IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.77/2006

The Commissioner of Income Tax,
(Central Circle), Having office
at CR Building, Queen's Road,
Banglore. .. Appellant.

Versus

Ms. Maria Sylvia D'Souza,
Through Smt. Yogita Gosalia,
Power of Attorney Holder,
Gosalia House, Pajifond,
Margao, Goa. .. Respondent.

Ms. Asha Dessai, Advocate for the Appellant.

Mr. S. D. Lotlikar, Senior Advocate with Mr. H. Kankonkar, Advocate for the respondent.

CORAM :- **A. P. LAVANDE &**
U. V. BAKRE, JJ.
DATE :- 30th August, 2012.

ORAL JUDGMENT : (Per A. P. Lavande, J.)

Heard Mrs. Dessai, learned Counsel for the appellant and Mr. Lotlikar, learned Senior Counsel appearing for the respondents.

2. This appeal under Section 260-A of the Income Tax Act, 1961 ('the Act' for short) has been preferred by the revenue challenging the order dated 07/04/2006 passed by

the Income Tax Appellate Tribunal ('ITAT' for short) dismissing the appeal filed by the revenue against the order dated 31/03/2004 passed by the Commissioner of Income Tax (Appeals) ('CIT(A)' for short) allowing the appeal preferred against the order passed by the Assessment Officer.

3. Briefly, the facts relevant for disposal of the present appeal are as under :

Francisco Jose D'Souza, the husband of the respondent (assessee) was working in Bahrain. He returned to India in the year 1985. His earnings in the foreign country were brought to India and were invested in Fix Deposit Receipts (FDRs) in various banks. The husband of assessee expired on 4/02/1988 leaving behind one daughter and three sons. All the three sons are settled abroad. The daughter is married and is living in Goa. All the fix deposit receipts after the death of Francisco continued in the name of assessee and on the entire interest income TDS was deducted by the bank.

4. On 16/12/1998, search was conducted at the business premises and residence of Gosalia Group. The daughter of the assessee was married to one of the sons of

Gosalia Group. During the search, papers including FDRs were found and the same were in the name of assessee. Therefore, the Assessment Officer brought the entire interest income earned on the said FDRs to tax in the hands of assessee. The assessee also disclosed another income in the block return for a sum of Rs.3,79,434/-, the interest income from FDRs was Rs.32,54,905/-. The Assessment Officer made an addition of Rs.36,34,339/- being the income from undisclosed sources during the block period in the hands of the assessee. The order passed by the Assessment Officer was challenged by the assessee by filing appeal to the CIT(A).

5. The CIT(A) partly allowed the appeal filed by the assessee and brought only 50 % of the undisclosed money in the hands of assessee by observing that remaining 50 % will go to the successors of the deceased i.e. his three sons and daughters-in-law. The CIT(A) also gave credit of 50 % of TDS in the hands of the assessee.

6. Aggrieved by the order passed by CIT(A), the revenue filed an appeal to ITAT.

7. The ITAT by the impugned order dismissed the

appeal upholding the findings given by the CIT(A).

8. The ITAT placed reliance upon Articles 1122 and 1123 of Portuguese Family Civil Law in Goa, Daman and Diu, Section 5A of the Act and the judgments of this Court in *CIT Vs. Purushottam Bhende; 106 ITR 932, 941 (Bom.)*, *CIT Vs. Shri and Smt. Jose Filipe Alvares; 211 ITR 1027,* *CIT Vs. Datta Gaytonde; 241 ITR 241/242 (Bom.)* and *Goa Salaried Tax Payers Association Vs. Union of India; 249 ITR 195 (Bom.)*

9. The ITAT further held that the law applicable to the assessee could not have been superseded by the mutual consent of the parties or negligence on behalf of the parties. The ITAT, therefore, held that 50 % share of the deceased husband would go to the legal successors which include three sons and one daughter; if the successors had not taken legal proceedings for transfer of their shares in their names at the most it amounted to negligence on their part and for this negligence they would be liable to be assessed on the income proportionately accrued to them as per Section 5A of the Act. The Tribunal further held that the department would be at liberty to assess the income in the hands of legal

heirs accrued as per Section 5A of the Act. Insofar as TDS is concerned, the ITAT held that there was nothing wrong on the part of the bank for deducting TDS on the entire income and the successors would be at liberty to claim set off in so far as TDS already deducted on their shares of income are concerned as per law. Consequently, the ITAT did not find any infirmity in the order passed by the CIT(A) and dismissed the appeal.

10. The appeal was admitted on the following substantial question of law :

> (i) Whether in law and in the facts and in the circumstances of the case, ITAT, is justified in holding that 50 % of the share of the deceased husband will go to his legal heirs and 50 % to the assessee, by overlooking the fact that all the FDRs are standing in assessee's name and she is receiving total interest, which is enjoyed by her as her income, without taking any steps to transfer the shares of the heirs, which amounts to undisclosed income liable to tax under Section 158 BD of the IT Act ?

11. Mrs. Dessai, learned Counsel appearing for the appellant submitted that the CIT(A) had erred in setting aside

the well reasoned order passed by the Assessment Officer. According to learned Counsel, the entire interest on the fix deposits ought to have been assessed in the hands of the assessee and not 50 % of the interest inasmuch as the entire interest amount was held in the name of the assessee and even TDS was not deducted by the bank.

12. Placing reliance upon Section 283 of the Act, Ms. Dessai submitted that the view taken by the CIT(A) as well as ITAT is patently unsustainable in law. She further submitted that there was no actual partition in respect of the assets and more particularly the amounts which were admittedly lying in the name of the assessee in the bank and as such, in the absence of actual partition, the Assessment Officer was entitled to assess the entire interest in the hands of the assessee for the purpose of finding tax liability. She further submitted that the assessment ought to be on the basis of body of individuals and in the absence of formal dissolution, the order passed by the Assessment Officer cannot be faulted. She placed reliance upon the judgment of this Court in the case of *Commissioner of Income Tax Vs. Shri and Smt. Jose Filipe Alvares; (1995) 211 ITR 1027 (Bom.)*.

13. We have carefully considered the rival submissions, perused the record and the judgment relied upon.

14. The CIT(A) as well as the ITAT have held that in terms of Section 5A of the Act which was brought into force in the year 1994 with retrospective effect from 01/04/1963, the assessee and her husband were governed by the system of Community of Assets ('COMMUNIAO DOS BENS') which is in force in the State of Goa. The ITAT held that after the death of husband of the assessee, only 50 % of the share in the FDRs would pass on to three sons and one daughter and the assessee would be entitled to 50 % of the share and, therefore, the directions given by the CIT(A) to the Assessment Officer to consider 50 % of the interest amount in the hands of the assessee as her undisclosed income for the block period, cannot be faulted. In our view, the Tribunal has rightly placed reliance upon Section 5A of the Act and Articles 1122 and 1123 of Portuguese Family Civil Law which is in force in the State of Goa and dismissed the appeal preferred by the revenue against the order passed by the CIT(A).

15. In our view, the reliance placed by the revenue on

the judgment in the case of Jose Filipe Alvares (supra) is totally misplaced. Even in the said case, in view of amendment to Income Tax Act by introduction of Section 5A with retrospective effect, the Division Bench of this Court declined to answer the question referred to it and remitted the matter to the Tribunal to decide afresh in the light of Section 5A of the Act. In our view, the ratio of the said judgment does not advance the case of the revenue. Similarly reliance placed on Section 283 of the Act is also misplaced inasmuch as it is not at all applicable in the present case.

16. We are of the considered view that the submission made on behalf of the revenue that the assessment ought to have been on the basis of the body of individuals is totally misplaced.

17. In view of the above, we do not find any merit in the present appeal. The substantial question of law formulated in this appeal is accordingly answered against the revenue. Consequently, the appeal is dismissed.

A. P. LAVANDE, J.

U. V. BAKRE, J.

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