IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1454 of 2005
With
TAX APPEAL NO. 1846 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE A.J.DESAI -Sd-

and

HONOURABLE MR.JUSTICE A.G.URAIZEE -Sd-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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KRISHNAMEGH YARN INDUSTRIES....Appellant(s)
Versus
ASSTT.COMMISSIONER OF INCOME TAX....Opponent(s)

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Appearance:
MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1
MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE A.J.DESAI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 14/07/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE A.J.DESAI)

1. By way of the present appeal filed under Section 260(A) of the Income-tax Act, 1961, the appellant – assessee has challenged the validity of order dated 28.02.2005 passed by the Income Tax Appellate Tribunal (herein after referred to as 'the ITAT' for short), by which the appeal preferred by the assessee challenging the judgement and order dated 07.07.2004 passed by the Commissioner of Income Tax (Appeals) Ahmedabad (herein after referred to as 'the CIT (Appeals)' for short) is confirmed and the claim made by the assessee with regard to set off of undisclosed stocks against his losses for the assessment year 2001-02 has not been accepted and enhancement made by the CIT (Appeals) vide order dated 07.07.2004 is confirmed.

2. The following two substantial questions of law were framed at the time of admission of the appeal.

[1] Whether, in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that stock of raw material disclosed at the time of survey can be added both u/s 69B as well as 69C of the Act?

[2] Whether, in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in not allowing set off of business loss with income from other sources for the same year?

3. Brief facts arise from the record are as under:

3.1. The appellant – assessee is a partnership firm having business in yarn sizing and its accounts are regularly audited along with relevant material. The assessee was used to submit the same while

filing return under the provisions of the Income-tax Act, 1961 (herein after referred to as 'the act' for short). For the assessment year 2001-02, the assessee filed return under the provision of the act on 29.10.2001 declaring total income of Rs. 3,06,984/- together with audit report as provided under the provision of section 44(AB) of the act. The return of the income of the assessee was selected for scrutiny and accordingly, notices under Sections 143(2) and under Section 142(1) of the act came to be issued to the aseessee. In response to the notices, the authorized income tax practitioner attended the hearing along with accountant of the assessee. The relevant documents including the books of account were produced before the Assessing Officer to scrutinize the case of the assessee.

3.2. During the course of scrutiny of trading account, it was noticed that the assessee had declared gross profit of Rs.49,60,845/- on the total turn over of Rs.9,62,63,584/-. It was worked out at 5.15% of the total turn over. It was also noticed that the value of closing stock was to the tune of Rs.33,21,944/- shown in the trading account, which included excess stock amounting to Rs.10,06,987/-. The said stock was disclosed by the assessee himself during the course of survey operation carried out under Section 133(A) of the act on 30.11.2000. Therefore, it comes to fact that if the excess stock disclosed to the tune of Rs.10,06,987/- is not taken into consideration for gross profit, which comes to Rs.39,53,867/-.

3.3. The return submitted by the assessee for the year 2001-02 was finally scrutinized and the Assessing Officer had passed an order on 28.10.2003, however, did not consider the certain allowance, which the assessee had claimed. As far as the excess stock to the

tune of Rs.10,06,987/- is concerned, the submission made by the assesse was accepted by the Assessing Officer.

3.4. The assessee challenged the order of the Assessing Officer with regard to non-granting of certain set off claimed by the assessee apart from Rs.10,06,987/- with regard to excess stock.

3.5. The CIT (Appeals), by an order dated 07.07.2004, dismissed the appeal. However, enhanced the income by Rs.10,06,987/- treating the same as deemed income under Section 69(B) of the act and also issued notice under Section 271(1)(c) of the act on the ground that the undisclosed stock to the tune of Rs.10,06,987/- is an income and therefore, the petitioner was bound to pay the tax on the said undisclosed stock and was asked to pay penalty.

3.6. The said decision was challenged by the assessee before the ITAT. By judgement and order dated 12.08.2005, the appeal preferred by the assessee came to be partly allowed, however, did not consider the case of the assessee with regard to set off to the tune of Rs.10,06,987/- available under Section 71 of the act as well as his claim with regard to losses incurred during the said assessment year. Hence, the present appeal.

4. Mr.B.S.Soparkar, learned advocate for the assessee would submit that the CIT (Appeals) as well as the ITAT have committed error of law not allowing the set off to the tune of Rs.10,06,987/- against the losses under Section 71 of the act. He would further submit that during scrutiny, the assessee had disclosed the income with regard to the undisclosed stock to the tune of Rs.10,06,987/-. Though, as per the books of account, the value of stock was shown to the tune of Rs. 3,26,498/-. He would further

submit that the CIT (Appeals) has accepted the fact that post survey the stock was fully disclosed in the books of account, however, the CIT (Appeals) has erred in coming to the conclusion that the said investment was totally unexplained and hence, the said unexplained expenditure has been shown in the books of account. He would further submit that the CIT (Appeals) has treated the case that the assessment falling under Section 69(B) of the Act and the CIT (Appeals) has erred in not allowing set off of business expenses out of unexplained investments.

5. He would further submit that the Assessing Officer had rightly given set off against the losses caused by the assessee against the said undisclosed stock relying upon the provisio of Section 71 of the act read with section 69(B) of the act. He would further submit that the observation made by the CIT (Appeals) as well as ITAT are contrary to the facts of law, and therefore, requires to be quashed and set aside.

6. By taking me through the operative part of the order of the CIT (Appeals) and particularly showing total income in para – 17 of the order, he would submit that the CIT (Appeals) has committed error holding the said amount of Rs.10,06,987/- as deemed income under Section 69(B) of the Act. In support of his submission, he relied upon the case of ***Commissioner of Income Tax V. Shilpa Dyeing & Printing Mills (P.) Ltd.*** reported in ***[2013] 219 Taxman 279 (Gujarat)*** delivered by the Division Bench of this Court and would submit that the present case is covered under the said decision and therefore, the appeal be allowed and the orders passed by the CIT (Appeals) as well as ITAT be quashed and set aside.

7. On the other hand, Ms. Mauna Bhatt, learned advocate for the revenue has opposed this appeals. By taking me through the orders passed by the CIT (Appeals) as well as the ITAT and particularly, the reasons assigned by the ITAT with regard to the applicability of the proviso of Section 69(C) of the Act, she would submit that the assessee had not disclosed the amount to the tune of Rs.10,06,987/-, the case would fall under the proviso of Section 69 of the act. By relying upon the case of ***Attar Singh Gurmukh Singh V. Income Tax Officer, Ludhiana*** reported in ***[1991] 191 ITR 667***, learned advocate would submit that the Apex Court has considered the unexplained expenditure not to be given set off under the proviso of Section 71 of the Act. Learned advocate would further submit that for the assessment year 2001-02, the closing stock was to the tune of Rs.10,06,987/-, which might have carried forward by the assessee of the non-assessment year of 2002-03, which the assessee might have taken advantage of the next year. Hence, the appeals be dismissed.

8. We have learned advocates for the respective parties. Perused the orders of the CIT (Appeals) as well as the ITAT. It is an undisputed fact that during scrutiny, the assessee himself has disclosed the fact that in his books of account, he had shown less stock to the tune of Rs.10,06,987/-. It is also an admitted fact that when the physical stock was examined by the authority, the value of the said stock was Rs. 13,33,485/-, however, as per the books of account, the value of stock was to the tune of Rs.3,26,498/- i.e. amount to the tune of Rs.10,06,987/- was not recorded in the books of account. However, it is admitted by the assessee himself that he has not completely disclosed the stock in the books of account. Now, considering the proviso of Section 69(B) of the act, we are of the opinion that the assessee had not fully disclosed the

stocks in the books of account and therefore, the Assessing Officer as well as the CIT (Appeals) have rightly observed that the case of the assessee would fall under the proviso of Section 69(b) of the act.

We are also of the opinion that the submissions made by the learned advocate is that the case would fall under the proviso of Section 69(c) of the act does not apply to the facts of the present case. It is not the case of the revenue that there is an unexplained expenditure, which would cover under the proviso of this Act and therefore, the assessee would not be entitled for the set off under the proviso of Section 71 of the act. As far as applicability of the case of ***Commissioner of Income Tax V. Shilpa Dyeing & Printing Mills (P.) Ltd. (Supra)*** is concerned, the same would be applicable since the Court had held that the amount of excess stock would fall under the definition of income as per Section 14 of the Act and therefore, the assessee would be entitled for the set off under proviso of section 71 of the act. As far as the case of ***Attar Singh Gurmukh Singh V. Income Tax Officer, Ludhiana (Supra)*** is concerned, the same would not be applicable in the present facts and circumstances of the case since it is not the case that there was unexplained expenditure made by the assessee.

9. Therefore, we are of the opinion that the CIT (Appeals) as well as the ITAT have committed error in refusing giving set off to the assessee under Section 71 of the act and accordingly, we allow these appeals by setting aside the order dated 28.02.2005 passed by the Income Tax Appellate Tribunal (the ITAT) and order dated 07.07.2014 passed by the Commissioner of Income Tax (Appeals) Ahmedabad [the CIT (Appeals)].

10. As far as Tax Appeal No. 1846 of 2005 is concerned, since we have allowed the appeal preferred by the assessee and have quashed and set set aside the order dated 28.02.2005 passed by the Income Tax Appellate Tribunal (the ITAT) and order dated 07.07.2014 passed by the Commissioner of Income Tax (Appeals) Ahmedabad [the CIT (Appeals)], there is no question of imposing penalty upon the assessee. Hence, the present appeal is also allowed.

-Sd-
(A.J.DESAI, J.)

-Sd-
(A.G.URAIZEE,J)

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