxes for condoning the delay caused in filing returns under section 119 of the Act. In support of his submission, Mr. Desai has relied upon the decision of the Apex Court in the case of **Assistant Commissioner of Income Tax vs. A.R. Enterprises reported in [2013] 350 ITR 489** wherein it is held that since the assessee had not filed its return of income bythe due date, the Assessing Officer was correct in assuming that the assessee would not have disclosed its total income.

6. Mr. R.K. Patel, learned advocate appearing for the respondent – assessees supported the impugned order and submitted that the assessees, though belatedly, had already filed the returns of income before the date of search and therefore the same cannot be treated as undisclosed income of the assessees. He submitted that all the returns were filed before the date of search and hence the intention of the

assessees was not to conceal the income and therefore the same may not be treated as undisclosed income of the assessees.

7. On the facts and circumstances of the present case, we are of the considered opinion that the Tribunal has not committed any error while coming to the conclusion that the income representing their shares from the partnership firm cannot be treated as undisclosed incomes of the assessees. The Tribunal has considered the provisions of clause (c) of sub section (1) of Section 158-BB. Section 158BB is reproduced hereinbelow:

> **"Computation of undisclosed income of the block period**
> 158BB.(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of Chapter IV on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined,-
> (a) where assessments under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments;
> (b) where returns of income have been filed under section 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;
> (c) where the due date for filing a return of income has expired but no return of income has been filed, as nil,.
> (d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 has not expired, on the

basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;
(e) where any order of settlement has been made under sub- section (4) of section 245D, on the basis of such order;
(f) where an assessment of undisclosed income had been made earlier under clause (c) of section 158BC, on the basis of such assessment. Explanation.- For the purposes of determination of undisclosed income,-
(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub- section (2) of section 32;
(b) of a firm, or its partners, the method of computation of undisclosed income and its allocation to the partners shall be in accordance with the method adopted for determining the assessed income or returned income for each of the previous years falling within the block period;
(c) assessment under section 143 includes determination of income under sub- section (1) or subsection (1B) of section 143.
(2) In computing the undisclosed income of the block period, the provisions of sections 68, 69, 69A, 69B and 69C shall, so far as may be, apply and references to" financial year" in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the requisition.
(3) The burden of proving to the satisfaction of the Assessing Officer that
any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.
(4) For the purpose of assessment under this Chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation

> under sub- section (2) of section 32 shall not be set off against the undisclosed income determined in the block assessment tinder this Chapter, but may be carried forward for being set off in the regular assessments."

7.1 The Tribunal has observed that in the present case, the intention of the assessees is clearly reflected in so much as she had already filed the return before the date of search. In view of the aforesaid provisions of the Act, it is borne out that the respondents filed their returns, though beyond the due date specified u/s 139(1) of the Act, but before the date of search on 08.09.1995. The returns of the income of the assessees were already on the records of the department before the date of search and therefore it cannot be said that the assessees tried not to disclose their incomes from the partnership firm.

8. The reliance on the decision in the case of **A.R. Enterprises (supra)** placed by the learned advocate for the appellant shall not be applicable to the facts of the present case as in the said case before the Apex Court, the returns were filed after the date of search whereas in the present case the returns for two years were already filed before the date of search. It is required to be noted that when section 158BB(3) is read with section 158B(b), which defines undisclosed income, for income to be considered as disclosed income, it should have been disclosed in the return filed by the assessees before the search or requisition.

9. For the foregoing reasons, we do not find any merit in the appeals and the appeals are accordingly dismissed.

(K.S.JHAVERI, J.) **(K.J.THAKER, J)**

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