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

% **Decision delivered on: 13.12.2023**

16

+ **ITA 104/2021**

PR COMMISSIONER OF INCOME TAX, CENTRAL-3

..... Appellant

Through: Mr Abhishek Maratha, Sr. Standing
Counsel with Mr Parth Semwal,
Advocates.

versus

SH. SHYAM SUNDER JINDAL

..... Respondent

Through: Mr Rohit Jain, Mr Aniket D. Agrawal
and Mr Abhishek Singhvi, Advocates.

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+ **ITA 107/2021**

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PRINCIPAL COMMISSIONER OF INCOME TAX - CIRCLE-3

..... Appellant



Through: Mr Abhishek Maratha, Sr. Standing
Counsel with Mr Parth Semwal,
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versus

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versus

SH. SHYAM SUNDER JINDAL Respondent
Through: Mr Rohit Jain, Mr Aniket D. Agrawal
and Mr Abhishek Singhvi, Advocates

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. These appeals, in the first instance, came up for hearing before the Court on 26.03.2021.
 - 1.1 While issuing notice in the above-captioned appeals, we heard the matter briefly.
2. We had also noticed on that date i.e., 26.03.2021, that the appellant/revenue had proposed two questions of law.



3. After hearing counsel for the parties, we held that the question proposed by the appellant/revenue concerning the power of rectification exercised by the Income Tax Appellate Tribunal [in short “Tribunal”], under Section 254(2) of the Income-tax Act, 1961 [in short, “Act”], did not arise for consideration, for the reasons given therein.

4. Thus, we confined the above-captioned appeals to the second question proposed by the appellant/revenue. For convenience, the relevant parts of the order dated 26.03.2021 are extracted hereafter:

“2. Issue notice to the respondent-assessee.

3. Mr. Rohit Jain accepts service on behalf of the respondent-assessee.

4. The captioned appeals have been filed by the revenue. Via these appeals, challenge is laid to the common order dated 20.12.2019 passed by the Income Tax Appellate Tribunal (in short 'Tribunal') in exercise of its powers under Section 254(2) of the Income Tax Act, 1961. The order concerns the assessment years (in short AYs) 2008-2009 to 2011-2012.

5. The record shows that the Tribunal, in an earlier round, had dealt with the AYs 2007-2008 to 2011-2012. These were the appeals which had been filed by the assessee.

5.1. The Tribunal while passing an order dated 03.09.2019, in the said appeals, dealt with the issue as to whether or not the assessee had maintained a foreign bank account with the Hongkong and Shanghai Banking Corporation Limited, Geneva, Switzerland (in short 'HSBC'). The Tribunal, after perusing the record and granting hearing to learned counsels for the parties, remanded the issue for fresh consideration by the assessing officer. To be noted, this issue arose only in AYs 2006-2007 and 2007-2008.

5.2. The other issue which the assessee had raised, and concerned addition of 4% notional interest vis-a-vis the credits found in the said account said to be maintained by the assessee, was not adjudicated upon by the Tribunal.

6. It is in this background that a rectification application was filed by the assessee which was disposed of by the Tribunal via the impugned order dated 20.12.2019.

7. Ms. Vibhooti Malhotra, who appears on behalf of the revenue, says that the Tribunal ought not to have reversed, albeit partially, its order dated



03.09.2019 concerning notional interest in exercise of powers under Section 254(2) of the Act as this was not an error apparent on the face of the record.

7.1. Mr. Rohit Jain, who appears on behalf of the assessee, contends to the contrary.

8. We have perused the order of the Tribunal which is indicative of the fact that the issue regarding notional interest was not the subject matter of assessment year 2007-2008. This issue arose only in AYs 2008-2009 to 2011-2012.

9. The Tribunal, therefore, took a view that since it had not ruled on this aspect of the matter, the direction concerning remand could not apply to the said issue. It is on this basis that the rectification application was allowed and the matter was decided on merits. On merits, the Tribunal ruled in favour of the assessee by applying its own decision in the case of Krishna Kumar Modi dated 05.07.2019 passed in ITA No.2892/Del/2017. The Tribunal was of the view that since no material was available on record as to the interest received by the assessee, the same could not be added to his taxable income, albeit, on a notional basis. Based on this rationale, the issue with regard to the notional interest was decided in favour of the assessee.

9.1. It is in this backdrop that the revenue has suggested the following substantial questions of law for our consideration:

“A. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT has exceeded its power of rectification under Section 254(2) of the Act by means of the impugned order, when the issue had been remanded to the file of the AO by the Hon'ble ITAT vide its order dated 03.09.2019.

B. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT was legally justified in holding the interest income added by the AO as notional whereas the outstanding balance in HSBC account was interest bearing and there was no materials before Ld. ITAT to hold such interest as notional. ”

10. Having regard to our discussion above, in our opinion, the Tribunal exercised its powers, correctly, under Section 254(2) of the Act. Since the issue regarding notional interest is not adverted to in the order dated 03.09.2019, they were entitled to recall the order qua the said issue.

11. Therefore, in our view, the first question of law does not arise for our consideration. The prayer made, in that behalf, is declined.

12. **Insofar as the second question of law is concerned, we will consider the same along with assessee's appeal i.e. ITA No.612/2017 whereby the direction of remand qua the existence of the bank deposits has been assailed. This appeal, i.e. ITA No.612/2017, we are told, was**



admitted by this Court vide order dated 13.11.2017 which was corrected on 01.08.2019.

12.1. We are told by Mr. Rohit Jain that the said appeal is listed in the category of 'Regulars'.

13. Accordingly, list the captioned appeal on 05.08.2021 along with ITA No.612/2017.”

[Emphasis is ours]

5. As would be evident on a perusal of the extract of the order dated 26.03.2021, insofar as the proposed second question was concerned, we had directed that it would be heard with the respondent's/assessee's appeal i.e., ITA 612/2017. That appeal i.e., ITA 612/2017 was listed on our board today.

6. We have heard arguments in the appeal, and for the reasons provided in that order, ruled in favour of the respondent/assessee.

7. With the consent of the counsel for the parties, the above-captioned appeals are taken up for hearing today itself. The following second proposed question of law is admitted for consideration:

“B. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT was legally justified in holding the interest income added by the AO as notional whereas the outstanding balance in HSBC account was interest bearing and there was no materials before Ld. ITAT to hold such interest as notional?”

8 Mr Abhishek Maratha, learned senior standing counsel, who appears on behalf of the appellant/revenue cannot but accept that the result of these appeals is inextricably linked with the result of ITA 612/2017.

9. Since we have concluded in ITA 612/2017 that the impugned addition would have to be deleted as no incriminating material was found during the search, in our opinion, the AO could not have calculated notional interest on



the addition originally made by him.

10. Therefore, the aforementioned question of law is answered in favour of the respondent/assessee and against the appellant/revenue.

11. The appeals are, accordingly, disposed of in the aforesaid terms.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

DECEMBER 13, 2023/rk