

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 47 OF 2012

M/s. Braganza Construction Pvt.
Ltd., Braganza Apartments, Angud,
Mapusa, Bardez, Goa. ... Appellant

V e r s u s

The Asst. Commissioner of Income
Tax, Circle-2(1), Panaji, Goa. ... Respondent

Mr. S. R. Rivankar and Mr. Rama Rivankar, Advocates for the
Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondent.

Coram :- **M. S. SONAK &**
C. V. BHADANG, JJ.

Date : **6th December, 2019.**

ORAL JUDGMENT (*Per M. S. Sonak, J*)

1. Heard Mr. Rivankar, the learned Counsel for the appellant and Ms. Susan Linhares, the learned Standing Counsel for the respondent.

2. By order dated 22nd August, 2012, this appeal was admitted on the following substantial questions of law :

“(i) Whether on the facts and in the circumstances of the case the ITAT was justified in holding that the said amount of Rs.80 lakhs is deemed to be unexplained expenditure under proviso, to section 69C, of the IT Act, without considering the evidence/ material placed on record by the assessee, justifying that the said amount was expended by assessee from bank account ?

(ii) Whether the ITAT has exceeded its jurisdiction by treating the said amount of Rs.80 lakhs under Section 69-C of the Act, when it was not the case spelt out by the assessing officer in show-cause notice issued under Section 147 read with Section 148 of the Act ?”

3. After having heard the learned Counsel for the parties, we are satisfied that yet another substantial question of law is involved in this appeal. The same, according to us, ought to read as follows :

(iii) Whether the ITAT in the facts and circumstances of the present case, was required to consider the application for production on record mere additional evidence by the appellant in the form of cheques/demand drafts and other banking documents in order to evidence the source of payments to the extent of approximately ₹ 39 lakhs, having regard to the provisions in Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 ?

4. The issue involved in the present appeal relates to deemed unexplained expenditure under the proviso to Section 69C of the Income Tax Act, 1961, (IT Act, for short). The ITAT in the impugned judgment and order has held that an amount of ₹ 80 lakhs expended by the appellant was required to be treated as unexplained expenditure and, consequently, deemed income of the appellant-assessee. In the appeal before the ITAT, the appellant has produced on record certain documents by its application dated 3rd May, 2011. The documents, inter alia, include reference to certain cheques, which, Mr. Rivankar, the learned Counsel for the appellant, explains as the source of the

amount and the source of the expenditure. Along with the application, even agreement dated 30th March, 2004 is produced.

5. From the impugned judgment and order, we find that all this material has not even been considered. In particular, there is no discussion on whether such material could be admitted in evidence at the appellate stage or not and thereafter considered. Looking to the proviso of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963, we are satisfied that the aforesaid substantial question of law is indeed involved in this matter and is required to be decided. Further, we are satisfied that if the aforesaid substantial question of law, which we have now framed, is decided in favour of the appellant and against the revenue, then, the matter will have to be remanded to the ITAT and there will be no occasion to decide the two substantial questions of law framed at the time of admission of this appeal.

6. Ms. Linhares, the learned Standing Counsel for the respondent, has made her submissions on the aforesaid substantial question of law, without seeking any adjournment.

7. Ms. Linhares, the learned Standing Counsel submits that the documents which the appellant seek to produce before the ITAT, were very much available at the stage when the assessment was made. However, the same were not produced before the Assessing Authority. She submits that all this casts a doubt upon such evidence. She also submits that the application made by the appellant does not satisfy the predicates of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963.

8. According to us, at this stage, we are really not required to go into the issue as to whether the production of such additional evidence was to be allowed or not. From the impugned judgment and order, what we find is that the ITAT has not even considered the appellant's application seeking leave to produce additional evidence at the stage of appeal by it. This, according to us,

amounts to failure to exercise jurisdiction, which, by virtue of the provisions in Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963, was undoubtedly vested in the ITAT. Upon exercise of such jurisdiction, thereafter, it is open to the ITAT to examine whether the application made by the appellant indeed fulfils the parameters of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 or whether something is required to be said regards the documents that are sought to be produced at the appellate stage. However, consideration of this application was required and since the same has not been done, the impugned judgment and order of the ITAT is required to be set aside and the matter remanded to the ITAT for consideration of the appellant's application seeking leave to produce additional evidence before the ITAT.

9. In the aforesaid regard, reference is required to be made to the provisions in Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963, which reads as follows :

“Rule 29 - The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.”

10. From the aforesaid rule, it is quite clear that the ITAT does have the power to permit production of additional evidence before the Tribunal if the case for the same is indeed made out by the parties. This means that the Tribunal is duty bound to consider the application seeking leave to produce additional evidence at the appellate stage. Since this has not been done, the

substantial question of law, now framed, is required to be answered in favour of the appellant and against the revenue.

11. Accordingly, without going into the merits of the main matter or without even going in the merits of the application made by the appellant seeking leave to produce additional evidence at the appellate stage, we, for the aforesaid reasons, set aside the impugned judgment and order by the ITAT and remand the ITA No.03/PNJ/2011 to the file of the ITAT, Panaji, for fresh adjudication. We direct that the ITAT considers the appellant's application seeking leave to produce additional document, in accordance with law and on its own merits. All contentions of all parties are specifically kept open.

12. Needless to add, that the ITAT shall afford opportunity of hearing to both the parties and only thereafter decide the appeal which we have now remanded to it. This appeal is accordingly disposed off in the aforesaid terms.

13. There shall be no order as to costs.

14. The parties are directed to appear before the ITAT/Its Registry on 10th January, 2020 and produce authenticated copy of this order.

15. All concerned to act on the basis of the authenticated copy of this order.

C. V. BHADANG, J.

M. S. SONAK, J.

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