IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1323 of 2008
With
TAX APPEAL NO. 1325 of 2008
With
TAX APPEAL NO. 1327 of 2008
With
TAX APPEAL NO. 1328 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-
and
HONOURABLE MR.JUSTICE G.R.UDHWANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
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 or any order made thereunder ?	No

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COMMISSIONER OF INCOME TAX-I....Appellant(s)

Versus

NARESH KUMAR AGARWAL....Opponent(s)

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Appearance:
MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1
MR MANISH J SHAH, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 19/08/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. All these appeals are preferred by the revenue against the judgment and order dated 30.4.2008 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "D", Ahmedabad (For short, "the Tribunal") in IT(SS)A No.293, 294, 343, & 344/Ahd/2002, whereby the appeal of the assessee was allowed and the appeal of the revenue was dismissed. Tax Appeal Nos.1323 and 1328 of 2008 are preferred against Naresh Kumar Agarwal while Tax Appeal Nos.1325 and 1327 of 2008 are preferred against the wife of the assessee, viz. Parvatidevi Nareshkumar Agarwal.

2. At the time of hearing of these appeals, this Court framed following questions of law:-

Tax Appeal No.1323 of 2008:-

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.31,66,939/- made by the Assessing Officer as undisclosed investment in the properties acquired by the assessee?

(ii) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal is right in deleting the surcharge levied by the Assessing Officer under the provisions of the Finance Act?

(iii) Whether on the facts and in the circumstances of the case, the order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of the case and, therefore perverse or not?

(iv) Whether on the facts and in the circumstances of the case the order passed by the Income Tax Appellate

Tribunal deleting the addition made by the Assessing Officer is not based on the relevant the evidence and material on the record of the case and, therefore, is suffering from non-application of mind and perverse, or not?"

Tax Appeal No.1325 of 2008:-

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.42,32,665/- made by the Assessing Officer as undisclosed investment in the properties acquired by the assessee?

(ii) Whether on the facts and in the circumstances of the case, the order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of the case and, therefore perverse or not?
(iv) Whether on the facts and in the circumstances of the case the order passed by the Income Tax Appellate Tribunal deleting the addition made by the Assessing Officer is not based on the relevant the evidence and material on the record of the case and, therefore, is suffering from non-application of mind and perverse, or not?"

TAX APPEAL No.1327 of 2008:-

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.27 lakhs made by the Assessing Officer as undisclosed investment in the properties acquired by the assessee, which has been sustained by the Appellate Commissioner?

(ii) Whether on the facts and in the circumstances of the case, the order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of the case and, therefore perverse or not?
(iv) Whether on the facts and in the circumstances of the case the order passed by the Income Tax Appellate Tribunal deleting the addition made by the Assessing Officer is not based on the relevant the evidence and material on the record of the case and, therefore, is suffering from non-application of mind and perverse, or not?"

TAX APPEAL No.1328 of 2008:-

"(i) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs. 82,682/- made by the Assessing Officer and sustained by the Appellate Commissioner as undisclosed investment in the properties acquired by the assessee?

(ii) Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal is right in law in deleting the addition of surcharge levied by the Assessing Officer under the provisions of the Finance Act?

(iii) Whether on the facts and circumstances of the case, the order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of the case and, therefore, perverse or not?
(iv) Whether on the facts and circumstances of the case, the order passed by the Income Tax Appellate Tribunal deleting the addition made by the Assessing Officer is not based on the relevant evidence and material on the record of the case and, therefore, is suffering from non-application of mind and perverse, or not?"

3. Mr.Sudhir Mehta, learned advocate for the revenue has taken us through the order of the Assessing Officer as well as the order of the CIT (Appeals) and submitted that the Tribunal has committed an error in deleting the addition made by the Assessing Officer and confirmed by CIT (Appeals). He submitted that the issue involved in the present appeals is squarely covered by the decision of the Apex Court in the case of **Commissioner of Income-tax v. Vatika Township P. Ltd.** reported in **[2014] 367 ITR 466 (SC),** wherein it is observed as under:-

"39. .....
(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

40. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in Suresh N. Gupta treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. Said judgment is accordingly overruled.

41. As a result of the aforesaid discussion, the appeals filed by the Income Tax Department are hereby dismissed. Appeals of the assessees are allowed

deleting the surcharge levied by the assessing officer for this block assessment pertaining to the period prior to 1st June, 2002."

3.1 In view of above observations, he prayed that in view of the above decision, present appeals may be allowed.

4. On the other hand, Mr.Manish Shah, learned counsel for the respondent supported the impugned orders and submitted that the Tribunal has not committed any error while passing the impugned orders. He has taken us through the impugned order, more particularly, para 9 of the order passed in IT(SS) No.294/Ahd/2002, wherein it is observed as under:-

"9. We have heard the rival submissions and perused the orders of the lower authorities and the materials available on record. It is observed that in the instant case a search was carried out on 28.3.2000. During the course of search some valuation papers in respect of the properties acquired by the assessee and his family members were found. The valuation shown in these valuations reports were much higher than the cost of acquisition shown by the assessee and his family members. During the course of search the assessee admitted payment of on money in respect of these properties to the extent of Rs.41.00 lacs by him. He also declared these investment of Rs.41.00 lacs as his undisclosed income in the block return filed by him. The A.O. observed that in the statement recorded under section 132 (4) of the Act in one sheet apparently is records that the assessee has admitted payment of on money of Rs.98.50 lacs. However, the AO has also admitted that this sheet does not bear the signature of the assessee. However, he further observed that in the same statement recorded under section 132 (4) of the Act in the subsequent sheet the assessee has admitted payment of only Rs.41.00 lacs as on money and that he also categorically stated that the earlier recording of

Rs.98.40 lacs was not his statement. In the circumstances, we find that the assessee has never admitted payment of Rs.98.50 lacs in respect of the properties in question as on money. Further, we find that no material was found during the course of the search to show that the assessee in fact paid any amount more than Rs.41.00 lacs as on money in respect of the properties in question. In absence of any material or evidence found as a result of search, in our consideration opinion the lower authorities were not justified in enhancing the amount of Rs.41.00 shown by the assessee as undisclosed income in the block return. Hence, we delete the addition of Rs.39.00 lacs sustained by the CIT (A). Thus, the ground of appeal of the assessee relating to this issue is allowed and the ground of appeal of the Revenue is dismissed."

4.1 Similarly, in the case of wife of the assessee, following observations were made while deciding IT(SS) No.293/Ahd/2002:-

"8. After hearing the rival submissions and perusing the orders of the lower authorities and the materials available on record we find that in the instant case proceedings under Chapter XIVB was initiated in pursuance to the search carried out on 28-3-2000 in the case of the husband of the assessee. Admittedly, no evidence or material indicating any actual payment of on money in respect of the properties acquired by the assessee was found during the course of the said search. However, the husband of the assessee Shri Naresh Kumar Agrawal who is also power of attorney holder of the assessee has admitted payment of certain on money by him in respect of the properties acquired by the assessee and also declared that as his income in the block return filed by him and paid the tax thereof. We observe that the addition was made by the Revenue only on the basis of the valuation report found during the course of the search. The AO himself admitted that the valuation shown in the report was exaggerated on and the same was prepared for obtaining the bank loan. We observe that the said valuation report does not indicate

the actual financial transaction and does not evidence that the assessee has out of her undisclosed income made any payment. In these circumstances, we find that no addition in a proceeding made under Chapter XIVB can be made in view of clear provisions laid down in section 158BB of the Act that the undisclosed income has to be computed on the basis of the material found during the course of search or any other material relatable thereto. We, therefore, delete the addition of Rs.27.00 lacs sustained by the CIT (A). Thus, the ground of appeal of the assessee is allowed and the grounds of appeal of the Revenue are dismissed."

4.2 He has relied upon the decision of this Court in the case of **Commissioner of Income-tax v. Chandrakumar Jethmal Kochar** reported in **[2015] 55 taxmann.com 292 (Gujarat),** wherein it is observed as under:-

"3. Learned advocate for the appellant has submitted that the Tribunal has committed an error in allowing the appeal. He further submitted that the Tribunal has not given any cogent reasons in its order.

*4. As against this, Mr. Soparkar, learned Senior counsel heavily relied upon the decision of this Court in the case of **Kailashben Manharlal Chokshi Vs. Commissioner of Income Tax,** reported in **[2010] 328 ITR 411 (Guj.),** more particularly paragraph No.23. In the aforesaid case, the judgment rendered in CIT Vs. D.L.F., reported in [2000] ITR 855 has been referred. Paragraph No.23 of the decision of Kailashben Manharlal Chokshi (supra) reads as under:-*

> *23. The main grievance of the Assessing Officer was that the statement was not retracted immediately and it was done after two months. It was an afterthought and made under legal advise. However, if such retraction is to be viewed in light of the evidence furnished alongwith the affidavit, it would immediately be clear that the assessee has given proper explanation for all the items under which disclosure was sought to be obtained from*

the assessee. So far as amount invested in house property is concerned, the assessee has specifically stated in his explanation dated 28.2.1989 that there was absolutely no basis for making the disclosure on account of bunglow at 68, Sarjan Society, Athwa Lines, Surat. It was in the year 1964 that the assessee took one Plot No.68 in Sarjan Co.Operative Housing Society which was also constructing the bunglow for which the assessee claimed to have been made contribution from time to time. The assessee took possession of the bunglow in 1974 when only ground floor was constructed. Since then he has been living there. The assessee has constructed first floor during 1986 to 1988 and he has incurred the expenses for first floor structure to the tune of Rs.2,03,185.65 ps. but this amount has been withdrawn from the account of the firm in which the assessee is a partner. As per say of Mr.Shah even departmental valuation officer has also accepted that the cost of construction of first floor worked out to Rs.2,06,060/-. There was, therefore, no reason for making addition of Rs.4 lacs on the basis of alleged disclosure made by the assessee in his statement recorded under Section 132(4) of the Act. In support of this statement the Revenue has not brought any evidence whatsoever which would establish that the assessee had in fact incurred an amount of Rs.4 lacs on the construction of the first floor and that amount was invested out of the undisclosed income. Hence there is no justification for making account of Rs.4 lacs merely on the basis of statement recorded under Section 132 (4). None of the authorities have considered this explanation and the CIT(A) as well as Tribunal both have proceeded on the footing that the Assessing Officer has considered the explanation.

So far as the addition on account of gold ornament to the tune of Rs.1 lac is concerned, the assessee has given the explanation that was reproduced by the Assessing Officer in his assessment order which says that during the course of search and seizure proceeding, statement of assessee's wife, Smt. Kailashben Chokshi was recorded and according to which she had received about 25 tolas of gold each

from her parents and from her parents in law side at the time of her marriage in the year 1960. She had given 15 tolas of gold ornaments to her daughter Ritaben at the time of her marriage in the month of March, 1988. If the total jewellery found during the course of search is taken into consideration, in light of the instructions issued by the Board, any middle class Indian family may be having jewellery and gold ornaments to that extent. Hence, no addition can be made on that count. Even if the board Circular may not have retrospective operation, looking to the quantum of holding and assessee's explanation, we are of the view that this is a normal holding which can be found in any middle class Indian family and hence no addition could have been justified on that count.

So far as addition of Rs.1 lac on account of unaccounted investment in furniture is concerned, it is stated by the assessee that on the ground floor furniture was made before 15 years and assessee had spent Rs.25,000/- for renovation after making withdrawal from the firm's account. It is further submitted that the furniture on the first floor was partly received and paid out of withdrawals from the firm. At the time of the search additional furniture meant for the first floor was just received by way of parcel from Ahmedabad and was lying in bundles. A detailed source of investment of furniture purchased from Ahmedabad with a due confirmation from the party concerned have been filed by the assessee before the Assessing Officer. Since no payment of this additional furniture was made by the assessee till the date of search, no addition could have been made on this count.

5. We have heard learned advocates appearing for both the parties and perused the material available on record. The Tribunal while deciding the appeal in paragraph No.8 has observed as under:-

8. We have heard the assessees counsel and the D.R. We are of the opinion that the CIT(A) when he relied upon the statement of the assessee made on 8.8.90 ignored the fact that there were two statements recorded on that day. The first

statement was recorded at the 8 am. and second statement was recorded at 8:45 pm. in the night. In the first statement recorded in the morning which are contained on pages 1 to 12 of the assessees paper book. There is no acceptance of the fact that the business belonged to him and not to the other persons who are said to have given the statements against him. It is notable that 33 questions were asked in the morning session and this morning session statement was the first statement. Therefore, if the line of reasoning recorded by the CIT (A) is accepted then the reliance has to be placed on the first statement in the morning. In this first statement in the morning there is no acceptance of any benamidari or any disclosure. It is notable that the second statement of the assessee started at 8:45 pm. which according to the assessee continued upto 6 am. next day. This is contained from pages 13 to 26 of the paper book and contains 35 questions and answers. Till question No.21 of the second statement there is no allegation of any benamidari. From question No.22 the statement starts talking about proprietorship of different concerns in the name of his various employees. Even in answer to question No.22 he could not give the names of the proprietors of Kamal Traders, Naman Traders, Sampat Traders, Adarsh textiles. In the last sentence of the said answer he stated as translated in English besides above there are no other firms in the name of our employees. In answer to question No.23 he accepted that Sugam Textiles was being run by his employees as his benami. In answer to question No.24 he accepted that all the concerns mentioned in question No.22 are his benami concerns. In answer to question No.26 he accepted that certain bank accounts were his benami bank accounts. In answer to question No.27 he further agreed that all the deposits made in the name of his employees are his deposits. In answer to question No.33 he disclosed an income of Rs.15 lakhs. He could not give any further details on that date. On 31.8.90 another statement of this assessee was recorded. In that he accepted that he was a partner in Padam Enterprises as individual and in Mahavir Trading Co. as HUF. In answer to question No.14 he stated that

through the two concerns of Sugam Textiles and Shanti Traders the profits of 14 concerns belonging to his group were reduced. The name of 14 concerns are given on assessees paper book page No.28. In answer to question No.12 he made a disclosure of Rs.24 lakhs in all including Rs.15 lakhs disclosed on 8.8.90. From the above statements one thing is clear that in the first statement made in the morning of 8.8.90 this assessee did not disclosure any benamidari and it was only in the second statement taken from 8:45 pm. onwards that he disclosed certain benamidaris and proceeded make certain disclosure. It is notable that the disclosure. Made in answer to question No.12 appearing on assessees paper book page No.32 in the statement given on 31.8.90 talks about disclosure of 24 lakhs in 14 concerns as group disclosure. The issue regarding group disclosure has neither been discussed by the A.O. nor by the CIT(A). Under I.T. Act an assessment has to be made on an assessee on an income determined in his case for a particular year. The quantum of disclosure made in each and every 14 concerns have not been identified by either of the lower authorities. The department has also not contested the fact that this assessees son suffered from diabetes. In view of the above circumstances we see reason to believe that the second statement given by the assessee after 8:45 pm. was not given under the the circumstances which could be said as normal for the assessee.

6. In view of the above discussion and considering the principal laid down in the case of Kailashben Manharlal Choksh (supra), we are of the considered opinion that the view taken by the Tribunal is just and proper. We are not convinced with the submissions made by Mr. Mehta, learned advocate for the appellant that the Tribunal has not given cogent reasons. Therefore, the answer to the first question would be against the Revenue and in favour of the assessee. The second question will also enure for the benefit of the assessee as from the record it is clear that other concerns were not Benami concerns of the assessee."

4.3 In view of above, he prayed to dismiss present appeals. He also submitted that the so far as the issue, which was decided in favour of the department, the assessee has not challenged the said decision.

5. We have heard learned counsel appearing on both sides. We have also perused the impugned orders and the material on record. We have also gone through the judgments relied upon by the learned advocates. Taking into consideration the observations made by the Tribunal in the impugned orders as well as the observations of this Court in Chandrakumar Jethmal Kochar (supra), we find that the Tribunal has not committed any error while passing the impugned orders. Therefore, present appeals deserve to be dismissed. Accordingly, all these appeals are dismissed and the impugned orders are confirmed. The questions posed for our consideration are answered in favour of the assessee and against the department.

Sd/-
(K.S.JHAVERI, J.)

Sd/-
(G.R.UDHWANI, J.)

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