* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No. 86/2006**

% Judgment reserved on: 22nd January , 2007

Judgment delivered on: 13th Februay, 2007

COMMISSIONER OF INCOME TAX
DELHI (CENTRAL) -II
ARA CENTRE, E-2,
JHANDEWALAN EXTN.
NEW DELHI ..... Appellant

Through: Mr.R.D.Jolly, Adv.

versus

SHRI KULWANT RAI
12, AURANGZEB LANE
NEW DELHI-110001 ..... Respondent

Through:Mr.RajivShakdhar, Sr.Adv.
with Mr.Sandeep Mittal,Adv.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

V.B. GUPTA, J.

Revenue has filed the present appeal under Section 260A of the Income Tax Act (for short to be referred as 'Act) challenging the order dated 14th February, 2005 passed by the Income Tax Appellate Tribunal, Delhi Bench "C" in IT(SS) No.455(Del)/2003 for block period assessment year 1991-92 to 14th February, 2001.

2. The relevant facts of this case are that a search operation under Section 132 of the Act was carried out in the Usha India Ltd. and Assessee is one of the promoters of the said company. During the course of search one agreement to sell marked as AD 46 was seized from the premises of the Assessee which was in respect of land situated at Daultabad Road, Shivana, Gurgaon. In this agreement it has been mentioned that an earnest money of Rs.34,01,784/- will be paid by the transferee to transferor at the time of signing of this agreement and balance consideration of Rs.1,36,07,140/- would be paid within the maximum period of three months, i.e., up to 16th April, 2001. This agreement was duly signed by Mr.Jaswant Rai (Vendor) and Sh.Anil Goel (Vendee). Though the

agreement was supposed to be signed by another transferor also, i.e., the present Assessee, the Assessee had not signed this agreement and it was left blank and at the time of seizure was lying with the Assessee. When the Assessee was asked about this sale, he replied that this agreement was not executed and earnest money has not been received. The Assessing Officer had added 50% of the earnest money amount in the hands of the Assessee on the ground that the money was equally shared by Assessee and his brother.

3. During the course of search, cash was also found from the bed room of the Assessee, though the Assessee claimed that the cash found was out of the withdrawals made by him from the bank from time to time, the last withdrawal of Rs.2 lacs was made from the bank on 4th December, 2000. The Assessing Officer treated this as unexplained cash on the ground that the explanation furnished by the Assessee was not satisfactory as the household expenditure had not been debited from this amount and logically it is not acceptable that the money drawn about two months ago was lying with the Assessee.

4. The Assessee filed an appeal against the order of block assessment and on both these issues, the appeal of the Assessee was dismissed by CIT(A).

5. Against the order of CIT(A), Assessee filed an appeal before the Income Tax Appellate Tribunal which was decided in favour of Assessee vide impugned order.

6. It is argued by the learned counsel for the Revenue that the impugned order of the Tribunal is liable to be set aside as the Tribunal has failed to appreciate that agreement was complete after the same was signed by the vendor and the vendee. Secondly, documents were seized from the premises of the Assessee and it was for the Assessee to satisfactorily explain about the documents but Assessee has not given satisfactory explanation about the receipt of earnest money. Further, the Assessee has not been able to prove the source of the cash found from his bed room nor he could furnish satisfactory explanation about the same. It is also contended that order of Income Tax Appellate Tribunal is perverse as it has relied upon decision of Apex Court in the case of the **Dhakeswari Cotton Mills Ltd v. Commissioner of Income Tax**,

(1954) 26 ITR 775 which is not applicable to the present case.

7. On the other hand, learned counsel for the Assessee has argued that the Assessee had not signed the agreement and thus there was no agreement in the eyes of law and further the entire addition has been made by the Assessing Officer on the basis of suspicion and surmises.

8. The foremost question for consideration is as to whether any substantial question of law arises in this case or not and on this point certain judgments of Apex Court as well as of this Court may be referred to.

9. In case of ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*** AIR 1999 SC 2213 it has been explained as to what can be termed as substantial question of law. It was held:-

> "If the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the federal Court or by the Supreme Court, its mere wrong application to facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the

> parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate Court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate Court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal."

10. In another case reported as ***Panchugopal Barua v. Umesh Chandra Goswami,*** AIR 1997 SC 1041, it has been laid down that existence of substantial question of law is sine qua non for the exercise of jurisdiction. It was held:-

> " A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the Section shows that nothing shall be

> deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. The proviso presupposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C."

11. Similarly in a decision of this Court reported as ***Mahavir Woolen Mills v.C.I.T.(Delhi),*** (2000) 245 ITR 297, meaning of "substantial question of law" has been explained. It was held:-

> " The issue raised by the Assessee in the appeal cannot be said to involve any question of law, much less a substantial question of law. A question of fact becomes a question of law, if the finding is either without any evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But, it is not possible to turn a mere question of fact into a question of law by asking whether as

a matter of law the authority came to a correct conclusion upon a matter of fact.

In Edwards v.Bairstow [1955] 28 ITR 579 (HL), Lord Simonds observed that even a pure finding of fact may be set aside by the court if it appears that the commissioner has acted without any evidence or on a view of the facts which could not be reasonably entertained. Lord Radcliffe stated that no misconception may appear on the face of the case, but it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances the court may intervene.

The words " substantial question of law" has not been defined. But the expression has acquired a definite connotation through a catena of judicial pronouncements. Usually five tests are used to determine whether a substantial question of law is involved. They are as follows:-

1) whether, directly or indirectly, it affects substantial rights of the parties, or
2) the question is of general public importance, or
3) whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court,

or

4) the issue is not free from difficulty, and

5) it calls for a discussion for alternative view."

12. Coming to the facts of the present case with regard to the addition of Rs.17,00,892/- made by the Assessing Officer as undisclosed income income of the Assessee for the block period, we may refer to the findings of the Tribunal on this point and the relevant portion reads as under:-

> " On consideration of the matter we find that the addition has been made by the learned Assessing Officer on the basis of surmises and guess work. He has ignored the fact that the agreement was found in possession of the Assessee. Had the vendee made substantial payment of Rs.34,01,784/- he would have taken care of not leaving the documents behind with vendors only. The learned Assessing Officer has also ignored the fact that the agreement was not complete, inasmuch as the Assessee had not signed the agreement. The reasoning given by the learned Assessing Officer is entirely guess work. It is well settled legal position in respect of income tax assessment proceedings that although strict rules of Evidence Act do not apply to Income-tax proceedings, assessments cannot be made on the basis of imagination and guess work. Reference in this respect

> may be made to the judgment of Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. vs. CIT(1954) 26 ITR 775 (SC) and a host of Supreme Court and High Court's judgments thereafter on the subject. We, therefore, direct deletion of the sum of Rs.17,00,892/- assessed by the Assessing Officer by way of half share of the Assessee in the alleged earnest money."

13. It is an admitted fact that the present Assessee had not signed the agreement in question and since the Assessee had not signed the agreement, no liability can be attributed qua that agreement towards the Assessee since he is not party to the agreement till he had signed the same. The mere fact that this agreement was found in the possession of the Assessee does not lead us anywhere. We find no hesitation in holding that this addition of Rs.17,00,892/- made by Assessing Officer is based on surmises and guess work and on this point case of ***Dhakeswari Cotton Mills Ltd v. Commissioner of Income Tax***, (1954) 26 ITR 775, may be referred to, in which held:-

> " In making an assessment under Section 23(3) of the Indian Income tax Act, the Income-tax Officer is not fettered by technical rules of evidence

> and pleadings, and he is entitled to act on material which may not be accepted as evidence in a court of law, but the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of *Seth Gurmukh Singh v.Commissioner of Income-Tax, Punjab* [(1944) 12 I.T.R. 393]"

14. The next ground taken up by the learned counsel for the Revenue is with regard to the addition of Rs.2.5 lacs on account of cash amounting to Rs.3,76,800/- found in the bed room of the Assessee at the time of search.

15. The Assessee has not disputed this recovery. However, the case of Assessee is that this represented cash remaining from the withdrawal from his bank account from time to time and a sum of Rs.2 lacs was received on 4th December, 2000 by cheque No.345947 and the Assessee has furnished cash flow statement to this effect also.

16. This cash flow statement furnished by the Assessee was rejected by the Assessing Officer which is on the basis

of suspicion that the Assessee must have spent the amount for some other purposes. The orders of Assessing Officer as well as Commissioner of Income Tax are completely silent as to for what purpose the earlier withdrawals would have been spent. As per the cash book maintained by the Assessee, a sum of Rs.10,000/- was being spent for household expenses every month and the Assessee has withdrawn from bank a sum of Rs. 2 lacs on 4th December, 2000 and there was no material with the Department that this money was not available with the Assessee. It has been held by the Tribunal that in the instant case the withdrawals shown by the Assessee are far in excess of the cash found during the course of search proceedings. No material has been relied upon by the Assessing Officer or Commissioner Income Tax(A) to support their view that the entire cash withdrawals must have been spent by the Assessee and accordingly, the Tribunal rightly held that the assessment of Rs.2.5 lacs is legally not sustainable under Section 158BC of the Act and the same was rightly ordered to be deleted.

17. The above being the position, no fault can be found

with the view taken by the Tribunal. Thus, the order of Tribunal does not give rise to a question of law, much less a substantial question of law, to fall within the limited purview of Section 260-A of the Act, which is confined to entertaining only such appeal against the order which involves a substantial question of law.

18. Accordingly, the present appeal is, hereby, dismissed.

(V. B. GUPTA)
JUDGE

February 13, 2007
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(MADAN B. LOKUR)
JUDGE