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

+ **INCOME TAX APPEAL NO. 563/2013**

Date of decision: 22nd November, 2013

COMMISSIONER OF INCOME TAX

..... Appellant

Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

Versus

VIRENDARA KUMAR GUPTA

..... Respondent

Through Nemo.

INCOME TAX APPEAL NO. 564/2013

COMMISSIONER OF INCOME TAX

..... Appellant

Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

Versus

SHARAD JAIN

..... Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

We feel that the order of the tribunal is just and fair. Rs.20 cores



was surrendered as undisclosed income at the time of search and it was agreed that the tax liability should be paid as set out in the statement recorded under Section 132(4) of the Income Tax Act, 1961 (Act, for short) of Virendara Kumar Gupta. The said statement has been reproduced in the impugned order passed by the tribunal. Subsequently, affidavit of Sarad Jain was filed on 15th May, 2009 wherein the undisclosed income of Rs.20 crores was duly maintained and accepted. The disclosure was bifurcated into Rs.7.50 crores, as on account of discrepancies in inventory prepared at the business premises of M/s Gupta and Company Private Limited. Rs.12.50 crores was disclosed as income earned through joint enterprise of Virendara Kumar Gupta, Sarad Jain and Sudhir Jain, described as ‘Sugandh Sansar’ in terms of agreement dated 9th January, 1998.

2. The ‘Sugandh Sansar’ as an Association of Persons (AOP) filed return of income for the Assessment Year 2009-10 on 30th October, 2009 declaring income of Rs.11 crores under the head “income from business and profession” after claiming operational expenses of Rs.1.5 crores from the surrendered amount of Rs.12.5 crores. The Assessing Officer, however, came to the conclusion that this amount should not be taxed in the hands of three member AOP, but individually in the hands of Virendara Kumar Gupta, Sarad Jain and Sudhir Jain. Thereafter, ‘Sugandh Sansar’ AOP filed a revision petition under



Section 264 of the Act and the Commissioner of Income Tax, Dell

VII passed an order dated 18th June, 2012. The relevant portion of the order reads as under:-

“6. I have given a careful consideration to the case law cited by the assessee and am of the view that the relief may be allowed to the assessee. This reminds me the judgement of Supreme Court in the case of **ITO vs Ch. Atchiaiah (218 ITR 239)** wherein it is held that the income has to be assessed in the hands of "right person" alone. By "right person" is meant the person who is liable to be taxed, according to law, with respect to a particular income. There are no words in the Income Tax Act, which empower the Income Tax Officer or give him an option to tax either the AOP or its members individually. If it is the income of the AOP in law, the association of persons alone has to be taxed; The members of the AOP cannot be taxed individually in respect of the income of the AOP. Consideration of the interest of the revenue has no place in this scheme. In the present case, department has taken a view that the surrendered income of Rs.12.5 crore belongs to the members individually and not to the AOP hence, no different view can be taken in the case of AOP by taxing the same amount again on the ground that the assessee himself had originally filed the return offering the surrendered amount in the hands of AOP. Hence the 2nd revised return filed by the assessee on 08.01.2011 requires consideration. The revisional powers of the Commissioner u/s 264 of the Income Tax Act 1961, has all the trappings of a judicial power. Jurisdictional High Court in the case of **Aparna Ashram vs Director of Income Tax (258 ITR 401)**, after relying upon the judgement of Supreme Court in the case of **Dwarka Nath vs ITO (57 ITR 349)** have held that the jurisdiction conferred u/s 264 is a judicial one. The nature of the jurisdiction and the rights decided carry with them necessarily the duty to Act judicially in



disposing of the revision. The revisional power has to be exercised on an objective consideration of the facts and circumstances of the case. The power is coupled with a duty to be exercised in the interest of doing real justice between the parties, particularly when under the Act the order passed u/s 263 is final. The assessee's claim has substantial merit. Assessment at Rs.22 crore made in the intimation u/s 143(1) requires to be set aside and the income has to be determined at "Nil".

7. It was specifically asked to the assessee as to what happened to the cash of Rs.1,46,46,900/- seized during search which was requested to be treated as advance tax and also to the sum of Rs.1,05,00,000/- (Rs.35 lac x 3) paid by all the 03 members of AOP equally as self assessment tax as the relief has been claimed only with respect to a sum of Rs.1,58,68,840/- paid by the AOP as self assessment tax. It has been explained by the assessee that the cash seized during search is already considered in the hands of persons from whom the same was seized. Similarly, amount of Rs.35 lac paid by each member as self assessment tax (total Rs.1,05,00,000/-) has been considered in the hands of each member and therefore, relief is claimed only with respect to a sum of Rs.1,58,68,840/-. I am of the view that when the sum of Rs.1,46,46,900/- and Rs.1,05,00,000/- has been considered in the hands of members then the relief may also be granted to the assessee with respect to self assessment tax of Rs.1,58,68,840/- and the same be considered in the hands of all the 03 members of AOP equally as self assessment tax paid by them with respect to the surrendered amount of Rs.12.5 crore.

8. In view of the fact that the appeals in the individual cases of the members of the AOP namely Shri V.K. Gupta, Shri Sudhir Jain and Shri Sharad Jain are still pending before CIT(A), the assessee was asked to clarify its position with regard to these appeals. The assessee has filed an undertaking from



all the three members of the AOP pointing out that the appeal have been filed against the additions made of the same amount which had been offered to tax by the assessee AOP M/s Sugandh Sansar. Further it has been stated that in case the relief is allowed to the AOP M/s Sugandh Sansar, all the three members of the AOP undertake to withdraw their appeals from the CIT(A). In view of his undertaking, it is further held that the relief granted in the preceding para will be effective only after the appeals have been withdrawn in the case of members of the AOP and the same have become final.”

3. Revenue has not challenged and questioned the said order.
4. In terms of the said order, Rs.12.5 crores was equally bifurcated in the hands of Virendara Kumar Gupta, Sarad Jain and Sudhir Jain. Taxes on Rs.12.5 crores have been duly paid.
5. The question raised in the present appeals is whether the two assesseees are liable to pay penalty @ 10% under Section 271AAA.
6. Learned counsel for the appellant-Revenue submits that initially the amount of Rs.12.5 crores was declared and disclosed by the AOP but subsequently the AOP had filed a revised return declaring ‘nil’ income. Therefore, the conditions for exoneration from penalty under Section 271AAA were not satisfied. It is stated that the individual-assesseees in their return of income had not declared proportionate amount of Rs.12.5 cores nor had they substantiated their statements as to the manner in which the income was derived.



7. We have considered the said contention, but do not find a merit in the same. The AOP consisted of Virendara Kumar Gupta, Sarad Jain and Sudhir Jain. Initially, the AOP had declared the entire undisclosed income. AOPs are taxed at maximum marginal rate, whereas individuals are taxed on cascading scale. The Assessing Officer had himself given tax credit to individual members of the tax paid by AOP. AOP consisted of three persons, including the present respondent-assessee. The tribunal has taken the realistic and pragmatic view and accordingly deleted the penalty under Section 271AAA of the Act noticing the factual matrix. 'Sugandh Sansar' had filed 'nil' return of income only after the Assessing Officer had decided that Rs.12.5 crores should be equally divided and taxed in the hands of Virendara Kumar Gupta, Sarad Jain and Sudhir Jain. The three respondent-assesseees had filed appeal before the Commissioner (Appeals) questioning the said order/position. Meanwhile, the AOP filed an application under Section 264, which was accepted by the Commissioner of Income Tax, Delhi-VII and in terms of the said order, the individual assesseees withdrew the appeals. Taxes and applicable interest were paid on the undisclosed income. Details of nature of undisclosed income and manner of earning was recorded in the statement of Virendara Kumar Gupta. It was stated that the income was derived from trading transactions not recorded in the books.



8. In light of the facts of the present case, we are not inclined interfere and entertain the present appeals. The same are accordingly dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

**NOVEMBER 22, 2013
VKR**