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

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*Decision delivered on: 13.12.2023*

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**ITA 612/2017**

SHYAM SUNDER JINDAL

..... Appellant

Through:

Mr Rohit Jain, Mr Aniket D. Agrawal  
and Mr Abhisek Singhvi, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX.... Respondent

Through:

Mr Kunal Sharma, Sr Standing  
Counsel.**CORAM:****HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE GIRISH KATHPALIA****ORDER**

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**13.12.2023****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

1. On 13.11.2017, a coordinate bench had admitted the above-captioned appeal, i.e., ITA No.612/2017 along with connected appeals.

1.1 The connected appeals, listed before the coordinate bench on the said date, were ITA Nos. 958/2017, 959/2017, and 960/2017.

2. Accordingly, the following question of law was framed for consideration in the above-captioned appeal, i.e., ITA No.612/2017 as well as ITA No. 959/2017:

“(i) Did the ITAT fell into error in setting aside the sums brought to tax by the AO under Section 153 A in the circumstances of the case?”

3. Insofar as the remaining appeals are concerned, i.e., ITA Nos. 958/2017 and 960/2017, which have been referred to hereinabove, the



following question of law was framed by the court:

“(i) Was the Tribunal correct in holding that penalty could not have been levied under Section 271(l)(b) of the Income Tax Act in the circumstances of the case?”

4. Although the order dated 13.11.2017 shows that the question of law, which is extracted in paragraph 2 above, arises in ITA No. 958/2017 as well, we are told that this was a mistake. In support of this submission, our attention is drawn to the order dated 01.08.2019. We may note that apart from ITA No. 612/2017, the other appeals, i.e., ITA Nos. 958/2017, 959/2017, and 960/2017 are not listed before the Court today.

5. As far as this bench was concerned, the matter was briefly heard on 25.05.2023, when the central issue raised in the appeal was captured. It was brought to the fore that during search, no incriminating material was found *qua* the appellant/assessee.

5.1 It is in this context that reliance was sought to be placed on the judgment rendered by the coordinate bench in *CIT v. Kabul Chawla*, (2015) 61 taxmann.com 412 (Delhi) and the judgment rendered by the Supreme Court in *PCIT v. Abhisar Buildwell P. Ltd.*, (2023) 149 taxmann.com 399 (SC).

6. Given the position taken on behalf of the appellant/assessee, which was that no incriminating material was found during the search, we had requested Mr Kunal Sharma, learned senior standing counsel, who appears on behalf of the respondent/revenue, to return with instructions concerning this issue i.e., whether or not any incriminating material was found vis-à-vis the appellant/assessee during the search carried out on 14.11.2011.

7. Thereafter, a substantive hearing in the matter took place on



18.08.2023. Mr Sharma, on that date, had indicated to the court that he had received instructions to the effect that incriminating material was, indeed, found during the search carried out on 14.11.2011, resulting in the impugned addition being made to the income of the appellant/assessee.

7.1 Since Mr Rohit Jain, who appears on behalf of the appellant/assessee, refuted the submission made by Mr Sharma, a direction was issued that the concerned officer would file an affidavit concerning the instructions received by Mr Sharma. We had also indicated on that date that if any incriminating material was found, as contended, during the search, it should also be placed on record.

7.2 Although three (3) weeks were given for this purpose, Mr Sharma was not able to file the affidavit, as directed by the court on 18.08.2023.

8. It is in this context that, when the matter was called out for hearing on 23.11.2023, we set forth the broad facts obtaining in the matter. For convenience, the relevant parts of the order dated 23.11.2023 are extracted hereafter:

- “1. This appeal concerns Assessment Year (AY) 2006-07.
2. The appellant/assessee is aggrieved by the addition made by the Assessing Officer (AO), via assessment order dated 27.02.2015, amounting to Rs. 69,07,414/-. This addition has been made based on the AO’s view that the appellant/assessee has undisclosed deposits with a foreign bank i.e., HSBC Bank, Geneva.
3. We had heard the matter briefly on 25.05.2023, when the following was recorded:

- “1. This appeal concerns Assessment Year (AY) 2006-07.
2. Mr Ajay Vohra, learned senior counsel, who appears on behalf of the appellant/assessee, says that no incriminating material was found in the AY in issue, in the search conducted on 14.11.2011.
3. The information based on which order under Section 153A of the Income Tax Act, 1961 [in short, “Act”] was passed was already available with the respondent/revenue. The information which was available with the respondent/revenue was a purported bank statement, received from HSBC Bank,



Geneva.

4. Mr Vohra says that this information was supplied to the appellant/assessee by the respondent/revenue on 21.11.2014. Therefore, the brief contention of Mr Vohra is that the impugned order dated 10.04.2017, passed by the Income Tax Appellate Tribunal [in short, "Tribunal"], deserves to be reversed, in view of the ratio of the judgment of this court in **CIT v. Kabul Chawla**, 380 ITR 573 Delhi.

4.1 To be noted, this judgment has been approved by the Supreme Court in **PCIT v. Abhisar Buildwell P. Ltd.** 2023 (143) taxman.com 399 (SC).

5. Mr Kunal Sharma, learned senior standing counsel, who appears on behalf of the respondent/revenue, says that he will return with instructions, specifically with regard to the aspect as to whether or not incriminating material was found qua the appellant/assessee, during the search carried out on 14.11.2011.

6. At the request of Mr Sharma, list the matter on 01.06.2023."

4. As would be evident, the matter was, thereafter, posted for hearing on 01.06.2023. On that date, the matter could not be taken up as court proceedings had gone beyond 5:30 P.M. Thereafter, the matter was taken up for hearing on 18.08.2023 when Mr Kunal Sharma, learned senior standing counsel, who appears on behalf of the respondent/revenue, returned with instructions to the effect that incriminating material was found during a search carried out on 14.11.2011, which resulted in the impugned addition.

4.1 This position was refuted by Mr Rohit Jain, who appears on behalf of the appellant/assessee. Accordingly, the following directions were issued on 18.08.2023:

"3. Mr Sharma will file an affidavit of the concerned Assessing Officer (AO) with regard to the instructions received. The incriminating material found during the search will also be placed on record.

3.1 The aforesaid affidavit will be filed within three weeks, a copy of which will be furnished to Mr Jain."

5. Despite a specific direction being issued, no affidavit has been filed on behalf of the respondent/revenue.

6. On the other hand, Mr Jain has taken us through the documents that were the subject matter of proceedings before the statutory authorities, which, prima facie, seem to indicate that the information concerning the bank account said to be maintained by the appellant/assessee with Geneva Branch of HSBC Bank emanated prior to the search carried out on 14.11.2011 [See Statement of Shyam Sunder Jindal, Volume 1, pdf page 12, Question no. 8].

7. We may also note that the appellant/assessee refutes the veracity of the document furnished to him, which appears to be a bank statement.

7.1 The appellant/assessee has, in his correspondence with the respondent/revenue, asserted that the appellant/assessee did not maintain a foreign bank account, as alleged; that the appellant/assessee was not aware of the source of such information; that the appellant/assessee had requested the department to provide the evidence based on which it is being alleged that the foreign bank account belonged to the appellant/assessee; that the source of the document had not been disclosed; that the document was not printed on



*the letterhead of the concerned bank and that it neither bears the signatures of the officials of the concerned bank, nor seal of the concerned bank.*

*7.2 It is also asserted by the appellant/assessee that the unverified document was furnished to him via an authorized representative only on 21.11.2014.*

*8. In support of the aforesaid assertions, our attention has been drawn to the documents that form part of Volume 1 of the case papers made available to the court. Reference is made to the documents appended on the PDF page 12 [running page 11]; PDF page 23 [running page 22]; PDF page 34 [running page 33]; PDF page 40 [running page 39], and PDF page 49 [running page 48].*

*9. We may indicate that the document appended on PDF page 12 is a statement of the appellant/assessee recorded on oath. The other documents are correspondences exchanged between the appellant/assessee and the ACIT, as well as the respondent/revenue.*

*10. We may also indicate that Mr Jain has placed before us a copy of the intimation, dated 22.09.2023, sent to the AO, requesting him to supply, to the appellant's/assessee's counsel, the affidavit, in terms of the order dated 18.08.2023. Furthermore, emails dated 18.11.2023, and 04.10.2023, were sent to Mr Sharma, requesting him to furnish a copy of the affidavit.*

*10.1 Despite the reminders served on the concerned officer and Mr Sharma, the affidavit has not been filed. As a result, we are left with only two choices.*

*10.2 First, to proceed without the affidavit and draw our inferences based on the record made available by the appellant/assessee.*

*10.3 Second, to give one more opportunity to the concerned officer to file an affidavit in terms of the court's order dated 18.08.2023.*

*11. For the moment, we are adopting a conservative approach, which is to give one last opportunity to the concerned officer to file an affidavit, as directed by the court via order dated 18.08.2023.*

*12. While filing the affidavit, the concerned officer will bear in mind the statutory record which has been made available in the matter, in particular, the parts to which our attention has been drawn during the hearing.*

*13. Mr Kunal Sharma will make sure that the concerned officer files the affidavit at least two (2) days before the next date of hearing and a copy of the same is furnished to Mr Jain.”*

9. Against this backdrop, the matter has come up for hearing before us once again.

10. Mr Sharma submits that since the affidavit of the concerned officer was not made available to him within the timeline indicated in the order



dated 23.11.2023, it was filed with the Registry today, i.e., 13.12.2023. However, Mr Sharma has furnished a hard copy of the affidavit dated 13.12.2023 to the Court.

11. A perusal of the affidavit, *inter alia*, reveals the following:

(i) Firstly, the information based on which the impugned addition was made was available to the respondent/revenue “*before the search action was carried out on 14.11.2011*”.

(ii) Secondly, since the appellant/assessee had taken the position that he did not maintain the subject account with the Geneva branch of HSBC Bank, a communication was addressed to the concerned Swiss authorities on 10.05.2012, followed by reminders. However, to date, no information has been received. Significantly, the dates on which reminders were sent have not been set forth in the affidavit.

(iii) Thirdly, during the assessment proceedings, details contained in the information note were compared and corroborated.

(iv) Fourthly, although, the appellant/assessee had been asked to execute consent waiver forms on multiple occasions so that the bank statement could be obtained from the concerned Swiss authorities, he refused to sign the consent form.

(iv)(a) Therefore, denial by the respondent/assessee as regards the ownership of the subject account demonstrates that there is willful concealment of income by him.

(v) Lastly, no physical material related to the foreign bank account was found during the search that would incriminate the appellant/assessee.

12. Therefore, what emerges is that the respondent/revenue did not secure



any incriminating material *qua* the appellant/assessee in the course of search that was carried out on 14.11.2011. The material that it had in its possession pertained to the period before the date of search.

13. The material that the petitioner/assessee had was deficient in several aspects, as was pointed out by the counsel at the hearing held on 23.11.2023. The deficiency in the material based on which the impugned addition was made is captured in paragraph 7.1 of the order dated 23.11.2023.

14. As regards the stand of the respondent/revenue, that the appellant/assessee had refused to sign the consent form, Mr Jain submits that the consent form was framed in such a manner that if the appellant/assessee were to sign the form, he would end up incriminating himself even when position taken by him was that he did not maintain a bank account with the Geneva branch of HSBC Bank.

14.1 In support of this plea, our attention has been drawn to the consent form which the appellant/assessee was called upon to execute. *Inter alia*, the consent form required the appellant /assessee to furnish the account number(s), master particulars, name(s) of account holders, name(s) of the beneficial owner(s)/settlor(s)/beneficiaries, and if the account was held through an entity, whether he had the necessary legal authority to grant access *qua* the subject account.

15. Given that the appellant/assessee has denied the ownership of the subject account and the respondent/revenue has not been able to place before the court reliable material which would have us believe that the appellant's/assessee's stand was not correct, we are of the view that the question of law framed in the matter would have to be answered in favour of the appellant/assessee and against the respondent/revenue.



15.1 The absence of incriminating material has persuaded us to take this view. As indicated hereinabove, no incriminating material, even according to the respondent/revenue, was found during the search.

15.2 Furthermore, the material on which the respondent/revenue relied on was not of a quality that would persuade us to hold that the stand taken by the appellant/assessee, which is, that he did not maintain an account with the Geneva branch of HSBC Bank, was incorrect.

16. Given the conclusion that we have arrived at and the position of law enunciated in the judgments referred to hereinabove, i.e., ***Kabul Chawla*** and ***Abhishar Buildwell P. Ltd.***, that a completed assessment can be reopened only if incriminating material is found during the course of search under Section 132 of the Income-tax Act, 1961, the question of law is answered in favour of the appellant/assessee and against the respondent/ revenue.

16. The appeal is thus, disposed of, as indicated above. The impugned order dated 10.04.2017 passed by the Tribunal is set aside.

16.1 Consequently, the impugned addition shall stand deleted.

17. For good order and record, the Registry will scan and upload the hard copy of the affidavit dated 13.12.2023 placed before the court by Mr Kunal Sharma so that it remains embedded in the case file.

18. Parties will act based on the digitally signed copy of the order.

**RAJIV SHAKDHER, J**

**GIRISH KATHPALIA, J**

**DECEMBER 13, 2023 / aj**