* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.557 of 2010**
ITA No.487 of 2011
ITA No.488 of 2011

Reserved on: March 07, 2011.
% *Pronounced On: May 11, 2011.*

1) ITA No.557 of 2010

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Avocate.

VERSUS

ASHOK LOGANI . . .RESPONDENT

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

Reserved On: April 07, 2011
Pronounced On: May 11, 2011

2) ITA No.487 of 2010

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Mr. Kamal Sawhney, Sr. Standing Counsel.

VERSUS

ASHOK LOGANI . . .RESPONDENT

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

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3) ITA No.488 of 2010

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Mr. Kamal Sawhney, Sr. Standing Counsel.

VERSUS

ASHOK LOGANI . . .RESPONDENT

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see ITA No.553 of 2010

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MAY 11, 2011
pmc

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4) **ITA No.488 of 2010**

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through : Mr. Kamal Sawhney, Sr. Standing Counsel.

VERSUS

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through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
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1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

Yes

A.K. SIKRI, J.

ITA No.553 of 2010 & ITA No.557 of 2010

1. These appeals are admitted on the following substantial question of law:

> "Whether the ITAT was correct in law in setting aside the order passed by the CIT under Section 263 of the Income Tax Act?"

2. We heard the arguments in detail at the time of admission itself.

3. These two appeals pertain to the Assessment Years 2003-04 and 2004-05. They are filed against the common orders dated 21.01.2009 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') in respect of both the assessment years. In these appeals before the Tribunal, the assessee had challenged the orders of Commissioner of Income Tax (CIT) passed under Section 263 of the Income Tax Act ('the Act' for brevity). Since both the orders under Section 263 of the Act were passed for these two assessment years under identical circumstances, the facts narrated hereinafter would cover both these assessment years.

4. A search under Section 132 of the Act was carried out in JMD Group on 16.12.2003. Since the assessee was a close associate of Mr. Sunit Bedi, MD of JMD Group, search was also carried out at the residence of assessee. However, his two concerns, viz., M/s In-Style Exports (Proprietary concern) and

M/s In-Style Exports Pvt. Ltd. (company in which he was a Director) were not covered under search/survey. During the search, a sum of ₹62,30,300/- was found from the residence of the assessee. In the statement recorded during search, the assessee offered a sum of ₹61.30 lacs for taxation as his undisclosed income for assessment year 2003-04.

5. Subsequently, the assessee filed his return for the assessment year 2003-04 declaring income of ₹1,57,24,780/-. The assessment was framed by the Assessing Officer (AO) under Section 153(3)/143(3) of the Act at an income of ₹1,58,10,044/-.

6. After calling the records, the CIT noticed that though the assessee had offered a sum of ₹61.30 lacs for taxation during search for assessment year 2003-04, but the same was not offered in the return of income and the AO had not examined this aspect during the assessment proceedings. Accordingly, he passed the orders dated 31.03.2008 under Section 263 of the Act whereby he set aside the order passed by the AO with direction to him to examine the same in the light of statement recorded at the time of search and surrounding circumstances. Likewise, he found that in the assessment year 2004-05, the assessee had offered a sum of ₹21 lacs only against the surrendered amount of ₹61.30 lacs at the time of search. On

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this basis, another order on the same date, i.e., 31.03.2008 was passed under Section 263 of the Act setting aside the assessment order in respect of Assessment Year 2004-05 also to the aforesaid limited extent and directing the AO to examine the same. The operative portion of the orders dated 31.03.2008, which is common in both the assessment years, reads as under:

> "10. Since the Assessing Officer has failed to examine the cash found at the residence of the assessee in light of the facts stated above, he made an assessment order which was erroneous to the extent that he did not bring unexplained cash to the tax on the basis of the admission of the assessee at the time of search. The assessment order so farmed by the assessee was erroneous and prejudicial to the interest of revenue. Further, although the cash of ` 6.30 lacs was offered as unexplained income for A.Y. 2003-04, in the return of income filed subsequently cash of ` 21 lacs was offered as undisclosed income for A.Y. 2004-05. Here also, the Assessing Officer was at fault as the cash was not taxed in accordance with the statement given by the assessee.
>
> 11. Since the assessment orders of both the Assessment Years 2003-04 and 2004-05 are erroneous and prejudicial to the interest of revenue these are set aside on the limited issue of cash found during the search proceedings. The Assessing Officer is directed to examine the issue of cash found at the residential premises of the assessee in light of the statement recorded at the time of search and surrounding circumstances. It is clarified that assessment orders for both Assessment Years are set aside since the assessee has offered part of the said cash in A.Y. 2004-05."

7. The assessee filed appeals before the Tribunal challenging the aforesaid order in respect of these two assessment years. The Tribunal has set aside the aforesaid order of the CIT.

According to the Tribunal, the AO had examined the issue and had even considered the statement of the assessee recorded on 27.05.2005. The assessee had furnished the cash book of both of his concerns and had explained the cash found at the time of search/survey except a sum of ₹21 lacs. The cash in hand which was available as per books of accounts, in the two concerns of the assessee was ₹36,95,720/- and after excluding this cash, the remaining was only ₹25,34,580/-. The assessee had offered of ₹21 lacs for the taxation in the year 2004-05 and thus, only a sum of ₹4,34,580/- remained to be explained. It was explained by the assessee as cash as per his own books. According to the Tribunal, after examining the claim of the assessee verifying the same from the books of accounts, the AO had accepted the claim of the assessee, though there was no mention of the same in the assessment orders. On this basis, while setting aside the order of the CIT, the Tribunal observed that order of the CIT was merely on surmises and conjectures. Two views were possible – one, viz., the subsequent explanation of the assessee was an afterthought and the other, viz., such an explanation was reasonable because it was corroborated and evidenced by the books of account duly audited. In a case like this, when the AO had held the inquiry, it could not be said that his order was erroneous

and called for any interference. Moreso, when the assessee had retracted the statement as well.

8. The first and foremost aspect which would arise for consideration is as to whether the AO had examined the issue and surrender of ₹61.30 lacs at the time of search in his statement recorded during the search out of an amount of ₹62.30 lacs found at his residence.

9. Admittedly, there is no discussion about the same in the orders of the AO which in fact is even taken note of by the Tribunal as well. However, according to the Tribunal, as per the order-sheet in respect of hearings held by the AO, on 24.08.2005, the AO had asked the assessee to explain the cash found during the course of search. Notings also reveal that the statement of the assessee was recorded on oath on 27.05.2005 on which date, he had explained that there was cash in hand in the books of M/s In-Style Export, of ₹18,17,202/- and in the books of In-Style Export Pvt. Ltd. of ₹18,78,518/-. The total of these two comes to ₹36,95,720/-. Out of total cash found in the course of search of ₹62,30,300/-, if cash of these two concerns are excluded, the remaining cash is only ₹25,34,580/- out of which, the assessee had included ₹21 lacs on this account in the return of income filed by him for the assessment year 2004-05 and hence, the remaining amount is only ₹4,34,580/- was explained by the assessee as cash as per his own books. On

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this basis, the Tribunal concluded that the AO had examined the claim and accepted the claim of the assessee after verifying the books of accounts.

10. No doubt, the order-sheet shows that the AO had asked the assessee to explain cash found. However, whether the AO had, in fact, gone into the issue and accepted the claim of the assessee or not is not discernible from the assessment order. No doubt, the AO is not supposed to write the orders in detail in the same manner as a Judicial Officer is supposed to write the judgments. At the same time, it cannot be ignored that huge cash of ₹62,30,300/- was found at the time of search and on that date, the assessee had surrendered a sum of ₹61.30 lacs and offered the same for tax. However in his income tax return, the assessee had offered a sum of ₹21 lacs only against the surrendered amount of ₹61.30 lacs at the time of search. In such a scenario, there should have been at least a brief discussion recording a satisfaction on the explanation offered by the assessee. We are constrained to make this observation because of two very important features, which we note in this case. These are:

First, keeping cash of ₹62.30 lacs, part of which belongs to his sole proprietorship firm, but another part to a

private limited company of which he is the Director, at residence, may raise certain doubts. Though in his letter dated 07.01.2004, he had stated that he had kept the cash at his residence in safe custody, however, this aspect needed to be properly examined.

Secondly, before the Tribunal, the assessee had given an explanation that cash in hands in the books of accounts of M/s In-Style Export was ₹18,17,202/- and in the books of In-Style Export Pvt. Ltd. was ₹18,78,518/-. Balance amount of ₹4,34,580/-, excluding ₹21 lacs surrendered, was explained by the assessee 'as cash as per his own books'. Curiously, the explanation furnished before the AO, as recorded by the CIT in reply to show cause notice, was altogether different. In his reply dated 18.05.2005, the assessee had explained as under:

"(i)	M/s. In-Style Exports	₹17,00,000/-
(ii)	M/s. In-Style Exports Pvt. Ltd.	₹18,00,000/-
(iii)	Shri Ashok Logani (Pers. Account)	₹ 4,00,000/
(iv)	Smt. Mala Logani (Pers. Account)	₹ 2,30,000-
		₹41,30,000/-

The balance cash of ₹21 lacs was declared as income for the year ending 31.03.2004 relevant to A.Y. 2004-05. The assessee had also furnished the copies of balance sheet, cash book, bank statements, wealth tax return etc. to substantiate the cash balance of these entities. Regarding the statement recorded at the time of search it was submitted that the books of accounts of the proprietorship concern and the company were not readily available with the assessee and therefore, the precise source of cash found during search could not be explained."

This may give an impression that it may be an afterthought on the part of the assessee to explain the cash.

11. Under these circumstances, the AO was required to go into this issue in proper perspective and could not be perfunctory in his approach. The AO in the assessment order did not discuss the statement recorded at the time of search. No doubt, as per the assessee, this statement was retracted. In a case like this, it was necessary for the AO to at least reflect that the retraction was proper. Another factor which we have highlighted is that the entire cash belonging to two firms was found at the residence.

12. In the aforesaid circumstances, the CIT held the view that the matter was not examined by the AO. We are of the opinion that it was a reasonably fit case for exercising revisionary jurisdiction under Section 263 of the Act. After all, CIT gave another chance to the assessee to explain the source of cash.

13. Once we are convinced that there was no proper consideration of the issue by the AO, the very foundation of the order of the Tribunal is knocked off. Thereafter, the Tribunal has ventured to undertake the exercise by itself satisfying about the explanation tendered by the assessee which it could not do. When the CIT passed the orders under Section 263 of the Act, at this stage he was only required to find out as to whether the

income has escaped assessment and the order is prejudicial to the interest of Revenue. We would like to reproduce the following aspects highlighted by the CIT in the orders:

> "5. From the contents of the above statement the following inferences could be made:
>
> 5.1 In contradiction of his earlier statement recorded during the search on 16.12.2003 wherein Sh. Ashok Logani could not explain the source of cash found at his residence and surrendered ₹61,30,300/- for taxation. He had subsequently tried to explain the cash as belonging to his two business concerns. He could not adduce any evidence to show that the cash found at his residence belonged to his business concerns. Thus, the letter filed by his subsequently, explaining the cash found at his residence is just an afterthought.
>
> 5.2 It may again be mentioned that none of the business premises was covered at the time of search. Hence, no actual verification of the cash lying at these premises has been carried out.
>
> 5.3 The statement recorded during the course of search had been given voluntarily by Shri. Ashok Logani as is evident from the flow of the statement. It was given in the presence of two witnesses who were respectable citizens from the same locality i.e. New Friends Colony. The assessee had not obtained any statement or affidavit from them in support of the plea that the statement was obtained under coercion or by intimidation. The assessee has totally failed to discharge the burden of proving that fact. No case has been made out that the statement was made under a mistaken belief of fact or law that too, when the statement and admission of undisclosed income is voluntary.
>
> 5.4 During the course of search at the residence of Sh. Ashok Logaini, jewellery amounting to ₹32,21,572/- was found out of which jewellery amounting to ₹9,30,767/- was seized. However, no jewellery was surrendered by the assessee which further goes to show that the statement was recorded voluntarily without any coercion or threat.
>
> 5.5 In spite of retracting his statement given at the time of search, the assessee could not offer any plausible explanation for cash to the extent of ₹21 lacs and offered the same himself for taxation in A.Y. 2004-05 which

indicated that in spite of being in export business, the assessee was in habit of keeping substantial amount of unaccounted cash at his residence. It is also evident from the fact that during A.Y. 1998-99, the assessee had surrendered an amount of ₹66 lacs during the course of survey and offered the same in his return of income."

14. Since these contentions were satisfied and the matter was relegated to the AO to conduct an inquiry, the Tribunal should have limited its discussion focusing on the proprietary of order by the CIT invoking his power under Section 263 of the Act and keeping in view the scope of that provision.

15. In this backdrop, we would like to refer to the judgment of Kerala High Court in the case of ***V. Kunhikannan Vs. Commissioner of Income Tax* 219 ITR 235**. In the said case, the High Court held that:

> "It is true that the Explanation was inserted and came into effect from April 1, 1989, that is, after the search was made in this case. But, the Explanation thereunder seeks to clarify the necessary import of the main provision contained in Sub-section (4) of Section 132 of the Act. It does not change the substantive provision of the Act; nor does it lay down a different method of using the statement recorded under Sub-section (4) of Section 132 of the Act. It permits interrogation of persons not only in relation to the books of account, etc., found as a result of the search but also on any other matter relevant for any proceeding under this Act. In this view of the matter, we hold that the authorised officer had the power to record statements on oath on all matters pertaining to the suppressed income. The statement cannot be confined only to the books of account. If a partner of the firm came forward to disclose about non-entry of the excess stock in the registers during the course of the search, there is no reason why the Income-tax Officer shall not make use of it even though there is no actual verification of the stock. The Tribunal has clearly found that the statement was made voluntarily.

It observed that the best and independent evidence in the matter would have been that of the two witnesses to the search, who are traders in the same locality. The assessee had not obtained any statement or affidavit from them in support of the plea that the statement was obtained by coercion or intimidation. So, the assessee has totally failed to discharge the burden of proving that fact. In this case, the assessment has been made based on the statement of the assessee. Since no case has been made out that the statement was made under a mistaken belief of fact or law, and as has been held above, the statement being a voluntary one, there is no scope for the assessee to challenge the correctness of the assessment as has been done in this case. A further contention raised by the assessee was that, having rejected a portion of his statement regarding unaccounted investment in a cinema theatre, there is no justification to rely on another portion of the very same statement for the purpose of sustaining addition of unaccounted stock. The addition on account of unexplained investment in the cinema theatre was rejected not on the ground that the statement was taken from the assessee on threat or coercion but on the ground that the cinema theatre was owned only by three of the four partners of the firm and that a presumption that unexplained investment, if any, was made by the assessee-firm could not be made. "

16. We have to keep in mind that against the orders passed by the AO, the Revenue is not given right to file an appeal, as there is no such provision. Limited jurisdiction is given to the CIT to revise such orders, if he finds that the same is prejudicial to the interest of Revenue. On the facts of this case, when it is found that there was no proper consideration by the AO to the issue at hand, he left many loose ends, that too in a case where huge cash was found during survey; most of it was surrendered by giving statement at the time of search, though retracted and sought to be explained afterwards. It was necessary for the AO

to properly adjudicate upon this issue and the assessment order should have at least reflected that he had satisfied with the explanation disclosing source of the cash found and that there was a proper and valid retraction. We may also reproduce the following observations of the Gujarat High Court in the case of ***Commissioner of Income Tax Vs. Minalben S. Parikh* (1995) 215 ITR 81 (Guj)**:

> "The words "prejudicial to the interest of the Revenue" has not been defined. However, giving the ordinary meaning to the words used in the statute, they must mean that the orders under consideration are such as are not in accordance with law and in consequence whereof, the lawful revenue due to the State has not been realized or cannot be realized. The well settled principle in considering the question as to whether an order is prejudicial to the interests of the Revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realized or not or can be realized or not if the orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realized has been subjected to tax or not if it is subjected to tax, whether it has been subjected to tax at the rate at which it could yield the maximum revenue in accordance with law or not. If the income in question has been taxed and legitimate revenue due in respect of that income had been realized, though as a result of an erroneous order having been made in that respect, the Commissioner cannot exercise the powers for revising the order u/s. 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his power by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising the powers u/s. 263 is under an obligation to consider the entire material about existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realized under the assessment order."

17. We, thus, answer the question, as formulated above, in favour of the Revenue and against the assessee. As a consequence, the Tribunal's order is set aside and the order of the CIT passed under Section 263 of the Act is restored.

18. These appeals are disposed of in the aforesaid terms.

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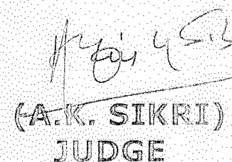
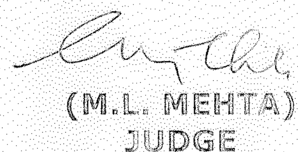
19. These two appeals are sequelled to the aforesaid two appeals. In fact, after the CIT had passed orders under Section 263 of the Act, the AO passed afresh assessment order dated 26.12.2008 under Section 153A read with Section 144 and 263 of the Act. Since the original order under Section 263 of the Act itself was set aside by the Tribunal and the order passed by the CIT (A) has been allowed, the matter is relegated to the CIT (A) to decide the appeals filed by the assessee against the assessment order dated 26.12.2008 on merits.

20. These appeals are accordingly disposed of.



(A.K. SIKRI)
JUDGE



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