

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

INCOME TAX APPEAL NO. 43 OF 2015

Subhash Rajaram Potdar .. Appellant

Versus

Commissioner of Income-Tax Nashik
and another .. Respondents

Shri M. K. Kulkarni and Shri R. R. Chandak, Advocates for the Appellant.

Shri Alok Sharma, Standing Counsel for Respondent Nos. 1 and 2.

**WITH
INCOME TAX APPEAL NO. 61 OF 2015**

Sanjay Janardhan Phadke .. Appellant

Versus

Commissioner of Income-Tax
Central Pune .. Respondents

Shri M. K. Kulkarni and Shri R. R. Chandak, Advocates for the Appellant.

Shri Alok Sharma, Standing Counsel for Respondent.

**CORAM : S. V. GANGAPURWALA AND
A. M. DHAVAL, JJ.**

CLOSED FOR ORDERS ON : 08.02.2018

ORDER PRONOUNCED ON : 23.03.2018

ORDER (Per S. V. Gangapurwala, J.) :-

. Both these appeals pertain to assessment year 2005-2006.

2. In these matters, the information was received from the annual information report that the appellants have deposited cash amount in the bank. The case was selected as scrutiny assessment. After issuance of statutory and mandatory notices, assessing officer proceeded to verify the assessment. The appellants were asked to submit information in regard to cash deposits into the bank accounts.

3. The assessing officer did not find the explanation satisfactory. The deposits in the bank accounts were considered as unexplained investment and added the same to the total income as provided U/Sec. 69 of the Income Tax Act (for short " I. T. Act").

4. The assessee preferred an appeal before the Commissioner Appeals. The Commissioner Appeals dismissed the appeals filed by the assessee. Aggrieved thereby the appellants filed appeals before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, Pune upheld the order of the Commissioner appeals and dismissed the appeals filed by the assessee. The appellants have assailed the same in the present appeals.

5. Mr. Kulkarni, the learned advocate for the appellants submits that, Sec. 69 of the I. T. Act can be invoked only, if, the assessee maintains books of account. Mr. Kulkarni, the learned advocate further submits that, the appeals involve following substantial questions of law.

Substantial Questions of Law in Appeal No. 43 of 2015

1. Whether on the facts and circumstances of the case and in law the Tribunal was correct in its decision to confirm the addition of Rs. 31,75,320/- U/Sec. 69 of the I. T. Act when the provisions of Sec. 69 of the I. T. Act do apply when income is not recorded in the books of account maintained as maintenance of books of account is sine qua non to apply Sec. 69 of the I. T. Act and Whether the Tribunal ought to have considered the judgment of jurisdictional High Court Bombay High Court that the cash credit found in bank pass book and not in cash book maintained as pass book supplied by the bank is not the books of account maintained, so held in CIT Vs. Bhaichand H. Gandhi (1983) 141 ITR 67 (Bom) ?

2. Whether on the facts and circumstances of the case and in law the Tribunal was required to consider the legal proposition that the judgment of the jurisdictional High Court and Supreme Court are retroactive and the interpretation of law made by the Court is of existing law and applies from the date the law came into force and not from the date on which the decision is rendered ? The judgment of the Bombay High Court in CIT Vs. Bhaichand H. Gandhi (supra) is binding on the Tribunal ?

Substantial Questions of Law in Appeal No. 61 of 2015

1. Whether on the facts and circumstances of the case and in law the Tribunal was correct in its decision to confirm the addition of Rs. 4,06,550/- U/Sec. 69 of the I. T. Act, when the provisions of Sec. 69 of the I. T. Act do apply, when income is not recorded in the books of account maintained as maintenance of books of account is sine qua non to apply Sec. 69 of the I. T. Act ? Whether the Tribunal ought to have considered the judgment of the jurisdictional High Court Bombay High Court that the cash credit found in bank pass book and not in cash book maintained as pass book supplied by the bank is not the books of account maintained ? So held in CIT vs. Bhaichand H. Gandhi (1983) 141 ITR 67 (Bom) ?

4. Whether on the facts and circumstances of the case and in law the Tribunal was required to consider the legal proposition that the judgment of the jurisdictional High Court and Supreme Court are retroactive and the interpretation of law made by the Court is of existing law and applies from the date the law came into force and not from the date on which the decision is rendered ? Whether the judgment of the jurisdictional Bombay High Court in CIT V. Bhaichand H. Gandhi (supra) is binding on the Tribunal ?

6. Mr. Kulkarni, the learned advocate for the appellants strenuously contends that, Sec. 69 of the I. T. Act can be invoked only, if the assessee maintains books of account. In the present cases, assessee do not maintain books of account, as such, Sec. 69 of the I. T. Act could not have been invoked. The learned

advocate relies on the judgment of the Orissa High Court in a case of Aurobindo Sanitary Stores Vs. Commissioner of Income Tax reported in (2005) 73 CCH 0147, so also on the judgment of the Division Bench of this Court in a case of Babulal C. Borana Vs. Income Tax Officer and others reported in (2005) 195 CTR 0199 and in a case of Commissioner of Income Tax Vs. Bhaichand H. Gandhi reported in (1983) 141 ITR 0067. The learned advocate submits that, the Tribunal and the authorities below have failed to consider the corresponding withdrawals from the same accounts leaving as insufficient balance in the end of the accounts. The addition of income is not the real income, which never accrued to the assessee under the law.

7. Mr. Sharma, the learned advocate for the respondents/department supports the order and submits that, there is marked distinction between Sec. 68 and 69 of the I. T. Act. Sec. 69 deals with unexplained investments. The assessee has failed to explain the investment. Inconsistent explanations were given. The learned advocate relies on the judgment of the Madhya Pradesh High Court in a case of Banshidhar Agarwal Vs. Commissioner of Income Tax reported in (1983) 36 CTR 0094 and another judgment in a case of Commissioner of Income Tax Vs. Shiv Shakti Timbers reported in (1998) 229 ITR 505.

8. Before we advert to submissions canvassed by the learned counsel for respective parties, it would be appropriate to refer to

Sec. 69 of the Income Tax Act.

INCOME TAX ACT, 1961

1.

Unexplained investments.

69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation about the nature and source of the investment or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

9. The appeals have to be considered only on substantial questions of law. In the proceedings before the Tribunal or the Commissioner Appeals, the appellants have never taken a stand that they do not maintain books of account inter alia Sec. 69 of the I. T. Act is not applicable. It is for the first time in the present appeals, the said stand is taken.

10. In both these appeals, it has been concurrently held before all the forums that the assessee have failed to discharge the burden to explain the source of deposit in their bank accounts. It has been concurrently observed that, there is no consistency in the explanation of the assessee and the assessee have taken

different stand before the assessing officer. The evidences filed by the assessee did not remotely support the case of the assessee. Nothing has been placed to explain the source of investment. The assessee even remotely did not take stand that they do not maintain books of account and that Sec. 69 of the I. T. Act is not applicable. It would be too late in the day to contend the same in the present appeals.

11. Be that as it may, there is marked difference between Sec. 68 and Sec. 69 of the I. T. Act. Sec. 69 of the I. T. Act applies where the assessee offers no explanation about the nature of source of investment or the explanation offered by him is not in the opinion of the assessing officer satisfactory, then the value of the investment may be deemed to be income of the assessee of such financial year. Sec. 69 of the I. T. Act deals with contingencies where assessee had made an investment, which are not recorded in the books of account if any maintained by him for any source of income.

12. In the present matters, the assessee are running their business. The nature of investment in the bank accounts has not been explained. On the contrary, inconsistent explanations were given, which were not found satisfactory by all the authorities. As the same was unexplained investments, the authorities were right in deeming the same to be the income of the assessee. Whether they had maintained the books of account was never an

issue before the authorities below, as the same was never raised. It would not be permissible for the appellants to contend it for the first time in the present appeals, as these appeals can only be considered on the substantial questions of law.

13. In the light of the above, as no substantial question of law arises, the appeals are dismissed. No costs.

[A. M. DHAVAL, J.]

[S. V. GANGAPURWALA, J.]

bsb/March 18