IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.17 OF 2015
WITH
INCOME TAX APPEAL NO.19 OF 2015
WITH
INCOME TAX APPEAL NO.26 OF 2015
WITH
INCOME TAX APPEAL NO.27 OF 2015
WITH
INCOME TAX APPEAL NO.42 OF 2015

The Commissioner of Income Tax,
Kendriya Rajaswa Bhavan,
Old Agra Road, Nashik. .... Appellant

- Versus -

M/s. Golani Brothers,
Sakri Phata, Bhusaval,
Dist: Jalgaon. .... Respondent

WITH

INCOME TAX APPEAL NO.18 OF 2015
WITH
INCOME TAX APPEAL NO.20 OF 2015
WITH
INCOME TAX APPEAL NO.21 OF 2015
WITH
INCOME TAX APPEAL NO.22 OF 2015
WITH
INCOME TAX APPEAL NO.41 OF 2015

M/s. Golani Brothers,
a Partnership firm duly registered
under the Indian Partnership Act

inter alia carrying on its business
at 303, Dalamal Chambers,
29, New Marine Lines,
Mumbai-400 020 and at
Plot No.136/3/2, Sakri-Phata,
N-H-6, Bhusawal-425 201. .... Appellant

- Versus -

1. Assistant Commissioner of Income Tax, Circle 2(2), Jalgaon.

2. Commissioner of Income Tax, Nasik, Kendriya Rajaswa Bhavan, Old Agra Road, Nasik-422 002.

3. Union of India .... Respondents

Mr. Suresh Kumar with Ms Samiksha Kanani for the Appellant in ITXA-Nos.17, 19, 26, 27 & 42 of 2015, and for the Respondents in ITXA-Nos.18, 20, 21, 22 & 41 of 2015.

Mr. Nitesh Joshi with Mr. Ashish Mishra i/by Mr. N.K. Mudnaney for the Respondent in ITXA-Nos.17, 19, 26, 27 & 42 of 2015, and for the Appellant ITXA-Nos.18, 20, 21, 22 & 41 of 2015.

CORAM: S.C. DHARMADHIKARI &
SMT. VIBHA KANKANWADI, JJ.

DATE : AUGUST 29, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.**):**

1. All these appeals filed by the Revenue and by the

assessee were placed before a Bench of this Court at Aurangabad. They were heard extensively and on 3-10-2003 the Bench of this Court at Aurangabad passed an order allowing both set of appeals partially and quashing and setting aside the Tribunal's order impugned in both of them. The Division Bench confirmed the Assessing Officer's order determining the tax liability of the assessee for the block period pursuant to search and seizure operation.

2. Aggrieved and dissatisfied with such a Judgment and Order of this Court in these appeals, especially aggrieved by the allowing of the Revenue's appeals in part and dismissal of the assessee's appeals in part, Civil Appeal No.5762-5771 of 2005 was filed in the Hon'ble Supreme Court of India.

3. Pertinently, the above appeals were by the assessee. By a common order passed on 15-9-2005, the Judgment of the High Court was set aside. The Judgment of the High Court was set aside on the simple ground that the High Court did not frame the substantial questions of law which arose for

consideration in the appeal, as required by Section 260A of the Income Tax Act, 1961 (for short, “the I.T. Act, 1961”)).

4. Such an order passed by the Hon'ble Supreme Court of India resulted in remand of the cases and restoration of the same to this Court.

5. Since it is an understanding of both sides that when the High Court Judgment and Order in all appeals (those of the Revenue and the assessee) is set aside by the Hon'ble Supreme Court, that revives for consideration all the appeals.

6. It is in these circumstances that we have taken up first one of the Revenue's Income Tax Appeal No.17 of 2015, for admission.

7. Mr. Suresh Kumar, appearing on behalf of the Revenue in support of this appeal, would submit that the questions which arise from the Tribunal's order dated 27-9-1999 for the Assessment Year 1990-91 are substantial questions of law.

8. He would bring to our notice the essential facts.

9. According to him, the facts and necessary for appreciation of his arguments are few and simple. The assessee before us has claimed that it is in the business of development and construction of properties.

10. The assessee is a partnership firm. It filed its original return of income declaring taxable income of Rs.2,27,770/-. This return was filed on 15-10-1990. The assessment in question was finalised under Section 143(3) of the I.T. Act, 1961 on 28-8-1992 determining the total income at Rs.2,48,232/-. The assessee-firm being engaged in the business of executing civil contracts had undertaken a development project for the construction of a commercial complex known as V.V. Market. This was a contract awarded by the then Jalgaon Municipal Council, Jalgaon. The work in respect of the development project commenced during the previous year relevant to the Assessment Year 1989-90. The assessee-firm has claimed upto 29-3-1994 that it is adopting project completion method as far

as income from the development of V.V. Market is concerned. On the basis of this stand, the assessee did not offer any income from the said V.V. Market work. It is then stated that a search under Section 132 of the I.T. Act, 1961 was carried out on the office premises of the assessee-firm as well as the residence of the partners of the firm on 11-8-1994. During the course of the action under Section 132, various incriminating documents such as charging of 'on money', non-recording of certain expenses, understating the investment in V.V. Market, etc., were noticed and which have been seized along with the books of account and other records. One S.D. Golani, a senior partner of the assessee-firm gave a statement. He made a disclosure on behalf of the firm under Section 132(4) of the I.T. Act, 1961 for various years on account of unexplained investment in V.V. Market project.

11. Besides this disclosure, there were disclosures in the name of other sister concern of the assessee-firm and their partners. The details of this disclosure are to be found on page 3 of the memo of Income Tax Appeal No.17 of 2015. After

noticing this disclosure and which was to the tune of Rs.1,29,00,000/- as far as the sister concern, and Rs.75 lakhs as far as the assessee and the V.V. Market project, notices under Section 148 of the I.T. Act, 1961 were issued for the Assessment Years 1990-91 to 1993-94 on 22-9-1994.

12. They were served on the assessee. The assessee filed a revised return of income before the receipt of these notices. The revised return of income filed showed some additional income declared under Section 132(4) but that declaration has been reduced by claiming certain expenses on account of labour payment, etc.. That is why the total income shown in the revised return of income is less than the amount declared under Section 132(4). The V.V. Market project commenced in October, 1988 and after referring to its salient features, namely, a high-rise tower building of 17 storeys with some amenities and allotment of 472 vegetable stalls to the nominees of the Municipality in the basement portion and 74 shops in the basement floor were to be given to the persons nominated by the Council and thereafter further 39 shops were also to be given to the nominees of the

Jalgaon Municipal Council. The arrangement and the rate is referred in details but strangely this issue regarding cost of construction was referred to the Departmental Valuation Officer ("DVO" for short) who originally determined the cost of construction at Rs.7,77,77,929/- vide his report dated 9-10-1995. As this report was merely on the basis of estimate and the incriminating material and the declaration made by the senior partner was not considered at the time of determining the cost of construction, a further reference was made to the DVO to determine the cost of construction in V.V. Market. The DVO has furnished a revised valuation report dated 11-3-1997 determining the cost of construction of V.V. Market at Rs.8,71,77,968/-.

13. Since during the search various incriminating papers were found in the business premises as well as at the residence of the partners, the Assessing Officer concluded that the firm and its partners transferred various shops to purchasers on receipt of privilege money on much higher rate than that was recorded in the books of account of the assessee-firm. The

details of such 'on money' earned has been made as an annexure to the assessment order. The issue regarding charging of 'on money' has been discussed by the Assessing Officer in the Assessment Order dated 27-3-1997 which was questioned by the assessee by filing appeals before the First Appellate Authority. The First Apppellate Authority decided the assessee's appeals by his order dated 29-5-1998. He granted partial relief to the assessee. After inviting our attention to the partial relief granted to the assessee, Mr. Suresh Kumar would submit that both the assessee as also the Revenue were not satisfied but rather aggrieved by this order of the First Appellate Authority and each one of them brought the appeals to the Tribunal.

14. By a common order passed on 27-9-1999, the appeals have been disposed of.

15. Mr. Suresh Kumar, therefore, would contend that as far as the questions proposed by the Revenue, the Assessing Officer has given cogent and satisfactory reasons. For illustration, he would invite our attention to Section 69C of the

I.T. Act, 1961. Mr. Suresh Kumar would submit that the Tribunal has not faulted the Assessing Officer for making a reference not once but twice to the DVO. The Assessing Officer has not been faulted for relying on the report of the DVO. If this report constitutes a valid piece of evidence, then, the Assessing Officer was justified in arriving at the conclusion that the explanation offered by the assessee is not satisfactory. Our attention has been invited to para 11.8 of the Assessing Officer's order at page 34 of the paper-book. Mr. Suresh Kumar would submit that the reasons assigned by the Assessing Officer required no interference by the First Appellate Authority or the Tribunal at least as they are based on a statement of Mr. Golani, copy of which is at page 61 of the paper-book.

16. Thereafter, inviting our attention to page 151 of the paper-book, Mr. Suresh Kumar would submit that the Tribunal after analysing these facts has partially modified the Assessing Officer's order. That is not in relation to the Assessing Officer's exercise of computation of the 'on money'. The 'on money' transaction and as analysed in the order by the Tribunal

revealed that the Assessing Officer was justified in estimating that 'on money' in respect of all the 268 shops sold during the year under consideration. That the Commissioner of Income Tax (Appeals) was not justified in determining the rate of 'on money' at 45% of the recorded price. The Assessing Officer was justified in assessing the 'on money' in respect of 27 shops as per Annexure-H and applying the rate of 'on money' at 105.78% in respect of the shops on the ground floor but this rate could not have been in respect of shops on first floor. However, by the Appellate Order, the Assessing Officer was directed to apply the rate of 100% of the recorded price in respect of shops on first floor. That no estimate can be made in respect of shops/stalls sold to the nominees of the Jalgaon Municpal Council and this total 'on money' and computed as above was to be added to the recorded sale price for the purpose of determining the profits from the project.

17. In these circumstances, Mr. Suresh Kumar would submit that the Tribunal having upheld the exercise of the Assessing Officer, including the reference made to the DVO not

once but twice, its final conclusion cannot be sustained. Thus, that is giving rise to substantial questions of law.

18. On the other hand, Mr. Nitesh Joshi would submit that the primary requirement of satisfying this Court that the appeals raise substantial questions of law has not been fulfilled in this case. The Revenue argued generally in the earlier round and such assertions and arguments of the Revenue were, with great respect, accepted by this Court necessitating the assessee filing appeals to the Hon'ble Supreme Court of India. Once the provisions of the law mandate framing of substantial question of law, then, according to Mr. Nitesh Joshi, none of the arguments of Mr. Suresh Kumar raise such question. The Revenue is requesting this Court to undertake an exercise of reappreciation and reappraisal of the same factual materials all over again. The Revenue has not been able to demonstrate any perversity or error of law in the order of the Tribunal. For illustration, Mr. Nitesh Joshi would invite our attention to Section 69C of the I.T. Act, 1961 and submit that the explanation that is required by that provision with regard to the source of expenditure ought

to be satisfactory and in the opinion of the Assessing Officer. Therefore, either there is no explanation for the source of the expenditure or there is an explanation which is unsatisfactory. However, the opinion in that behalf has to be clearly recorded by the Assessing Officer and his order must speak for itself. The order under challenge before the Tribunal did not speak for itself but proceeded on some assumptions. Therefore, any conjectures or surmises on the part of the authorities would not justify terming the expenditure as an income. Mr. Nitesh Joshi has highlighted that part of the Tribunal's order where it deals with the explanation of the assessee and concludes from the record that so far as 'on money' having been identified, treated as revenue receipt and brought to tax, then, the source of expenditure gets explained. If that explanation is satisfactory and the Tribunal has applied the test of no double addition to the income, then, there is no perversity in the order of the Tribunal nor has it misdirected itself in law. For these reasons, Mr. Nitesh Joshi would submit that the Revenue's appeals be dismissed.

19. We have with the assistance of Mr. Suresh Kumar and Mr. Nitesh Joshi perused the paper-books, including the order of the Assessing Officer and that of the First Appellate Authority and equally the Tribunal. On a perusal thereof and particularly in the backdrop of Section 69C of the I.T. Act, 1961, we have no hesitation in agreeing with Mr. Nitesh Joshi.

20. The Tribunal had before it several issues for consideration in the appeals of the Revenue as well as the assessee. The principal issue being the deals and transactions with those who are interested in buying shops, book them in advance and pay certain sums in cash. The initial disclosure of the assessee on this cash receipt was not found to be satisfactory. It was rather a misleading explanation and which led to several actions, including search and seizure. After the materials were seized, including incriminating documents, the Assessing Officer went about the exercise of scrutinising the revised return of income. During the course of the same, several queries and questions were raised. The 'on money' deals were

probed in the backdrop of a contract awarded by the Jalgaon Municipal Council to the respondent/assessee-contractor and developers. There were certain shops which were to be allotted to the nominees of the Municipal Council and certain shops could have been sold in open market. It is in relation to the shops and sold essentially in the open market that the issue arose for determination. The sums received in cash so as to book the shops were paid by the interested parties. These interested parties were identified, equally the shops and the consideration determined. If the total consideration was determined and certain component of it was received in advance or as 'on money' in cash, then, the Tribunal concluded that the Assessing Officer could have treated that as a receipt. That was a receipt of income which was not disclosed but discovered on account of operations such as search and seizure carried out at the office premises as also the residence of the partners of the assessee-firm. During the course of such scrutiny, the Assessing Officer has found that there were shops and specific in number to be allotted to the nominees of the Municipal Council, shops to be

sold in open market, all of which were located floor-wise. Therefore, he ought to have carried out a proper exercise, according to the Tribunal. The 'on money' could not have been treated as uniform irrespective of the location of the shop. There are specific advantages derived by the location of the shop on the ground floor, or basement and with frontage to the road. Therefore, all these factors and test not being applied, the Tribunal modified the Assessing Officer's order. The Tribunal, to be fair to both sides, did not probe or scrutinise the source of the power of the Assessing Officer in making reference to the DVO. It proceeded on the footing that such a reference could have been made and if made, what are the consequences thereof. Thus, the consequences then have been considered, properly analysed and to the extent the law permits, the order of the Assessing Officer has been maintained.

21. When it was disturbed and interfered with, the Tribunal found that there was indeed a justification for such interference. If the unaccounted expenditure is determined, then, necessarily the question which would arise for

consideration before the Tribunal is whether the Assessing Officer was justified in making addition under Section 69C for the years under consideration. The Tribunal, in para 39 of the order under challenge, found that the explanation as derived from the records and placed by both can be traced to the 'on money' received at the time of booking/sale of shops. The statement of the senior partner is referred. The senior partner admitted that the sums have been received as 'on money' and at the stage aforesaid. Therefore, both the amounts, namely the 'on money' as well as the unexplained expenditure cannot be brought to tax, according to the Tribunal. If the unaccounted expenditure so incurred was from the 'on money' received by the assessee, then, the question of making any addition under Section 69C does not arise because the source of the expenditure is duly explained. It is only the 'on money' which can be considered for the purpose of taxation. That is what the Tribunal therefore concluded and once the 'on money' is considered as revenue receipt, then any expenditure out of such money cannot be treated as unexplained expenditure, for that would amount to

double addition in respect of the same amount.

22. It is not a general or vague observation and finding or an inference drawn contrary to any specific legal provision but it is a conclusion imminently possible from the facts and circumstances peculiar to the assessee and its business. It is not as if any general observations have been made, particularly on law by the Tribunal and we, therefore, do not see its reasoning in paras 39 and 40 in isolation or read it out of context. If we peruse the order of the Tribunal in its entirety and for all the relevant assessment years, then, the reasons in paras 38 and 40 cannot give rise to any substantial question of law. It is a factual exercise which has been performed by the Tribunal and its conclusion that there could not be a double addition given the explanation for the source of expenditure, is also a permissible one. It is not as if such a conclusion is unknown to law. That is not even the stand of the Revenue before us.

23. As a result of the above discussion, we do not see any larger issue or wider question arising for our determination

and consideration in these appeals. In the peculiar facts and circumstances of the assessee's case, the Tribunal was justified in coming to the conclusion that the assessee's appeals deserve to be allowed and to the extent indicated in the impugned order.

24. We, therefore, dismiss the Revenue's appeals in their entirety.

25. The partial exercise carried out by the Tribunal to the satisfaction of the assessee resulted in further appeals to this Court by the assessee. We have heard Mr. Nitesh Joshi on the merits of each of the assessee's appeals.

26. Despite his ability and particularly his persuasiveness, he has been unable to show us any serious legal infirmity or perversity in the order of the Tribunal in only partially allowing the assessee's appeals and not in their entirety. The Commissioner of Income Tax (Appeals) and equally the Tribunal having recorded certain concurrent findings on fact in the assessee's appeals, they equally do not give rise to any substantial question of law.

27. Even the assessee's appeals are, therefore, dismissed.

28. All the appeals are dismissed without any order as to costs.

(SMT. VIBHA KANKANWADI, J.) (S.C. DHARMADHIKARI, J.)