

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1709 OF 2014

Commissioner of Income Tax-20 ... Appellant
Vs.
Shri. Deepak Kumar Agarwal ... Respondent

WITH
INCOME TAX APPEAL NO. 1780 OF 2014

Commissioner of Income Tax-20 ... Appellant
Vs.
Shri. Deepak Kumar Agarwal ... Respondent

WITH
INCOME TAX APPEAL NO. 131 OF 2015

Commissioner of Income Tax-20 ... Appellant
Vs.
Shri. Deepak Kumar Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 467 OF 2017

Pr. Commissioner of Income Tax-24 ... Appellant
Vs.
Nikki Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 468 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Govind Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 469 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Manidevi Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 470 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Manidevi Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 472 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Shri. Govind Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 477 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Manidevi Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 483 OF 2017

Commissioner of Income Tax-24 ... Appellant
Vs.
Shri. Govind Agarwal ... Respondent

WITH
INCOME TAX APPEAL (L) NO. 566 OF 2017

Pr.Commissioner of Income Tax-24 ... Appellant
Vs.
Shri. Govind Agarwal (HUF) ... Respondent

WITH
INCOME TAX APPEAL NO. 914 OF 2017

Pr.Commissioner of Income Tax-24 ... Appellant
Vs.
Shri. Govind Agarwal (HUF) ... Respondent

WITH
INCOME TAX APPEAL NO. 1169 OF 2014

The Commissioner of Income Tax 20 ... Appellant
Vs.
Shri. Govind Agarwal ... Respondent

WITH
INCOME TAX APPEAL NO. 1178 OF 2014

The Commissioner of Income Tax 20 ... Appellant
Vs.
Shri. Govind Agarwal ... Respondent

WITH
NOTICE OF MOTION NO. 1194 OF 2017
IN
INCOME TAX APPEAL NO. 1169 OF 2014

The Principal Commissioner of Income Tax-24 ... Applicant/
Appellant
Vs.
Mr. Govind Agarwal ... Respondent

WITH
NOTICE OF MOTION NO. 1197 OF 2017
IN
INCOME TAX APPEAL NO. 1178 OF 2014

The Principal Commissioner of Income Tax-24 ... Applicant/
Appellant

Vs.

Mr. Govind Agarwal

... Respondent

.....

Mr. Abhay Ahuja for the Appellant in ITXA/1709/2014,
ITXA/1780/2014 and ITXA/131/2015.

Mr. Naresh Jain i/b. Agrud Partners for the Respondent in all the
Appeals.

Mr. Arvind Pinto for the Appellant in ITXA/1178/2014,
ITXA/1169/2014, ITXA(L)/468/2017, ITXA(L)/472/2017 &
ITXA(L)/483/2017.

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**CORAM : S. C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

DATE : SEPTEMBER 11, 2017.

P.C. :

1. The Revenue has filed these Appeals challenging the order of the Income Tax Appellate Tribunal.
2. We would take the facts from Income Tax Appeal No.1709 of 2014.
3. Though the name of the respondent - assessee is distinct in each of these Appeals, it is agreed that the Revenue is proposing

similar questions in all of them. These Appeals of the Revenue arise out of the order passed by the Tribunal and taking a view that the grounds raised are covered, in majority of the cases, by the earlier order of the Tribunal.

4. A reference is also made to the same in as much as a Special Bench of the Tribunal was constituted so as to deal with similar grounds as were raised in the present Appeals.

5. In fact, the Tribunal has done nothing except reproducing relevant paragraphs of the order of the Special Bench and its earlier view based on that Special Bench order.

6. In Income Tax Appeal No. 1709 of 2014, the assessee is an individual deriving income from other sources. The assessee filed his return of income on 2nd August, 2004 declaring total income at Rs.24,05,800/-. A search and seizure action under Section 132(1) of the Income Tax Act, 1961 (for short, "the IT Act") was conducted on 3rd January, 2008 in the case of Evershine Group and in the case of the assessee warrant of authorization under Section 132 of the IT Act was executed on the same day. The assessment proceedings under Section 153A of the IT Act were initiated. The Assessing Officer made several additions to the total income and passed an order under Section 143(3) read with Section 153A on 31st December, 2009, on a total income of Rs.40,07,379/-. Being aggrieved by this order, the assessee

preferred an Appeal before the Commissioner of Income Tax (Appeals).

7. The Commissioner of Income Tax (Appeals) directed the Assessing Officer to re-compute the disallowances made under Section 14A of the IT Act as per the decision of this Court in the case of M/s. Daga Capital Management Private Limited, which is, according to the First Appellate Authority, on the very point. That order of the First Appellate Authority is dated 25th November, 2010.

8. Being aggrieved and dissatisfied with this order, the Revenue preferred an Appeal before the Tribunal. In fact, annexures "D" and "D-1" to this memorandum are the copies of the Appeal of the Revenue, as also the cross Appeal of the assessee.

9. In delivering a common order dealing with about 12 Appeals, the Tribunal, on 10th April, 2014, held that the additions were made beyond the scope of Section 153A/153C of the IT Act as no incriminating material in support of the additions made under Section 68 and under Section 14A were brought on record by the Revenue. That is how the Tribunal allowed the assessee's Appeal and dismissed that of the Revenue.

10. Mr. Ahuja, appearing in support of this Appeal would submit that the following two questions are the substantial questions of law:

6.1 Whether on the facts and in the circumstance of the case and in law, the Hon'ble ITAT was justified in holding that assessment u/s. 153A can be made only on the basis of incriminating material found in the search and no other issue can be taken following the Special Bench order in the case of "All Cargo Global Logistics Ltd.", when the SB decision of Hon'ble ITAT, Mumbai has been disapproved by Hon'ble Karnataka High Court in the case of Canara Housing Development Co. Vs. DCIT (unreported)?

6.2 Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition made u/s.68 of the IT Act of unexplained gift received, which could not be proved to be genuine by the assessee, by not going into the merits of the case, but by holding that only income related to incriminating documents found during the search u/s. 132 of the IT Act can be considered in assessment u/s. 153A of the IT Act and it is beyond the scope of section 153A of the IT Act, 1961?

11. Mr. Ahuja would submit, *inter alia*, that the two Sections of the Income Tax Act, namely, Section 68 and Section 153A have not been interpreted in their correct perspective.

12. The argument of Mr. Ahuja is that the view taken by the Tribunal based on its Special Bench decision in the case of *All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44, [2012] 23 Taxman.Com 103 (Mum.) (SB)* cannot be said to be correct.

13. During the course of the arguments, Mr. Ahuja has tendered a chart of the questions proposed by the Revenue for the

assessment years 2005-2006 and which he states were proposed based on the lead matter, namely, Income Tax Appeal No. 1178 of 2014 for the assessment year 2002-2003. The other question based on the Special Bench decision is common to Income Tax Appeal No.1709 of 2014 for the assessment year 2004-2005 and the Income Tax Appeal No. 1780 of 2014 for the assessment year 2005-2006.

14. We have already taken this chart on record, but we formally mark it as "X" for identification.

15. Mr. Ahuja's argument is that though the assessee is heavily relying upon a Division Bench judgment of this Court in the case of *Commissioner of Income-Tax v. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. and (2) All Cargo Global Logistics Ltd.* Reported in *[2015] 374 ITR 645 (Bom)*, still, the questions proposed by the Revenue in these Appeals ought to be entertained. These are substantial questions of law and the Division Bench judgment in *Continental Warehousing Corporation and All Cargo Global Logistics* (supra) is rendered in ignorance of a judgment of the Hon'ble Supreme Court reported in *[2007] 291 ITR 500 (SC) (Assistant Commissioner of Income-Tax vs. Rajesh Jhaveri Stock Brokers Private Limited)*.

16. It is also contended by Mr. Ahuja that on 12th July, 2017, Income Tax Appeal No. 1874 of 2014 and Income Tax Appeal No.

58 of 2015 (The Commissioner of Income Tax, Central-IV vs. M/s. SKS Ispat & Power Limited) have been dismissed following the above judgments of this Court, still, it would be improper to dispose of these Appeals on account of the judgments of this Court not taking into consideration the Supreme Court judgment.

17. Our attention is also invited to the work which is by now classic, namely, "The Law and Practice of Income Tax", 10th Edition by Kanga and Palkhivala. Our attention is also invited, on the interpretation of Section 68 of the IT Act, to a judgment of the Calcutta High Court in the case of *Bhola Shankar Cold Storage Pvt. Ltd. vs. Joint Commissioner of Income-Tax* which is reported in [2004] 270 ITR 487 (Calcutta).

18. On the other hand, the argument of the respondent throughout is that the Special Bench decision of the Tribunal has now been upheld by this Court in *Continental Warehousing Corporation and All Cargo Global Logistics* (supra). The question proposed, namely, the first question is not a substantial question of law.

19. As far as the second question as well, the Tribunal has not committed any error because the addition made under Section 68 of the IT Act deserves to be deleted.

20. At the outset, and since heavy reliance is placed by the Revenue on the Supreme Court judgment in ***Rajesh Jhaveri Stock Brokers Private Limited*** (supra), it would be proper to note the facts in the same.

21. There, the Assistant Commissioner of Income Tax challenged the correctness of the decision rendered by a Division Bench of the Gujarat High Court. That Division Bench judgment allowed the Writ Petition/Special Civil Application of the assessee.

22. The respondent - assessee, a private limited company, filed its return of income for the assessment year 2001-2002 on October 30, 2001, declaring total loss of Rs.2,70,85,105/-. That return was proposed under Section 143(1) of the IT Act accepting the loss returned by the respondent. A notice was issued under Section 148 of the IT Act on the ground that the claim of bad debts as expenditure was not acceptable. On 12th May, 2004, a return of income declaring the loss at the same figure as declared in the original return was filed by the respondent - assessee under protest. A copy of the reasons recorded was furnished by the Revenue on the request of the assessee sometime in November, 2004. The assessee raised various objections, both on jurisdiction and the merits of the subject matter recorded in the reasons. The Revenue disposed of these objections on 4th February, 2005 holding that the initiation of reassessment proceedings was valid and it had jurisdiction to undertake such an exercise. The notice

under Section 148 of the IT Act dated 12th May, 2004 was challenged by the respondent - assessee.

23. That Writ Petition was allowed and hence, the Revenue was in Appeal.

24. Mr. Ahuja's argument overlooks this factual aspect and when he relies upon the observations of the Hon'ble Supreme Court, and particularly in paragraph 13, he forgets that they were made in the context of a challenge to the notice under Section 148 of the IT Act. The Supreme Court, in paragraph 13 of this judgment, noted that intimation under Section 143(1)(a) was given without prejudice to the provisions of Section 143(2). Though technically this intimation issued was deemed to be a demand notice issued under Section 156, that did not *per se* preclude the Assessing Officer to proceed under Section 143(2). The right preserved was not taken away. The Hon'ble Supreme Court referred to the period between April 1, 1989 and March 31, 1998, and the second proviso to Sub-section (1) Clause (a) of Section 143 and its substitution with effect from 1st April, 1998. The sending of intimation between 1st April, 1998 and 31st May, 1999 under Section 143(1)(a) was mandatory. That requirement continued until the second proviso was substituted by the Finance Act, 1997, which was operative till 1st June, 1999.

25. The Hon'ble Supreme Court therefore, relied upon these amendments and, tracing their history, held that the intimation

under Section 143(1)(a) cannot be treated to be an order of assessment. That is how it referred to the Division Bench Judgment of the High Court at Delhi and explained the legal position. There was thus no assessment under Section 143(1)(a) and therefore, the question of change of opinion did not arise. A reference to Section 147 therefore, was made in the context of the Assessing Officer being authorized and permitted to assess or re-assess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. Before us, such is not the position, and even if this judgment of the High Court had been brought to the notice of the Division Bench deciding the *Continental Warehousing Corporation and All Cargo Global Logistics* (supra), there would not have been any difference.

26. The argument before the Income Tax Appellate Tribunal in this case was that the order passed by the Commissioner of Income Tax, Mumbai, confirming the assessment order under Section 143(3) read with Section 153A of the IT Act is both, bad in law and on facts. No addition could have been made while completing assessment under Section 153A of the IT Act in the case of completed assessment if no undisclosed income was determinable from the material found as a result of search.

27. As far as the addition under Section 68 on account of unexplained gifts received from the family members of Mr. B. R. Agarwal, the arguments have been noted.

28. The Special Bench order in the case of **All Cargo Global Logistics Ltd.** (supra) has been referred in the impugned order at the internal page 8 (running page 70 of the paper book).

29. The relevant paragraphs of the same have been reproduced.

30. The Tribunal concluded that the arguments relating to the validity of the notice under Section 153A and though that provision could have been invoked in the given facts and circumstances, but the additions made by the Assessing Officer were in the absence of any incriminating material. Therefore, they are not sustainable and they came to be deleted.

31. We do not think that any view other than the one taken by the Division Bench of this Court in the case of **The Commissioner of Income Tax, Central-IV vs. M/s. SKS Ispat & Power Limited** [Income Tax Appeal Nos. 1874 of 2014 and 58 of 2015] dated 12th July, 2017 or the reported judgment in **Continental Warehousing Corporation and All Cargo Global Logistics** (supra) can be taken.

32. Once we are of the firm view that the question no.1 proposed by the Revenue is already answered by this Court in a series of judgments, and particularly referred above, then we do not think that we should allow Mr. Ahuja to argue that these judgments are rendered in ignorance of the binding judgment of the Hon'ble Supreme Court in the case of **Rajesh Jhaveri Stock Brokers Private Limited** (supra). After having noted the context

and the factual backdrop in which the decision in the case of **Rajesh Jhaveri** was delivered and having distinguished it, we do not see how the question can be proposed by the Revenue as a substantial question of law. It is not a substantial question of law as the issue is already answered by this Court.

33. Even with regard to the unexplained gifts received by the assessee allegedly and the additions made under Section 68 of the Act, the Tribunal has relied upon its order in the case of Govind Agarwal (HUF) vs. DCIT (ITA No.8917/M/2010) decided on 16th May, 2013 for the assessment year 2005-2006.

34. There as well, reliance was placed on **All Cargo Global Logistic Ltd.** (supra) and equally, the conclusion that has been reached that once there is no incriminating material in support of the addition and brought on record by the Revenue, then, the earlier view of this Court binds the Revenue even on this addition. Thus, even this question cannot be termed as substantial question of law in the light of the two judgments of this Court in **Continental Warehousing Corporation and All Cargo Global Logistics** (supra) followed by **M/s. SKS Ispat & Power Limited** (supra).

35. As a result of the above discussion and the question being common to all the Appeals, we dismiss all the Appeals of the Revenue. There will be no order as to costs.

36. In dismissing the same, we also take notice of the reliance on the Division Bench judgment of the Calcutta High Court. The Calcutta High Court was considering the case of the assessee introducing share capital and most of the share applicants were from rural areas of Burdwan District in West Bengal. The Assessing Officer proceeded to verify the genuineness of such huge share capital introduced. He issued summons under Section 131 of the IT Act to several shareholders. They appeared and during their examination, the Assessing Officer found the materials based on which he added the total amount of Rs.29,54,000/- under the head "Income from undisclosed sources" under Section 68 of the IT Act. The Commissioner deleted this addition but the Tribunal upheld the order of the Assessing Officer. That is how, the assessee approached the High Court. The concurrent finding of fact is that no one could form an opinion that the subscribers to the share capital had any income exigible to income tax. In other words, such persons from rural background having no taxable income, could not have subscribed to the share capital of the assessee company. It is in these circumstances that the whole deal was found to be not genuine but bogus. We do not see how this judgment has any relevance because the view taken by the Calcutta High Court is essentially on facts.

37. Therefore, we are of the opinion that the Appeals of the Revenue are without any merit. They are dismissed, but in the circumstances, there will be no order as to costs.

38. In view of dismissal of the Appeals, the pending Notices of Motion also stand disposed of.

(PRAKASH D. NAIK, J.)

(S. C. DHARMADHIKARI, J.)

