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

INCOME TAX APPEAL NO. 498 OF 2013

Prakash K. Kankariya ... Appellant
Vs
Joint Commissioner of Income Tax Circle-2(2) ... Respondent

WITH
INCOME TAX APPEAL NO. 551 OF 2013

Prakash K. Kankariya ... Appellant
Vs
Joint Commissioner of Income Tax Circle-2(2) ... Respondent

WITH
INCOME TAX APPEAL NO. 813 OF 2013

Prakash K. Kankariya ... Appellant
Vs
Joint Commissioner of Income Tax Circle-2(2) ... Respondent

WITH
INCOME TAX APPEAL NO. 305 OF 2013

Prakash K. Kankariya ... Appellant
Vs
Joint Commissioner of Income Tax Circle-2(2) ... Respondent

Mr. Mihir Naniwadekar for the Appellants in all appeals.

Mr. Vimal Gupta, senior counsel with Mr. Sham Walve for the Respondents in all appeals.

CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.

MONDAY, 16TH MARCH, 2015

ORAL JUDGMENT : [Per S.C. Dharmadhikari, J.]

1. This appeal by the assessee challenges the concurrent findings and which have been recorded against him right upto the Tribunal, in the order dated 24th September, 2012, of the Income Tax Appellate Tribunal, Pune Bench in Income Tax Appeal No.90/PN/2011, for assessment year 2002-2003.

2. The assessee is an individual. He is an Ophthalmologist. He runs an eye clinic and hospital. Pursuant to a search and seizure action conducted on his premises on 1st September, 2004, the assessee filed his return in response to the notice under section 153A of the Income Tax Act, 1961, showing a total income of Rs.76,53,769/-. In the course of search, an agreement was found under which an amount of Rs.40,00,000/- was paid to one Shri Renavikar. The payment was on 30th June, 2001, which was admittedly not accounted in the regular books of accounts. The cash balance in the assessee's book was to the extent of Rs.10,22,850/-. The assessee took the stand that this amount

was spent making payment of Rs.40,00,000/-. He, therefore, offered the balance amount of Rs.29,77,150/- to tax as unaccounted investment.

3. This is the first part of the grievance raised before us by Shri Naniwadekar. He submits that insofar as this aspect is concerned, the Assessing Officer rejected the assessee's plea of set off and made an addition of Rs.10,22,850/-. Further, he also made an addition on account of estimation of undisclosed income over and above the figure disclosed by the assessee. The Commissioner of Appeals also maintained this order of the Assessing Officer. That is how the assessee approached the Tribunal. The argument of Mr. Naniwadekar and based on a Division Bench judgment of this Court in the case of *Commissioner of Income Tax, Poona vs. Jawanmal Gemaji Gandhi, (1985) 15 ITR 353* is that there was no material whatsoever to justify any addition on account of this payment of Shri Renavikar. The argument is that the assessee had to demonstrate that he had used an available fund to make an investment. That burden of proof was on the assessee. He has discharged the same. Thereafter, the Tribunal

could not have maintained the direction of the Commissioner and that of the Assessing Officer.

4. Upon perusal of the concurrent orders we are unable to agree with Shri Naniwadekar. The assessee's appeal and which is relevant for our purpose is the one which is Income Tax Appeal No.90/PN/2011. There the argument was that the additions made in those years failed to note that there was income available with the assessee for making payment of Rs.40,00,000/- to Shri Chandusheth Renavikar and, accordingly, no addition was required to be made of Rs.40,00,000/- while determining the income of the assessee for this year. In dealing with this argument, the Tribunal noted that the amount paid to Shri Renavikar was not accounted in the regular books of accounts. The assessee took a plea that on the date of payment of the said amount to Shri Renavikar viz. 30th June, 2001, there was a cash balance in the books and to the extent of Rs.10,22,850/-. Hence this amount was utilized for making payment to Shri Renavikar. The assessee declared the balance amount of Rs.29,75,150/- towards unaccounted investment. The Assessing

Officer rejected this stand. The rejection was based on clear and sound reasoning. There was evidence that the assessee indulged in suppression of professional receipts. There was documentary evidence in the form of diaries from 16th August, 2001 to 29th March, 2002. That was for 166 working days which is referred to at page 33 of the assessment order. The assessee voluntarily offered Rs.24,45,520/- towards suppression of professional receipts. These are operational receipts. On the basis of the incriminating evidence the Tribunal found that it is difficult to accept the statement that the assessee had with him the sum and which was required to be paid to Shri Renavikar. The Tribunal noted that the assessee also took the stand that there was one transaction with Shri Doke. That was a sum given to Shri Doke, but that transaction did not materialise. Shri Doke returned the entire sum. In regard to that the sum which was paid initially to Shri Doke has not been referred in the order passed by the Tribunal, particularly at paragraph 33. However, Haridas Doke was also examined by the Assessing Officer who confirmed that he returned the amount to the assessee as the transaction did not materialise. The assessee, therefore, pleaded that Rs.25,00,000/-

returned by Shri Doke and cash available with assessee was utilised for making payment to Shri Renavikar and to that extent the set off of the amount may be given. Thus, the Tribunal found that such a stand and which is raised during the course of assessment proceedings cannot discharge the burden and which is on the assessee. The desired presumption that the assessee has made the investment to the extent from the available cash balance cannot be raised. It is not the case that there is no transaction after 30th June, 2001. The source of this transaction was not proved is the first conclusion. The alternate contention and from the transaction of Shri Doke would denote that there is no evidence except the statement of Shri Doke that the amounts were returned. Presuming that the transaction did not materialise and the amount was returned by Shri Doke, there has to be a supporting evidence to show that Doke returned the amount on or before the date of the transaction with Shri Renavikar. Therefore, both contentions have been rightly rejected in our view in paragraphs 36 and 37 of the order under challenge.

5. As far as Jawanmal's case is concerned, there the assessee was a

dealer in gold and silver ornaments. The excise authorities seized and confiscated certain quantity of gold from him. Before the ITO, the assessee contended that the gold that had been seized came out of the stock of gold on hand with the assessee. This was rejected by the Assessing Officer / ITO. He held that the value of the gold was the income of the assessee from undisclosed sources. For the relevant assessment year, the ITO also made additions to the income of Jawanmal on the ground that the rate of gross profit shown by him was low. In doing so, the ITO estimated the turnover and the rate of gross profit. The Commissioner confirmed the order. Before the Tribunal, the assessee contended that as there had been intangible additions for the same assessment year, there was no reason to make a separate addition for the value of gold. On facts, the Tribunal held that there was no ground for making a separate addition for value of the gold and deleted the same.

6. It is maintaining such order of the Tribunal and with the above conclusion that this Court turned down the argument of the Revenue and their reliance placed on the judgment of the Hon'ble Supreme

Court. The Division Bench referred to the Supreme Court decision at page 355 of the report and then concluded that a number of circumstances of vital significance could point to the conclusion that the cash deficit or the cash credit could not reasonably be related to the amount covered by the intangible addition, but must be regarded as pointing to the receipt of undisclosed income earned during the assessment year under consideration. The observations of this Court must not, therefore, be seen *de hors* the factual position and that was a case of an addition twice over. The source of gold could easily be assumed to have come out of the intangible addition on account of the increased turnover. Therefore, the Tribunal held in favour of the assessee. That was because the assessee acquired the gold during the later half of the assessment year. It could then very well be that undisclosed income earned that very year constituted the fund from which this asset was acquired. This case is thus clearly distinguishable on facts.

7. Before us, the date of transaction was tried to be correlated by the assessee with the surplus balance of cash available in the books of

account. There cannot be direct presumption that the assessee has made the investment to that extent from the available cash balance as he had also another transaction and which has been referred in the alternate contention. In such circumstances, we are unable to agree with Mr. Naniwadekar that the appeal raises substantial question of law.

8. The concurrent findings are consistent with the materials placed on record.

9. With regard to the suppressed professional receipt of Rs.14,30,225/- once again the Tribunal found and in paragraph 40 that for a substantial period the assessee was maintaining parallel record suppressing professional receipts. It is true that there is no specific evidence for the period 1st April, 2001 to 30th June, 2001. However, the assessee himself admitted the *modus operandi* that he was not fully recording the receipts in the books of account. That is how the Assessing Officer's order has been confirmed. In paragraph 40 the Tribunal found that though there is no direct evidence, but the circumstances indicating to the contrary and against the assessee, the

addition to the extent of 10% has alone been sustained.

10. Mr. Naniwadekar would submit that this has been sustained by applying the ratio of the Hon'ble Supreme Court judgment in the case of *Commissioner of Income Tax vs. HM Eusafali HM Abdulala (1973) 90 ITR 271 (SC)*.

11. However, how this reliance is misplaced could be explained by relying on the later judgment of this Court in *Commissioner of Income Tax vs. Dr. M.K.E. Memon 248 ITR 310 (Bom.)*. There also a professional has been dealt with and the Supreme Court's judgment in *Abdulala* (supra) was followed. However, this Court cautioned as to how for a period of one year the estimation could not be made and it could be, therefore, arbitrary. An arbitrary method cannot be adopted and by relying on that judgment. In the present case, we do not find that any such arbitrariness has been demonstrated. The Tribunal found that the additions have been made in the assessment years 2000 – 2001 and 2001 – 2002, the benefit of set off may be given. So far as assessment year 2000-2001 is concerned, the addition is sustained to

the extent of Rs.20,00,000/- which was the payment made by the assessee to Shri Doke. So far the addition on account of suppressed profession receipts of Rs.14,30,225/- the Tribunal relied on the admissions and which can be gathered from the maintenance of a parallel record. The *modus operandi* was admitted. Therefore, the Assessing Officer's order was partially maintained. The addition as made by the Assessing Officer were not confirmed in the absence of direct evidence. In the circumstances, when the Tribunal relied on the decision of the Supreme Court to not uphold the entire addition as made by the Assessing Officer, but sustained it to the extent of 10%, then, we do not think and in such factual background, any substantial question of law arises for determination and consideration. In the matter before this Court in Dr. Memon's case, the arbitrariness was writ large because there was a block assessment of ten years. The Supreme Court judgment must be read in the backdrop of the facts and that is clear. The finding of fact by this Court is that it is improbable that the rate of fees charged by a professional in 1983 would remain static for the entire block period of ten years. It is in these circumstances the proportionate amount of refund could not have been

considered as static for ten years. With the other admitted facts and pertaining to the reduction of migration to Gulf countries on account of Gulf war that this Court found complete arbitrariness in the estimation by the assessee. At the same time, this Court held that it is open for the Assessing Officer to make an estimation and in that process there could be a certain guess work as well. That element cannot be discarded totally.

12. We do not find as to how any reliance on these observations in isolation and abstract would give rise to a substantial question of law enabling us to entertain this appeal. As a result of the above discussion, we are of the opinion that the appeal does not raise any substantial question of law and it is dismissed. No order as to costs.

13. Both sides agree that this order passed by us in Income Tax Appeal No. 498 of 2013 would govern the outcome of Income Tax Appeal No.551 of 2013 as also Income Tax Appeal No.813 of 2013. These appeals are also dismissed. There shall be no order as to costs.

A.K. MENON, J. ***S.C. DHARMADHIKARI , J.***