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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 21.08.2012

PRONOUNCED ON: 31.08.2012

+ **ITA 1620 & 1622/2010, C.M. NO. 18588/2010**

CIT Appellant
Through: Mr. Sanjeev Sabharwal, Sr.
Standing Counsel with Mr. Puneet Gupta,
Jr. Standing Counsel.

versus

INDEO AIRWAYS PVT. LTD. Respondent
Through: Mr. Piyush Kaushik, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% The Revenue in the present appeals directed against the common order of the ITAT in ITA Nos.229/Del/2004 and 321/Del/2004 concerning the block period 01.04.1998 to 20.08.1998, claims to be aggrieved by its order dated 11.09.2009. The following questions of law arise for consideration, i.e., (i) correctness of the impugned order directing the addition of ₹ 3,68,31,145/- to be withdrawn, by virtue of the impugned order; (ii) correctness of the

ITAT's order so far as disallowance of the sum of ₹ 1,93,76,463/- for AY 1998-99 and ₹ 46,35,660/- (AY 1999-2000) towards "green box expenses"; (iii) correctness of the Tribunal's order with regard to deletion of the sum originally disallowed by the AO on account of remuneration expenses and (iv) correctness of the impugned order deleting the disallowance of amounts paid towards commission by the assessee.

2. The brief facts necessary to decide the case are that search and seizure operation was carried out under Section-132 on 20.08.1998 in the premises of the assessee and the punchnama was drawn in the name of its Director Shri Naveen Gera. Block assessment was completed in respect of Shri Naveen Gera under Section-158 BC. The Revenue alleged that during the course of assessment proceedings in the case of Shri Naveen Gera, certain documents pertaining to the assessee were found. The assessee company was incorporated on 28.02.1997. Its business was to charter and operate flights for transportation of goods. Aircrafts were generally chartered from various foreign airlines and the assessee operated them on the Delhi-Moscow sector. The appellant used to consolidate cargo for transportation from Delhi to various foreign destination for which payment was made by Indian exporter either at Delhi or at the destination. After the completion of block assessment in respect of Shri Naveen Gera and on the basis of the material seized, an assessment was separately framed in respect of the assessee company under Section 158BD on 29.08.2002. The sum of ₹ 3,68,31,145/-

added under Section-68 was on account of credit entries of cash allegedly received from non-existing people. The AO on the basis of materials seized and marked as Annexure A-95 to A-100, held that the genuineness, identity and credit worthiness of the depositors was doubtful. The amount was, therefore, directed to be added back in the hands of the assessee. In the assessee's appeal, the Commissioner - CIT (A) after considering the materials on record held that the total sum of ₹ 2,48,11,926/- i.e. the substantive expenditure under the head "green box expenses" could not be held to be illegal. The CIT (A) was of the opinion that once the undisclosed income of the assessee to the tune of ₹ 3 Crores - i.e. the receipts was brought to tax, expenditure – also revealed in the same books of accounts – had to be deducted. The reasoning of the CIT (A) can be gathered from the following extracts of the order in appeal: -

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It has been further mentioned in the assessment order that though the fact that expenditure was made cannot be denied as it appeared in the seized documents, however, it seems that the said expenditure was incurred abroad in an illegal manner and the same could not be allowed. According to the Assessing Officer the theory of purchase and transportation of green boxes appeared to be an afterthought. In view of the above, it was held that the said expenditure being illegal in nature, as already decided by various legal authorities, cannot be allowed. The Assessing Officer in his order has not specified as to on what basis he has treated these expenses as illegal. The conclusion of the Assessing Officer that the business prudence would not allow such heavy expenditure against meager receipts does not seem to be correct, as against the receipt of Rs.3 crores approximately, an amount of only Rs.2.40

crores approximately was spent leaving a balance of merely Rs.60 lacs with the appellant. According to me such an income during a period of less than two years is not a meager income.

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In view of the decision of Rajasthan High Court in the above mentioned case even in such situation, the expenditure allowable. Though no evidence had been found during the search to indicate that the whole amount was not spent for the purpose of the business, but the fact that during the F.Y.1998-99 an amount of Rs.46,35,660/- was spent on Green Boxes against the receipt of only Rs.10,68,100/- will show that the appellant must have spent certain amount under this head for the services which were either not provided or for certain services the payments were not received till the date of search. In such types of services, where work is to be done outside the country, no one will do anything unless the payments are received in advance. Therefore, it cannot be said that the expenditure of Rs.46,35,660/- was solely for the purpose of receipts accounted for in the Block Assessment. During the FY 1997-1998 the expenditure under the head Green Boxes was less than 70% of the total receipts. Thus for the FY 1998-1999 an expenditure of Rs.7,47,670/- (70% of Rs.10,68,100/-) can be treated for the purposes of the business, the balance amount of Rs.38,87,990/- may be disallowed. The Assessing Officer is directed to restrict the disallowance under the head Green Boxes expenses to Rs.38,87,990/- for assessment year 1999-2000. The addition of Rs.1,93,76,463/- pertaining to AY 1998-1999 is deleted.

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3. Similarly, as regards the commission amount of ₹ 8,38,127/- and ₹ 2,48,065/- for the AYs 1998-1999 and 1999-2000, the CIT (A) was of the opinion that these were shown as expenditure in the books seized during the search and in the absence of any material, the

opinion of the AO that only 10% of the freight charges were reasonable and the rest was excess, could not be sustained. As far as the amount of ₹ 6,48,500/- and ₹ 6,300/- for AY 1998-99 and 1999-2000, the AO had held that these heads were inadmissible as they were illegal consideration. On this score, the CIT (A) confirmed the order of the AO.

4. The appeals of the Revenue in connected cases as well as those of the assessee were heard together and disposed of by the impugned order. The Tribunal after elaborate discussion in respect of the materials on record concluded the first question and held that the business of freight and door to door delivery carried on did not belong to Naveen Gera but was that of the assessee. It was also held that income or loss from a composite activity includes air transport and door to door delivery business. The relevant findings of the Tribunal with regard to the disallowance and the partial relief granted by the CIT (A) are found in the following extracts of its impugned order: -

“36. We have heard the rival submission of both the parties and have gone through the material available on record. We are of the considered opinion that admittedly, the assessee has received Rs.3 crores approximately on account of fright charges for door delivery business and except green boxes expenses, no direct expenses is claimed by the assessee. It has to be accepted that for earning this income, the assessee must have incurred expenditure on account of delivery of goods from Airport to the door of the consignee. While determining the quantum of the expenses, we have to keep in mind that the assessee is not having any office in Russia and delivering the consignment at the door of the consignee, personal work is involved and hence expenses of sizeable amount will be there.

Out of green boxes expenses, Ld. CIT (A) has deleted the entire amount in assessment year 1998-1999 and he has noted that green boxes expenses in this year is less than 70% of total receipts. The same expenditure in assessment year 1999-2000 was deleted only in part because it is noted by Ld. CIT (A) that in that year i.e. 1999-2000 the expenses claimed is Rs.46,35,660/- as against receipt of Rs.10,68,100/-. He has allowed expenses in this year also to the extent of 70% of receipts i.e. Rs.7,47,670/- and confirmed this disallowance of the balance amount of Rs.3,88,99,990/-. Before us and before Ld CIT (A) also, it was submitted that the expenditure of later year i.e.1999-2000 is a partly on account of work done in the earlier year i.e. assessment year 1998-1999 and hence composite percentage should be seen. It has been explained that against total receipt of Rs.2,92,50,205/-, total expenditure of green boxes is of Rs.2,40,12,123/- and this gives gross profit percentage of 17.91% which is very reasonable particularly in view of this fact that transportation business in Russia was being controlled in India without any office in Russia. Considering the facts of the case, we are inclined to accept this contention of the assessee that green boxes expenses is reasonable expenses for earning the impugned income. We are also in agreement with LD AR of the assessee that expenses in financial year 1998-1999 were higher than the receipt in that year because the expenses in this year included expenses on account of earlier year also and since the assessee is following cash system of accounting with regard to undisclosed business income, the same should be allowed and since we are concerned with block assessment, whether, the expenses is accounted for in the assessment year 1998-1999 or assessment year 1999-2000 it does not make any difference because ultimately we have to compute the income of the block period as a whole and hence we are of the considered opinion that entire expenses of green boxes claimed by the assessee is allowable.

37. Similarly, with regard to R expenses, we are of the considered opinion that merely because some remuneration expenses are accounted for in regular books of accounts, it cannot be said that there cannot be any expenses on account of

remuneration outside the books. The heading R expenses may create some doubts but in the absence of any evidence that these are expenses on account of Rishwat i.e. bribe, it cannot be held on the basis of suspicion only that the expenses are not remuneration expenses but Rishwat expenses. Nothing has been pointed out by the Assessing Officer as to for what illegal activity, the assessee might have paid Rishwat i.e. bribe. In the absence of any material to show or to indicate that R expenses may be on account of Rishwat, we feel that the same should be allowed as remuneration expenses.

38. Regarding part disallowance out of commission payment, we find that the Assessing Office has made disallowance on ad hoc basis by saying that commission payment to the extent of 10% of receipts is allowable. The same has been deleted by Ld. CIT (A) on the basis that there is no evidence available in the seized record to indicate that only 10% of freight charges was a reasonable amount for payment as commission and hence the Assessing Officer was not justified in restricting the commission payment on ad hoc basis. We find no infirmity in the order of Ld. CIT (A) on this issue and hence we confirm the same. In this manner, we find that all the three disallowance made by the Assessing Officer in both the years are not sustainable and hence the income on this account is to be assessed in the hands of the company at a figure of loss of Rs.72,14,338/- as claimed by the assessee. Although, such loss was claimed by the assessee in the hands of the company M/s. Indeo Airways Pvt. Ltd.”

5. It is urged on behalf of the Revenue by the learned counsel that the impugned order is *ex facie* erroneous inasmuch as it upheld the disallowance of the “green box, commission and R expenses”. It was submitted that with the inclusion of Explanation to Section 37 (1), only legally tenable or legitimate expenditure which does not relate to any activity that amounts to an offence can be deductible. Counsel

urged that the scanty nature of evidence with regard to “green box” and absence of any material to sustain that as well as the purpose for other payments meant that such amounts could not be deducted as business expenses.

6. Learned counsel for the Revenue urged that in every search related assessment, the Revenue was entitled to draw a presumption under Section 132 (4A) and thereafter call for the materials to satisfy whether the assessee’s claim or that of the person searched is reasonable and permissible within the law. Counsel submitted that the mention of certain heads of expenditure *ipso facto* did not oblige the Revenue authorities to take them at face value particularly after insertion of Explanation to Section-37 (1). It was emphasized that the so called “green box” for which a huge amount of expenditure was claimed by the assessee’s admission itself utilized as consideration to certain individuals for the door to door delivery of the freight. No supporting material in the form of receipts, vouchers etc. were furnished by the assessee despite request; likewise, the assessee could not produce any permission by any government agency under the then existing FERA etc., enabling it to carry on such business. Consequently, all these expenses could not be allowed as deduction under Section-37.

7. Learned counsel for the respondents submitted that once the income tax authorities rely upon a set of circumstances including certain materials and evidence seized during the course of a search and further seek recourse to Section-132 (4A), the logical consequences of

a presumption spelt out in terms of that provision have to be necessarily follow. Having once taken recourse to the presumption under Section-132 (4A) that the receipts constituted income and brought this amount to tax, the Revenue cannot draw a reverse presumption against the assessee and ask it to prove that why certain entries ought to be disallowed as inadmissible heads. In other words, if the Revenue falls back on presumption under Section 132 (4A), the nature of the presumption has to be the same with regard to the material in respect of which it is drawn. Learned counsel relied upon the judgment of this Court reported as *CIT v. Naresh Kumar Aggarwalla*, 331 ITR 510; and that of the Bombay High Court in *Surender M. Khandar v. ACIT*, 321 ITR 254.

8. Learned counsel also relied upon the decision of this Court reported as *CIT v. Ravi Kant Jain*, 250 ITR 141 for the submission that the scope of the block assessment is confined to the material found during the search. Reliance was lastly placed upon the decision of the Calcutta High Court in *CIT v. Ashim Krishna Mondal*, 270 ITR 160. It was urged in addition that in view of concurrent findings of fact pertaining to expenses incurred by the assessee, the scope of proceedings by virtue of Section-260A, no question of law can be said to arise.

9. The above discussion reveals that consequent to the search, a sum in excess of ₹ 3 crores was determined as the undisclosed receipts of the assessee; it was sought to be brought to tax. The assessee contended, *inter alia*, that if that were correct, the other amounts

shown as expenditure should be allowed as business expenses. This was not upheld by the AO, who disallowed the entire amount. The CIT (A) accepted the assessee's contentions, and directed deletion of a major portion of the disallowance. The revenue's appeal was rejected by the Tribunal, which, by the impugned order, accepted the assessee's cross objection. The threshold point which this court has to decide is whether the assessee is right in contending that since the revenue has suffered concurrent findings on questions of fact, no substantive question of law arises for consideration by the court. There is authority for this proposition, in the form of this Court's judgment in *Commissioner of Income Tax v. S.J. Knitting and Finishing Mills P. Ltd.*, [2004] 266 ITR 0582, that in such circumstances, the findings of the lower authorities are to be treated as pure findings of fact, and the reference consequently has to be answered against the revenue.

10. This court does not wish to rest its decision on the narrow ground of the appeals involving pure issues of fact, especially since the parties made elaborate submissions on the merits of the case.

11. In order to resolve the main issue in controversy, it would be relevant to notice certain provisions of the Income Tax Act. The Explanation to Section 37 (1) is relevant and reads as follows:

37. (1) Any expenditure (not being expenditure of the nature described in [sections 30](#) to [36](#) and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively¹⁵ for the purposes of the business or profession shall be allowed in computing the

income chargeable under the head "Profits and gains of business or profession".

[Explanation.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]

12. Section 37 is a residuary provision, and allows expenditure as deductible while computing the income on the subject to fulfilment of these conditions:

- a) the expenditure should not be deductible under Sections 30 to 36 of the Act;
- b) The expenditure must have been incurred wholly and exclusively for the purposes of the assessee's business;
- c) It should not be personal in nature; and
- d) It should not must not be capital in nature."

13. The Explanation to Section 37 (1) of the Act was inserted by Finance (No.2) Act, 1988 with retrospective effect from 01.04.1962, i.e., inception of the Act. This appears to have been a public policy driven amendment, disallowing deduction benefits in respect of illegal activities which could potentially be brought to tax. The phraseology of the provision clarifies that if the (business or commercial) activity is '*an offence or which is prohibited by law*' deduction, which might otherwise be eligible to the benefit of Section 37 (1) would not be granted.

14. In the present case, the AO and, to a certain extent, the CIT (A) appear to have proceeded *inter alia*, to disallow heads of expenditure towards commission payments, sundry expenses (termed ‘R’) and green box expenses. As far as the “green box” expenses are concerned, the assessee had relied on the books relied on by the revenue to assess the income, to urge that these constituted expenses entitled to deduction. The AO held these expenses to be excessive. The assessee argues that once the revenue seeks to draw a presumption, by relying on Section 132 (4A) of the Act that presumption has to be given full effect. In other words, if the correctness of the contents of books and other materials is to be presumed, such a deemed state of affairs would have to be assumed in respect of all entries in the books, and not merely the entries of income (or receipts).

15. Section 132 (4A) reads as follows:

“(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting

of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

As to the nature of the presumption, the Kerala High Court, in *Income Tax Officer, B-Ward, Ernakulam v. T. Abdul Majeed*, [1988] 169 ITR 440, held as follows: -

"It is true that section 132(4A) of the Act enables the court to presume the truth of the contents of such books. However, it is a presumption which can be rebutted. Moreover, the presumption envisaged therein is only a factual presumption. It is in the discretion of the court, depending upon other factors, to decide whether the presumption must be drawn. The expression used in the sub-section is "may be presumed" as is used in section 114 of the Evidence Act, 1872. It is not a mandate that whenever the books of account are seized, the court shall necessarily draw the presumption, irrespective of any other factors which may dissuade the court from doing so."

16. In *P.R. Metrani v. Commissioner of Income Tax, Bangalore* (2007) 1 SCC 789 the Supreme Court elaborated upon the nature of presumption under Section 132 (4A) and the scheme of the provision, in the following words:

"Sub-section (4A) was inserted by Taxation Law (Amendment) Act, 1975 with effect from 1.10.1975 to permit a presumption to be raised in the circumstances mentioned therein. Before the insertion of sub-section (4A) the onus of proving that the books of account, other documents, money bullion, jewellery etc. found in possession or control of a person in the course of a search belonged to that person was on the Income Tax Department. Sub-section (4A) enables an assessing authority to raise a rebuttable presumption that such books of account,

money, bullion etc. belonged to such person; that the contents of such books of account and other documents are true, and, that the signatures and every other part of such books of account and other documents are signed by such person or are in the handwriting of that particular person. Raising of such presumption has been enacted by the Legislature to enable the assessing authority to make a provisional adjudication within the time frame prescribed under Section 132. Otherwise it may not be possible to do so. The object of introduction of Section 132 is to prevent the evasion of tax, i.e., to unearth the hidden or undisclosed income or property and bring it to assessment. It is not merely an information of undisclosed income but also to seize money, bullion etc. representing the undisclosed income and to retain them for the purposes of realization of taxes, penalties etc. Search and seizure is a serious invasion in the privacy of the person. Section 132 which is a complete code by itself provides that the money, bullion or the books of account etc. should not be retained unnecessarily and that the provisional assessment made under Section 132 for the purpose of retention of the books is passed within a specified time in accordance with law. It provides that the books of account, money and bullion which are not required are not retained unnecessarily thereby causing harassment to the person concerned. In order to see that the assessment order is framed within the time frame provided under Section 132, legislature provided for a rebuttable presumption to be raised against the person from whose possession and control the books of account, money, bullions etc. are seized so that the order can be passed within the time frame provided under Section 132.

A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) "may presume", (ii) "shall presume" and (iii) "conclusive proof". "May presume" leaves it to the discretion of the Court to make the presumption according to the circumstances of the case. "Shall presume" leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it.

In this sense such presumption is also rebuttable. "Conclusive proof" gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.

The words in sub-section (4) are "may be presumed". The presumption under sub-section (4A) therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4A) is a irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of Section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in Section 132 or any other provisions of the Act which could warrant such an inference or finding. Presumption under sub-section (4A) would not be available for the purpose of framing a regular assessment. There is nothing either in Section 132 or any other provision of the Act to indicate that the presumption provided under Section 132 which is a self contained code for search and seizure and retention of books etc. can be raised for the purposes of framing of the regular assessment as well."

If the revenue was of the opinion that the expenses claimed towards "green boxes" was inadmissible or was excessive, or not genuine, in order to reject the entries in the books of account and other documents of the assessee, seized during the search, it ought to have relied on other materials. Having once drawn the presumption that the contents of the documents (of the assessee) taken into possession during the search were true, the revenue could not have, consistently with that presumption, proceeded to require the assessee to produce materials in support of the expenditure entries. Such an inconsistent approach in respect of the contents of the same book appears to have been founded only on suspicion that they were not genuine. However, suspicion

cannot replace proof. Moreover, the full effect of the presumption should be given effect to, whenever the statute directs a particular non-existent state of affairs to be assumed. (Ref *State of Bombay v. Pandurang Vinayak*, AIR 1953 SC 244; *Karnataka State Road Transport v B.A. Jayaram & Ors*, AIR 1984 SC 790). In these circumstances, the effect of the presumption (which bade the revenue, when it chose to invoke it, to presume that the “*contents of such books of account and other documents are true..*”. Therefore, in the absence of any materials, in the form of documents, the revenue could not have denied the benefit of any expenses which would otherwise have inured to the assessee, as an allowable deduction under Section 37 (1).

17. So far as the heads of expenses are concerned, the revenue was unable to show how any of them were prohibited by law, or amounted to offences. The assessee’s business was to transport export goods, and ensure their door to door delivery in Moscow. Confirmations had been received during the course of proceedings, from some of the assessee’s clients. The assessing officer himself allowed some deductions; which in turn implied that what aroused his suspicion was the seemingly high level of expenditure. On this aspect, however, the CIT (A) held that the margin of profit, a little over 17% compared favourably with the general trend in the business. In view of these facts, the ITAT, in the opinion of this court, did not commit any error of law in holding that such expenses were deductible under the main part of Section 37 (1) of the Act.

18. In view of the above discussion, all questions framed in these appeals are answered in favour of the assessee, and against the revenue. Consequently, the appeals fail and are dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

AUGUST 31, 2012