IN THE HIGH COURT OF BOMBAY, AT GOA
APPELLATE SIDE

INCOME TAX APPEAL NO.56 OF 2012

1. Isidore Fernandes,
Age : Major, PAN No.AADPF0570F,
R/o.St.Inez, Panaji-Goa.

2. Mrs.Pauline Fernandes,
Age : Major, PAN No.ADCPP5209M,
R/o.St.Inez, Panaji-Goa. Appellants

versus

The Assistant Commissioner of Income Tax,
Central Circle, Panaji, Goa. Respondent

Mr.D.Pangam with Mr.Parikshit Sawant, Advocates for Appellants.
Ms.Susan Linhares, Advocate for Respondent.

CORAM : PRAKASH D. NAIK AND B.P.DESHPANDE, JJ.

Date of reserving the Judgment : 25th August 2023

Date of pronouncing the Judgment : 12th February 2024

JUDGMENT – (Per : Prakash D. Naik, J.) :-

1. This appeal is preferred under Section 260-A of Income Tax Act, 1961 (`I.T.Act' for short) challenging Order dated 30th June 2011 passed by Income Tax Appellate Tribunal, Panaji, Goa (`ITAT') in Income Tax Appeal Nos.176 to 178 and 182 to 183/PNJ/2008.

2. Appellant filed return of Income Tax on 17th October 2001 declaring total income of Rs.1,67,083/- and agricultural income of

Rs.57,239/-. The return was processed u/s.143(1) of I.T.Act. Subsequently search u/s.132 was conducted on 31st August 2004. Notice u/s.153A of I.T.Act was issued on 30th November 2004 and served on the Appellant-Assessee on 1st December 2004 requiring the assessee to furnish the return within 45 days from the receipt thereof. In response, the assessee filed his return declaring NIL income. Subsequently the assessee revised his income on 4th March 2005 declaring total income of Rs.1,67,083 and agricultural income of Rs.57,239/-.

3. Notice u/s.143(2) was issued to the assessee on 21st September 2005 and it was served on the assessee on 26th September 2005. Subsequent notice u/s.143(2) and 142(1) along with questionnaire was issued on 14th June 2006 and served on the assessee on 28th June 2006. The advocate and authorized representative of the assessee filed some information. The questionnaires were issued vide letters dated 20th July 2006 and 16th October 2006. The representative of assessee filed details called for.

4. The Assessing Officer assessed the total income as Rs.19,25,286/- and agricultural income of Rs.57,239/-. Appellant was held liable to pay interest of Rs.11,29,825/-. It was directed that demand notice be issued accordingly and show cause notice u/s.274 r/w 27(1)(c) of I.T.Act was issued.

5. The Assessment Order dated 20th December 2006 was challenged by preferring appeal before Commissioner of Income Tax (Appeals). Vide order dated 16th October 2008 the appeal was partly allowed.

6. Learned counsel for Appellants submitted as under :

(a) The impugned orders are contrary to law;

(b) In accordance with Section 69(C) of I.T.Act it is required to be established firstly that expenditure was incurred. Except bear entries, there is nothing on record to show that there was expenditure incurred;

(c) The proof of spending is not there. Tax cannot be levied on inference which is not supported by evidence;

(d) The I.T.Department has not taken into account sale of capital goods made during the financial year 1999-2000 at Poiguinim agricultural land against which Appellant had cash in hand at farm house;

(e) It was an error to make addition on account of peak credit of Rs.3,84,000/- and Rs.55,186/- without taking into consideration availability of cash with the assessee out of sale of capital goods at the farm house;

(f) It was an error to make addition of Rs.29,03,000/- u/s.69(c) against recording in diary maintained by accessee;

(g) It was brought to the notice of Assessing Officer that entries appearing in the diary are relating to the real estate commission business. The names appearing on the pages are of different persons who have done transactions on which assessee got commission and the amounts mentioned against their names are the considerations paid or received by those persons;

(h) The assessee was called upon to furnish names and addressed of the persons to whom the Appellants were met along with source of making payments. The assessee had given explanation vide letter submitted on 5th July 2006 by stating that the diary is the record of transactions of commission earned with regard to real estate business. The wife of assessee was looking after the real estate business and assessee is trying to trace the persons who are recorded therein. It will be difficult to produce such persons. The books ending for the period on 31st March 2001 shall have reference of most of the names and those books are seized. The assessee has not made any payment nor received any payment. The assessee has received commission on the transactions and commission is duly accounted for. The names mentioned in the seized material have reference in the books of account maintained for the purpose of agricultural income and commission for the year ending on 31st March 2001. In this book of account, the assessee has shown commission received from January-2001 and February-2001. The account book was not available on the date of search and the same was produced during post search inquiries and assessment proceedings. The assessee has received similar commission in the earlier years and subsequent orders;

(i) In reply to the questionnaire dated 16th October 2006, the assessee in his letter dated 1st November 2006 stated that all the notings appearing in seized material No.A/IF/01 and A/IF/02 are real estate transactions on which assessee got commission, which has been accounted in the books of account. Some of the names appearing in the list are relating to the commission received from M/s.Dempo;

(j) The assessee was called upon to explain about payment of certain amount to tenants/mundakars and whether said payment was made directly to tenants/mundakars. In reply, it was stated that amount has been directly paid to the tenants by cheques/pay orders;

(k) The assessee in his letter dated 12th December 2006 had submitted reply in respect to letter of M/s.Dempo and clarified that names of tenants are recorded by M/s.Dempo in the year 1996-97. The assessee had received commission from M/s.Dempo for the relevant year 2001-02. All these amounts were received towards commission. The diary and lose papers have no evidentiary value. Such documents have no basis for assessment and inferences of income.

7. Learned counsel for Appellants has relied upon following decisions :

(i) M/s.Kishinchand Chellaram Vs. Commissioner of Income Tax, Bombay City II, Bombay – cdj-1980-SC-095;

(ii) M/s.Krishna Textiles Vs The Commissioner of Income Tax - (Income Tax Reference No.43 of 1999 decided by DB of Gujarat High Court;

(iii) CBI Vs. V.C.Shukla and others – (1998)3-SCC-410.

8. Learned advocate for Respondent submitted that there are concurrent findings of appellate authorities which does not warrant interference. During the course of search at the residence of assessee documents were seized which contains lose papers and notings in the diary. The total amount mentioned against name is Rs.30,85,000/-

which is written as “PAID” and Rs.7,15,000/- is shown as balance. The assessee could not give proper explanation. The assessee did not furnish names and addresses of the persons named therein. The assessee was asked to explain the exact nature of transaction and furnish names and addresses of persons mentioned therein with purpose of transactions. The assessee tried to explain that notings are real estate transactions on which he received commission which has been accounted for in the books of account. Since it was stated that transactions were relating to M/s.Dempo and TDS certificate has been filed by the assessee issued by M/s.Devashri Real Estate Developers, Dempo House, Panji, vide letter dated 16th November 2006 they were called upon to furnish nature of professional services rendered by assessee in respect of TDS. It was reported that payment of Rs.1,50,000/- was made to assessee towards liaisoning ad assisting M/s.Devashri Real Estate Developers in negotiations with tenants and mundakars for re-settlement and development of Tonca property where a complex has been constructed by it. They were also asked the names of tenants/mundakars who were staying in the property and the amount paid to said persons. The details were furnished. The names and amounts given by M/s.Devashri Real Estate Developers were not in conformity with the amounts written by assessment in the seized material. All the amounts were paid by M/s.Devashri Real Estate Developers directly to the tenants/mundakars by cheques/pay orders and hence question of writing names of tenants in the assessee’s diary does not arise. Thus, it was established that M/s.Devashri Real Estate Developers has not given any amount to the assessee to disburse to the tenants/ mundakars. The names given by M/s.Devashri Real Estate Developers and names written in the seized material does not match.

Therefore, assessee's statement that names and amounts mentioned on pages 3, 7 and 9 of the seized material are relating to to real estate business for assisting M/s.Devashri Real Estate Developers for vacating tenants/munadakrs from the proposed construction site and the amount mentioned against such names are the total consideration received by parties and the assessee has received only commission out of those transactions, is without any basis. It was proved that transactions were not relating to real estate dealings on which assessee has received commission of Rs.1,50,000/- but the assessee has spent Rs.30,85,000/- during the previous financial year. Hence amount of Rs.30,85,000/- was added to the income written as unexplained expenditure u/s.69C of I.T.Act. The Assessing Officer, the First Appellate Authority and the ITAT have given findings on the material on record, which does not warrant interference.

9. The assessee filed income tax return declaring income of Rs.1,67,083/- and agricultural income of Rs.57,239/-. Search was conducted u/s.132 of I.T.Act. Notice was issued u/s.153A of Act. The assessee filed return declaring NIL income. Thereafter assessee revised income on 4th March 2005 declaring total income of Rs.1,67,083/- and agricultural income of Rs.57,239/-. Notice u/s.143(2) of I.T.Act was issued to the assessee. The authorized representative of assessee appeared before Assessing Officer.

10. Assessee is an ex-MLA. He is running a Bar and Restaurant & real estate business. During the assessment it was found that assessee and his family members were having certain bank accounts which were not disclosed. The assessee contended that accounts relates to his daughter and sons. The assessee was called upon to furnish details of employment of his children. The assessee produced

certain documents. The Assessing Officer analyzed said documents and was of the opinion that children of the assessee were students. The Assessing Officer found that assessee has not disclosed bank accounts and the interest earned on amounts deposited in such accounts. Sum of Rs.2,104/- was added on the income returned. It was noticed that during the previous year assessee had credited certain amount to SB account maintained for agricultural income. He was asked to explain the source of credited entries of said amount. The assessee stated that he had sold his capital assets, however, did not produce any evidence, e.g. license obtained for cutting trees etc. The Assessing Officer observed that assessee has gross receipts of Rs.1,95,248/- from agricultural operations and after debiting the expenditures as declared net agricultural income of Rs.1,46,836/-. Considering the fact that account was maintained for agricultural income and assessee is having considerable amount of agricultural income, the peak credits in the said account of Rs.3,84,000/- was treated as assessee's income earned from other than agricultural activities utilized for crediting the same in the said account.

11. During the search a document called as `Goa Diary' was seized and it was numbered as A/IF/02. Noting was found in it in the handwriting of wife of assessee stating that amount of Rs.2,20,000/- was given to Newton. The assessee gave explanation to the entries and stated that diary belongs to the assessee and his wife and entries in the diary were made by him and his wife. He did not recollect the said person to whom the amount is given. However, amount given to the person is returned back on different dates from March-2001 to August-2002. The assessee could not explain the entries properly. Subsequently vide letter dated 1st November 2006 it was stated that

amount of Rs.2,00,000/- was advanced at the agricultural farm to Mr.Newton for putting fencing to agricultural farm. Since he did not complete the job, money was recovered back. The Assessing Officer found that recovery of excess amount has not been shown as receipts in the amount.

12. During the course of search at the residence of assessee material marked as A/IF/01 and A/IF/02 were seized which contain lose papers and notings in the diary. In the material marked A/IF/02 and A/IF/01 total of the amount written as Rs.30,85,000/- was written as paid and Rs.7,15,000/- was shown as balance. During the course of search assessee was questioned about contents of documents. It was admitted by the wife of assessee that document was found at her residence and it belongs to her husband. She also stated that she is not in a position to explain anything as the diary belongs to her husband. The assessee was asked to explain the same. It was explained that entries are relating to real estate commission business. The names appearing are of different persons who have done transactions on which assessee got commission and the amount mentioned against their names are of considerations paid or received by those persons on which assessee got some commission. The assessee was asked to furnish names and addressed of the persons to whom payments were made along with source for which payments were made. The assessee stated that his wife is looking after the real estate business and he is trace out the persons. He has not made any demand nor received any payment. The names of persons named in the seized material have reference to the books of account maintained for the purpose of agricultural income and commission for the year ending on 31st March 2001. The assessee showed commission received from January-2001 and February-2001. The

account book was not available on the date of search. It was produced during post search inquiry and assessment proceedings. Since assessee did not furnish names and addresses of the persons reflected in the aforesaid documents, he was again asked to explain nature of transactions. The assessee by his letter dated 1st November 2006 stated that notings are real estate transactions on which he got commission which has been accounted in the books of accounts. Some of the names appearing in the lose papers are of commission received from M/s.Dempo. Since it was stated that this transaction is relating to commission received from M/s.Dempo and since assessee had admitted receipt of gross receipt of Rs.1,50,000/- as commission amount and also TDS certificate has been filed by the assessee issued by M/s.Devashri Real Estate Developers, Dempo House, Panji, vide letter dated 16th November 2006, they were asked to furnish nature of professional services rendered by assessee in respect of TDS. They were also asked names of tenants/mundakars who were staying in said property and the amount paid to said persons. M/s.Devashri Real Estate Developers furnished information about tenants and amount paid. It was also reported that payment of Rs.1,50,000/- was made to assessee towards liaisoning and assisting M/s.Devashri Real Estate Developers in negotiating with tenants and mudakars for resettlement and development of property where they have constructed a complex. It was also stated by them that amount has been directly paid to the tenants/mundakars by cheques/pay orders. The names and amount given by M/s.Devashri Real Estate Developers was not in conformity with the names and amounts written by assessee in the seized material and also amounts were paid directly to the tenants by cheques and/or pay orders, the question of writing names of tenants in the assessee's diary does not arise. The assessee submitted his reply vide letter dated 12th December 2006 stating that those were the names of tenants recorded by M/s.Dempo in the year 1996-97. He has received commission from M/s.Dempo for the relevant period of assessment 2001-02. The Assessing Officer opined that assessee's contention that names mentioned in M/s.Devashri Real Estate Developers letter are relating to the year 1996-97. The opinion from M/s.Devashri Real Estate Developers was called for relating to TDS made by them during the year 2000-01 relating to assessee for assisting them for vacating tenants. It was also stated that he has employed persons to remove the tenants and names mentioned in the diary is of the persons who assisted him for evicting the tenants. The statement was contradictory to the statement made during the course of search and during assessment proceedings wherein it was stated that names mentioned in the diary is of tenants of M/s.Dempo and he has assisted M/s.Dempo in evicting tenants and the amount mentioned therein are the compensation paid by them. Since M/s.Dempo has paid compensation directly to the tenants by cheque and/or pay orders, the need of writing their names in diary is unusual. The assessee did not produce any person whose name was written in the diary. If the names named in the diary is of the person who has assisted the assessee for evicting the tenants, he could have produced such persons to verify the veracity of his statement. The assessee is trying to evade the truth. The Assessing Officer therefore satisfied that it is established truth that M/s.Devashri Real Estate Developers has not given any amount to assessee to disburse amount to tenants/ mundakars. Thus, the statement of assessee to the effect that names and amount mentioned on material A/IF/01 and A/IF/02 is relating to real estate business for assisting M/s.Dempo for vacating tenants from proposed construction site and amount mentioned against such names are total consideration received by concerned parties and the assessee has received only commission out of these transactions has no substance. Thus, transactions are not relating to real estate dealings to which assessee has received commission of Rs.1,50,000/- but the assessee has spent Rs.30,85,000/- during the relevant assessment year under consideration which is not explained in any of the assessment year as the said amount is to be added in the income written as unexplained expenditure u/s.69C of I.T.Act. The total income of the assessee was computed, as stated hereinabove, and it was held vide Assessment Order dated 20th December 2006 that payable income tax is Rs.11,29,825/-.

13. From the assessment order it is apparent that adverse inference about entries made in the diary was not made merely on the basis of such entries but also on the explanation given by assessee and falsity found in the explanation.

14. The assessee preferred appeal before Commissioner of Income Tax challenging the Assessment Order dated 20th December 2006. The appeal was filed for the A.Y.1999-2000 to 2005-06. The Commissioner of I.T (Appeals) (`CIT(A)') noted that all the major issues in this case have been dealt with by Assessing Officer in the assessment order passed for the A.Y.2001-02 and the appellate order will first check up and adjudicate the issues relevant for A.Y.2001-02 and thereupon individual issues in other assessment years will be taken up. The CIT(A) observed that the Assessing Officer in the assessment order has disallowed excess exemption claimed of Rs.17,800'/-. The said ground was not pressed by Appellant and hence same was dismissed. It was observed that addition of

Rs.3,84,000/- made by Assessing Officer after working of peak credit is upheld. The CIT (A) also confirmed the addition of Rs.55,186/- by Assessing Officer after marking out peak credit in the undisclosed bank account. The ground regarding addition of Rs.10,000/- made by Assessing Officer for amount receivable from Mr.Newton out of agricultural amount was not pressed. Other ground urged before CIT (A) was against addition of Rs.29,03,000/- made by Assessing Officer u/s.69(3) for recordings made in diary seized during search. The CIT(A) analyzed the observations of Assessing Officer in great details and observed that reasons stipulated in the assessment order led the Assessing Officer to conclude that the transactions noted in the diary were different from the real estate business on which the assessee had received commission and the amount was spent on some activities which have not been explained and as such addition for unexplained expenditure u/s.69C was made by the Assessing Officer. The CIT(A) observed that assessee has not brought on record any evidence to establish that entries pertain to any other assessment year and as such Assessing Officer cannot be faulted for considering the transactions mentioned therein for the period relevant for he period 2001-02. The submission that transaction mentioned in the seized diary is spread from 1996 to 2002 was rejected. It was further observed that document has been seized from the residence of assessee. It has been admitted to be belonging to the assessee and written by assessee's wife as per directions of assessee. During the proceedings amounts mentioned against the names of particular persons was admitted to be consideration paid or received by those persons. The assessee was not able to furnish complete names and addresses of the persons to whom these payments were made. The CIT(A) also considered the fact that assessee has been taking different stands in regard to the transactions mentioned in the seized diary. The peak of amount in which commission was shown as received from January-2001 to February-2001 was produced during inquiry. It was not available on the date of search at the premises and entries are made after search to co-relate the amounts mentioned in the seized diary. The fact remains that assessee's stand of having received commission income for transaction with Dempo for assisting M/s.Devashri Real Estate Developers for eviction of tenants, is repudiated by the fact that names and amounts given by M/s.Devashri Real Estate Developers are not dealing with the names and amounts found written in the seized material. It is the claim of M/s.Devashri Real Estate Developers that amounts were directly paid by them to the tenants by cheques or pay orders. Besides there being variations in the names and amounts, the assessee had no occasion to refer such payments made by M/s.Devashri Real Estate Developers and therefore Assessing Officer was right in treating the transaction recorded in the seized papers as distinct from the payments made by M/s.Devashri Real Estate Developers. The CIT(A) also upheld the Assessing Officer's action in charging interest u/s.234B of I.T.Act. Vide order dated 16th October 2008 appeal for the year 1999-2000 to 2005-06 was partly allowed.

15. The appeals were preferred before ITAT, Panaji against order dated 16th October 2008 passed by CIT(A). The ITAT has observed that interest is to be increased by the amount payable under(i) of Section 234B of I.T.Act. Such an increase can be made only if interest u/s.234B has been charged in the original assessment. The ITAT remitted the matter back to Assessing Officer for verification of facts and adjudication.

16. The ITAT observed that CIT(A) has already considered the issue in detail about peak credit in the bank account and rejected said ground. The ITAT also dealt with the ground relating to entries made in the diary found at the residence of assessee. The Tribunal considered the fact that Assessing Officer has verified from M/s.Devashri Real Estate Developers who reported that payment of Rs.1,50,000/- was made towards liaisoning and assisting them in negotiations with the tenants and mundakars for re-settlement and development of property where complex was constructed by them. They also furnished names of tenants/mundakars staying in the property and confirmed that amounts have been directly paid to the tenants/mundakars by cheques/pay orders and it was not the case that amount was first paid to the assessee and then disbursed by the latter to the concerned persons. Being confronted with the reply received from M/s.Devashri Real Estate Developers on the point of discord and disparity in names and amounts appearing in two sets of documents, the seized material and details furnished by the developers, the assessee submitted that the names furnished by the developer was for the year 1996-97. The explanation was not accepted by the Assessing Officer. The Assessing Officer referred to the contradictory stand taken by assessee at different stages. The Assessing Officer also mentioned that compensation to the tenants was directly paid by M/s.Dempo and that assessee was not able to produce any persons whose names were mentioned in the diary and those produced by M/s.Dempo were deferred. The CIT(A) considered the aspects at length and recorded finding that explanation furnished by assessee with regard to entries in the diary is rightly not found valid by the Assessing Officer. The ITAT did not find any fault with the order of Assessing Officer and it was upheld.

The ITAT also rejected other contentions of Appellants and by order dated 30th June 2011, the appeals were disposed off being partly allowed.

17. The Assessing Officer has elaborately discussed all the issued by analyzing the documents and factual matrix. The CIT(A) also dealt with issues urged by assessee by preferring appeal and the ITAT has also concurred with the views expressed by Assessing Officer except on minor issues. We do not find any reason to interfere in the concurrent findings of the authorities as stated above.

18. The decisions relief upon by learned advocate for Appellants were delivered in the facts and circumstances of those cases and cannot be made applicable to the present case.

19. It is pertinent to note that the documents found and seized from the assessee's premises were written by Appellant no.2 Mrs.Pauline Fernandes, wife of Appellant no.1 Mr.Isidore Fernandes. The entries in this document is relating to the business of assessee of liaisoning for which commission has been received from time to time. The assessee has made payment, as explained, in getting clear the properties or vacating the same from unauthorized occupants. The assessee does not deny that these entries did not relate to the activities carried out by him. He also admits that only part of the entries are correct. The authorities below have found that explanation given by the assessee is not tenable and it does not support his case. Nexus of payment by M/s.Dempo has not been established with the payment shown as made in the lose sheets found in the house of assessee. The assessee was unable to explain the source of availability of funds. Payments are not disclosed by

assessee in the regular returns of income tax filed prior to the date of search. The entries in the lose sheets has not been explained. The authorities below have rightly rejected the claim of the assessee being devoid of any merit. No interference is called for in the impugned orders Appeal must fail and is required to be dismissed.

ORDER

(i) Income Tax Appeal No.56 of 2012 is dismissed.

(B.P.DESHPANDE, J.) **(PRAKASH D. NAIK, J.)**

MST