

(2009) 02 J&K CK 0001
Jammu & Kashmir High Court
Case No: None

Qazi Shabir Ahmed

APPELLANT

Vs

Income Tax Officer
and Others

RESPONDENT

Date of Decision: Feb. 11, 2009

Acts Referred:

- Income Tax Act, 1961 - Section 100, 142, 148, 260A, 271

Citation: (2009) 224 CTR 160 : (2009) 2 JKJ 302 : (2009) 183 TAXMAN 220

Hon'ble Judges: Muzaffar Hussain Attar, J; H. Imtiyaz Hussain, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. Through this appeal the appellant calls into question orders passed by Tribunal (Amritsar Bench) dt. 30th Oct., 2008; order passed by CIT(A)

dt. 17th Jan., 2008 and order of assessment passed by respondent No. 1

2. This appeal is filed in terms of Section 260A of IT Act of 1961 for short (the Act of 1961).

It would be appropriate to mention here, that though, appeal is filed against the judgment/order of Tribunal (Amritsar) but the said authority has not been impleaded as party respondent in this statutory appeal.

3. The basic order of assessment has been passed by respondent No. 1, whereby and whereunder, net taxable income of the appellant for the

asst. yr. 2004-05 has been found to be Rs. 16,13,800, and the Income Tax leviable on and recoverable from the appellant has been found to be

Rs. 6,45,436. The assessment order passed by the respondent No. 1 also intimates the appellant about initiation of penalty proceedings u/s 271(1)

(c) of the Act of 1961. The appellant being aggrieved of the said assessment order filed first statutory appeal before the CIT(A). The CIT(A) vide

its order dt. 17th Jan., 2008 accepted the appeal to the extent of deleting an addition of Rs. 80,000 on account of income under the head salary,

which was assessed by respondent No. 1 in his assessment order. The appeal in respect of income as assessed to tax from undisclosed sources in

the amount of Rs. 14,67,137 was dismissed.

The appellant being still aggrieved of the order of CIT(A) challenged the same by filing an appeal before the Tribunal (Amritsar) Bench, which

appeal was dismissed by the said Tribunal on 30th Oct., 2008.

4. The appeal is creature of the statute and appeals can be filed only when statute permits same and can be filed on the terms and conditions

mentioned in statute. Appeals are being heard in terms of the Act of 1961 by superior authorities/forums. The order of the ITO has merged into the

order of CIT(A) and the order of the said appellate authority further got merged into the order of Tribunal. The said Tribunal having not been

impleaded as party respondent, maintainability of appeal is thus under cloud.

5. We have, however, heard the learned Counsel for the appellant on merits of the case and accordingly accord consideration to the same on its

merits. The facts as revealed by the record of the appeal are that the respondent No. 1 issued office letter dt. 7th Dec, 2006 which was

accompanied with notice u/s 142(1) of the Act of 1961, to the appellant and he was required to file return of income as also to explain the deposits

made in SB 3741 maintained by the appellant in J&K Bank, Zainakote main branch to the tune of Rs. 1,10,053 and in account No. 11125B

3279913 at J&K Bank Ltd., Poloview branch to the tune of Rs. 30,58,250. The appellant responded by attending the office of respondent No. 1

along with his counsel Shri Neeraj Karwal and furnished photostat copy of return of income bearing receipt No. 3328 filed by appellant assessee

before ITO 24(4) New Delhi. Along with the said return the appellant assessee had also submitted statement of total income and same was

declared to be at Rs. nil. The appellant assessee volunteered to get his assessment completed at Srinagar as was already done for the asst. yr.

2003-04. The appellant vide reply dt. 15th Dec, 2006 tendered explanation in respect of the amounts deposited in the above referred SB

accounts. The explanation of the appellant was accepted by respondent No. 1 to the extent of deposits made in account No. 3741. The

respondent No. 1 also accepted the stand of the appellant that the deposits in the other SB account are at Rs. 14,67,137 only. The appellant gave

an explanation that the deposits made in the SB account are the sale proceeds of land and some cash in the account is re-deposited in the account

out of the cash withdrawals from the same account during the assessment year. The respondent No. 1 in his assessment order has recorded a

finding that the appellant gave same facts and reasons for the asst. yr. 2003-04.

The appellant failed to produce any documentary evidence in support of his above stated contention that the deposits in the account are the sale

proceeds of the land allegedly sold by him at Narbal. The respondent No. 1 accordingly was not satisfied about the explanation tendered as it was

based on no evidence and accordingly ordered that the deposits to the extent of Rs. 14,67,137 are assessed to tax as income from undisclosed

sources, unexplained credits in the bank account. The income from the salary was estimated at Rs. 80,000 and appellant was ordered to pay tax

accordingly. The respondent No. 1 also ordered for initiation of penalty proceedings u/s 271(1)(c) for providing inaccurate particulars of income.'

6. This order of the respondent No. 1 was challenged by filing an appeal before the GIT(A) Jammu (headquartered at Amritsar). The appellant

submitted photo-copy of agreement to sell before CIT(A) to substantiate his claim that the amount found in the SB account at J&K Bank branch

Poloview was in fact the consideration amount received by him in lieu of the sale of the land at Narbal. The CIT(A) accepted the plea of the

appellant so far as it related to the assessment year to the extent of declaring the appellant to have received salary to the tune of Rs. 80,000 net

and ordered for deleting same from the assessment order. In respect of the other part of assessment order, the CIT(A) recorded his finding at para

3.3 which is reproduced as under:

I have considered the submission of the learned Counsel for the appellant, which have been filed during the course of appellate proceedings, by

Shri Robin Singh, accountant of M/s SSM Polytechnic & Engineering College, Baramullah carried on by the appellant to his capacity as 'chairman'

of the college. A copy of an agreement to sell has been filed by the appellant, in which the date and mode of receipt of the total amount of Rs. 28

lacs has not been mentioned and so the amount received of sale of land cannot be co-related with the dates of deposits in the bank account.

Moreover, this document is not too legible and is not even attested or certified by any authority and so it cannot be taken as a genuine document.

Further, this 'agreement to sell' is an additional evidence, which cannot be admitted in view of the judgment of Hon'ble Kerala High Court in the

case of C. Unnikrishnan Vs. Commissioner of Income Tax, , since the appellant's case is not covered by any of the four exceptions mentioned in

Rule 46A(1) of the IT Rules, 1962. Hence, the addition made by the AO by treating the amount of deposit of Rs. 1,46,137 as 'income from

undisclosed sources', is confirmed. This ground of appeal is dismissed.

7. The appeal of the appellant filed before the Tribunal, Amritsar Bench was also dismissed. The appellant is aggrieved of the said order and has

filed this appeal u/s 260A of the IT Act. The said provision of the Act of 1961 is reproduced as under:

260A Appeal to High Court-(I) An appeal shall lie to the High Court from every order passed in appeal by the Tribunal, if the High Court is

satisfied that the case involves a substantial question of law.

(2) The Chief CIT or the CIT or an assessee aggrieved by any order passed by the Tribunal may file an appeal to the High Court and such appeal

under this Sub-section shall be-

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief CIT or

CIT;

(b)

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this Sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the

appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which-(a) has not been determined by the Tribunal; or (b) has been wrongly determined by the

Tribunal, by reason of a decision on such question of law as is referred to in Sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the CPC, 1908, relating to appeals to the High Court shall, as far as may be, apply in

the case of appeals under this section.

8. In terms of Section 260A of the Act of 1961 an appeal shall lie to High Court, if the High Court is satisfied that the case involves a substantial

question of law and the appellant is duty bound in terms of the statute to precisely state the substantial question of law involved.

In terms of Sub-section (3) of Section 260A where the High Court is satisfied that a substantial question of law is involved it has to formulate that

question and appeal has to be heard on the question so formulated. The High Court has further power to hear, for reasons to be recorded, the

appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

Sub-section (7) of Section 260A provides the provisions of CPC, 1908 relating to appeals to the High Court shall, as far as may be, apply in the

case of appeals under this section.

9. It is settled position of law that appeal is creature of statute and appeal can be filed only when permitted by statute and can be filed on the

grounds mentioned in the statute.

In terms of Section 260A the High Court gets power to hear and decide an appeal only when a substantial question of law is involved. The Section

260A of the Act of 1961 thus, authorizes the High Court to hear an appeal only when substantial question of law is involved. The appellant has not

specifically formulated any substantial question of law in his memorandum of appeal, but at para (6) of the appeal, the appellant has stated that he

is aggrieved of the order of Tribunal Amritsar Bench and assails the same on the grounds which are taken in alternative and without prejudice to

each other and has further stated that substantial questions of law are involved and same need to be adjudicated upon by this Court. Appellant

however has not clearly delineated in the memo of appeal as to which are the substantial questions of law involved.

10. What would constitute substantial question of law has been stated by Supreme Court in case *Kashmir Singh Vs. Harnam Singh and Another*, ,

the paras 15 to 17 are reproduced as under:

15. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a

material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of

law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of

fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new

point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore,

depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not : the paramount

overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling

necessity of avoiding prolongation in the life of any lis. [see *Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.*, .]

16. The principles relating to Section 100, relevant for this case, may be summarized thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But, the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

17. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But, it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence'. It not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

11. Learned Counsel for the appellant in support of his appeal has submitted that the agreement to sell which was produced before first appellate authority has not been considered by the said authority which according to wisdom of the learned Counsel constitutes substantial question of law on which this appeal requires to be heard and decided. The perusal of the order of the CIT(A) as reproduced in this judgment demonstratively

shows that the said authority has considered the agreement to sell but has declined to rely upon the same on the valid reasons that the date and mode of receipt of total amount of Rs. 28,00,000 has not been mentioned in the said agreement to sell and has accordingly recorded a finding that the amount received allegedly for sale of land cannot be co-related with the dates of deposits in the bank account. The first appellate authority has while further dwelling upon the contention held that the document is not attested or certified by any authority so cannot be taken as genuine document.

The contention of learned Counsel for petitioner in view of the finding recorded in para (3.3) of the impugned order pales into insignificance and is rendered unsustainable in law. The document having been considered but rejected for the reasons recorded would demonstratively show that the affect of the agreement to sell on the proceedings has been considered by the first appellate authority. In these circumstances and in view of the law laid down by Supreme Court no substantial question of law is involved on this issue in this appeal. The learned Counsel for the appellant has further submitted that the first appellate authority has not considered the agreement to sell on the grounds that same is an "additional evidence" and not is covered by four exceptions mentioned in Rule 46A(1) of IT Rules, 1962. The agreement to sell, therefore, has not been considered. This argument requires to be rejected on the ground that the agreement to sell has been considered by first appellate authority and has recorded reasons that the dates and modes of receipt of amount of Rs. 28,00,000 having not been mentioned, so same cannot be co-related with the dates of deposits in the bank account. The first appellate authority has further held that the agreement to sell being an additional evidence is not covered by any of the four exceptions of the Rule 46A(1) of IT Rules, 1962. The fact of the matter is that the agreement to sell has been considered and for valid reasons recorded, not given any credence and peripherally also held not to be treated as additional evidence.

12. The learned Counsel for the appellant in support of his contention has referred to judgment of the Supreme Court titled Trustees of H.E.H.

Nizam's Supplemental FamRu Trust v. CIT (2000) 159 CTR 114 sc : (2000) 2 SCC 14, to canvass that the law laid down by Supreme Court in

the judgment applies to the facts of this case also. The facts of the case in Trustees of H.E.H. Nizam's case (supra) were that a return of income

was filed in which some notes/order were recorded, but were not communicated to the assessee. Subsequent notice u/s 148 was issued for filing

of return for same assessment year. Return was filed and assessment officer (ITO) accepted the return and completed assessment. The Supreme

Court in the facts of the case held that note of assessment officer was mere information of the assessment, first return was not closed, final order

having not been passed in the earlier return, reassessment proceedings were invalid.

13. The fact of this case are explicitly different from facts of the case of Trustees of H.E.H Nizam's (supra). In this case after issuance of notice for

filing of return, the appellant projected before the ITO and requested that the return filed by him at Delhi , photocopy whereof was produced

before ITO with request to proceed in the matter and complete the assessment proceedings. The ITO has passed orders on one single return filed

by the appellant. On facts the law laid down by Supreme Court is not applicable to this case.

14. For what has been stated above, no substantial question of law is involved in this case which would enable this Court to adjudicate upon the

same.

This appeal is accordingly dismissed.