IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.541 OF 2009

The Commissioner of Income Tax (Central – II),

4th Floor, Aayakar Bhavan, M.K. Road,

Mumbai – 400 020 ...Appellant.

Versus

M/s. Tips Industries P. Limited,

Plot No.A-18, Laxmi Industrial Estate,

Veera Desai Road, Andheri (West),

Mumbai – 400 058 ...Respondent.

Mr.Abay Ahuja for the appellant.

Mr.Deepak Tralshawala with Mr.V.S. Hadade for the respondent.

CORAM : Dr. D.Y. Chandrachud &
J.P. Devadhar, JJ.

DATE : 22nd January, 2010.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. This appeal is filed by the revenue under Section 260A of the Income Tax Act, 1961. According to the revenue, the following substantial questions of law arise out of the order passed by the Income Tax Appellate Tribunal on 31st January 2004 in Appeal No. IT (SS) A No.337/Mum/2003 :-

i) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition of Rs.3.2 lacs and Rs.3.12 lacs being unaccounted expenses under Section 69C especially since the assessee was not able to explain the source of the expenditure nor co-relate the said expenditure as relating to the earlier than A.Y. 1999-2000 ?

ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in deleting the addition of Rs.6.45 crores in spite of the fact that the addition were made on correct application of the seized documents which were in the handwriting of the Assessee and the seized material was sufficient to justify the additions and the presumption under Section 132(4A) not being rebutted by the Assessee ?

iii) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition of Rs.4 lacs although the assessee could not explain the source of expenditure of the unaccounted income not recorded in the cash book and also because the expenditure was contrary to public policy ?

iv) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in law in deleting the addition of Rs.68 lacs in relation to the agreement with Weston Components Limited being unexplained expenditure which were not recorded in the cash book of the Assessee and also being against public policy nor was the presumption under Section 132(4A) rebutted by the Assessee ?

v) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in law in allowing the deduction under Section 80IA of the Act mainly on the grounds that the issue was not a result of the block assessment even though the dis-allowances were mainly based on the seized materials at the time of search operations and survey thereafter and also in reliance upon Section 158B(b) ?

2. The assessment year involved herein is the block period 1-4-1989 to 27-7-1999.

3. The respondent (assessee for short) is engaged in the manufacture of blank as well as pre-recorded audio cassettes of motion pictures and musical software under the trade name and logo `TIPS'. The business premises of the assessee are situate at Andheri, Palghar, Silvassa etc.

4. A search and seizure action under section 132 of the Income Tax Act, 1961 (1961 Act for short) was initiated at the business premises of the assessee as well as the residential premises of the assessee's group concerns on 27th July 1999. During the course of search, loose papers (23 pages) concealed behind a photo-frame were seized from the residence of Shri Kumar Taurani, a director of the assessee Company. The seized papers, prima facie related to the unaccounted business transactions of Shri Kumar S. Taurani, Shri Ramesh S. Taurani, Tips Films Private Limited and Tips Industries Private Limited.

5. During the course of search, statement of Ramesh S. Taurani, director of the assessee company, was recorded wherein the said Mr. Ramesh S. Taurani admitted that the transactions noted in the seized papers were not recorded in the regular books and that the transactions noted in the seized papers related to the period from January to March 1998.

6. In the light of the seized materials, notice under Section 158BC of the 1961 Act was issued to the assessee calling upon it to show cause as to why the unaccounted transactions noticed from the seized materials should not be taxed in the block assessment. Thereupon, the assessee filed its block return of income, declaring the undisclosed income for the block period at Rs. NIL.

7. In response to the questionnaire forwarded by the assessing officer during the course of block assessment proceedings, Mr. Kumar Taurani answered each of the questions and contended that no additions be made in the block assessment.

8. Rejecting the contention of the assessee, the assessing officer passed the block assessment order on 28th September 2001 making various additions as more particularly set out therein.

9. Being aggrieved by the aforesaid order, the assessee filed an Appeal before the Commissioner of Income Tax (Appeals), who by his order dated 27th March 2003 upheld the assessment order. Being aggrieved by the aforesaid order, the assessee filed further appeal before the Income Tax Appellate Tribunal and the Tribunal by the impugned order dated 31st January 2004 partly allowed the appeal of the assessee. Being aggrieved by the aforesaid order, the present appeal is filed by the revenue under section 260A of the 1961 Act.

10. The basic argument of the revenue is that the order of the Tribunal is totally perverse, because the concurrent findings recorded by the assessing officer and upheld by CIT (A) are sought to be reversed by the Tribunal by totally ignoring the material evidence on record and totally ignoring the statements recorded during the course of search, which have great evidential value. It is submitted that in the seized papers it is mentioned that the unaccounted expenditure was incurred in "January to March", but the year in which such expenditure was incurred is not mentioned. In such a case, it was reasonable to assume that such expenditure was incurred in the year in which the search took place i.e. in A.Y. 1999-2000. It is contended that the Tribunal erroneously arrived at the conclusion that there is no material to support the contention of the revenue that the unaccounted expenditure pertains to A.Y. 1999-2000. It is contended by the revenue that in view of the

proviso to Section 69C inserted with effect from 1-4-1999 (relevant to A.Y. 1999-2000), the unexplained expenditure which is deemed to be the income of the assessee cannot be allowed as a deduction under any head of income if the assessee fails to explain the source of such expenditure. It is contended that to overcome this difficulty, the assessee has sought to claim that the expenditure was incurred during A.Y. 1998-1999 without any justification.

11. Relying upon a decision of the Calcutta High Court in the case of C.I.T. V/s. Bhagwati Developers P. Limited reported in 261 ITR 658 (Cal), it is contended on behalf of the revenue that in the present case, since the assessee has failed to explain, satisfactorily the source of unaccounted expenditure, the additions made were proper and the Tribunal ought not to have deleted the additions made by the assessing officer. Reliance is also placed by the counsel for the revenue on the decision of this Court in the case of Rameshchandra & Co. V/s. C.I.T. [168 ITR 375 (Bom)], decision of the Karnataka High Court in the case of C.I.T. V/s. P.R. Metrani HUF [251 ITR 244 (Karnataka)], decision of the Kerala High Court in the case of Kunhambu (v) & Sons V/s. CIT [219 ITR 235 (Ker)] in support of his contention that the statements recorded during the search has evidential value and in the absence of any retraction of the statements recorded during the course of search, the Tribunal ought not to have disturbed the concurrent finding of fact recorded by the assessing officer and the CIT (A).

12. The learned counsel for the assessee on the other hand submitted that the Tribunal, on appreciation of the evidence on record and the explanation given by the assessee, arrived at a finding that the additions / dis-allowance made by the

authorities below are not sustainable in law. He submitted that in the present case, no efforts have been made by the assessing officer to rebut the contention of the assessee that the expenditure noted in the seized papers inter alia related to the amounts given to the employees / cashier. In these circumstances, the explanation given by the assessee being reasonable, the Tribunal accepted the contention of the assessee. Therefore, the decision of the Tribunal being a finding of fact recorded by a highest fact finding authority under the 1961 Act ought not to be disturbed and the appeal filed by the revenue ought to be dismissed.

13. We have carefully considered the rival submissions.

14. The first question raised by the revenue relates to deletion of Rs.3.2 lacs and Rs.3.12 lacs being additions made by the A.O. under Section 69C on the ground that the assessee has failed to explain the source of the expenditure noted at pages one and two of the seized papers. The assessee had contended before the A.O. that the above amounts represented the unaccounted wages paid to the employees during January to March 1998. It is apparent from the assessment order that no efforts have been made by the A.O. to verify the above explanation given by the assessee. The assessing officer has presumed that the above expenditure might have been incurred in the year of search relating to A.Y. 1999-2000 and while making additions on the basis of seized material, disallowed the expenditure by applying the proviso to Section 69C of the 1961 Act.

15. It is pertinent to note that the Tribunal has recorded a finding that the approach of the assessing officer in disbelieving the claim of the assessee is self

defeating, because, if the notings are not the expenditure incurred by the assessee then no addition of undisclosed income could be made in the first instance. The Tribunal has held that having made addition on the basis that the unaccounted expenditure was incurred out of the unaccounted income, it was not open to the assessing officer to hold that the source of expenditure was not explained, especially when the seized papers itself contain the names of the persons who are claimed to be the employees of the assessee. Moreover, admittedly the unaccounted expenditure noted in the seized papers relates to the assessee as well as Tips Films Private Limited. In the case of Tips Films Private Limited, the assessing officer has accepted the contention of the assessee therein that the said expenditure relates to A.Y. 1998-1999. Therefore, there was no reason for the assessing officer to hold that in the case of the assessee the unaccounted expenditure was incurred in A.Y. 1999-2000. The fact that the assessing officer, in the case of Tips Films Limited has recorded a finding that the expenditure was incurred for the purposes of business in AY 1998-99 cannot be said to be distinguishing feature so as to hold that in the case of the assessee the expenditure was incurred in AY 1999-2000. In other words, in the absence of any material on record, it was not open to the A.O. to hold that the expenditure incurred by Tips Films Pvt. Ltd. related to AY 1998-99 and the expenditure incurred by the assessee related to AY 1999-2000. Similarly, there is no material on record to suggest that the persons whose names are noted in the seized papers are not the employees of the assessee. In these circumstances, the finding recorded by the Tribunal that the amounts in question represent the amount paid by the assessee to its employees in AY 1998-99 cannot be faulted. Consequently, the first question raised by the revenue cannot be said to give rise to any substantial question of law.

16. The second question raised by the revenue relates to the Tribunal deleting the addition of Rs.6.5 crores made by the assessing officer. The counsel for the revenue has fairly stated that he is not pressing the said question as the decision of the Tribunal is based on appreciation of evidence.

17. The third question raised by the revenue relates to the deletion of the addition or Rs.4 lacs. The addition of Rs.4 lacs was made by the A.O. on the basis of the noting recorded in the seized paper (page 7) which read as follows "*Given 17/4 Desai Cashier 4/-*". In the statement recorded during the course of search on 28-7-1989, Mr.Ramesh Taurani had stated that the particulars at page 7 of the seized paper represents an account of the amounts paid to various parties. During the course of assessment proceeding the assessee contended that the above noting simply means giving Rs.4 lacs to the cashier Mr. Desai out of Rs.5 lacs withdrawn from the bank. The A.O. rejected the contention of the assessee and noticing that the said transaction was not recorded in the cash book, the assessing officer made addition of Rs.4 lacs as unaccounted receipts. The Tribunal noted that the explanation given by the assessee during the course of assessment proceedings is at variance with the statement recorded during the course of search. However, on verifying that the assessee had in fact withdrawn Rs.5 lacs from the bank on the relevant date, the Tribunal held that the explanation given by the assessee was reasonable and deleted the addition even though the transaction was not recorded in the cash book. Before us, it is contended on behalf of the revenue that the statement recorded under Section 132(4) of the 1961 Act has great evidential value

and therefore, the Tribunal ought not to have deleted the addition of Rs.4 lacs made by the assessing officer.

18. We see no merit in the above contentions. As rightly held by the Tribunal, the statement recorded during the course of search does not even remotely suggest that the amount given to Mr.Desai (cashier) was out of the undisclosed income of the assessee. What was stated during the course of search was that the notings on page 7 of the seized papers represent amounts given to various persons. Therefore, once the cash withdrawal of Rs.5 lacs from the bank by the assessee is established, irrespective of the entry in the cash book, it was possible to reasonably hold that out of the cash withdrawal of Rs.5 lacs, an amount of Rs.4 lacs was given to cashier Mr. Desai. In such a case, it cannot be said that the decision of the Tribunal is perverse or contrary to the evidence on record. In any event, the decision of the Tribunal does not give rise to any substantial question of law.

19. The fourth question relates to deletion of the addition of Rs.68 lacs made on the basis of the notings contained in Page 13 of the seized paper which reads thus :-

" Page 13 – Ravi

21/4	11.00
22/4	05.00
24/4	04.00
27/4	05.00
28/4	05.00
29/4	05.00
01/5	15.00
07/5	10.00
11/5	05.00
17/5	03.00 "

20. During the course of assessment proceedings, the assessee explained that the name `Ravi' refers to Mr.Ravi Vachani, Director of Western Components Limited and the above notings merely represented the payment schedule based on the negotiation between Ravi Vachani and the assessee for sale of the entire music rights for a total consideration of Rs.68 lacs. The assessee contended that the said negotiations did not materialize and subsequently on 27-4-1999 an agreement was arrived at for sale of the music rights at Rs.60 lacs. Producing a copy of the agreement dated 27-4-1999 before the assessing officer, the assessee contended that since the notings contained in the seized papers did not materialise no addition can be made on the basis of the above notings. Rejecting the contention of the assessee, the assessing officer made additions of Rs.68 lacs as unexplained expenditure. The Tribunal deleted the addition on the ground that the written agreement with Weston Components Limited produced by the assessee gave credence to the explanation given by the assessee that the notings represented the payment schedule and not the actual payment. Moreover, the Tribunal noticed that the ledger account of the assessee is credited by Rs.60 lacs as per the agreement dated 27-4-1999. The Tribunal has held that the assessee has properly explained the reasons as to why the agreement was entered into for Rs.60 lacs and not for Rs. 68 lacs and hence the addition based on suspicion cannot be sustained. The contention of the revenue, before us, is that in the absence of the assessee producing the first agreement the Tribunal ought not to have interfered with the concurrent findings recorded by the assessing officer and the CIT (A) which were based on the notings contained in the seized papers.

21. We see no merit in the above contentions. The explanation given by the assessee that the notings on page 13 of the seized paper represented the payment schedule of an agreement yet to be executed is corroborated by the fact that the assessee, in fact has later on entered into an agreement with the Weston Components Limited for sale of music rights which is duly recorded in the books maintained by the assessee. There is no material on record to suggest that over and above the agreement dated 27-4-1999, the assessee had entered into an agreement with Weston Components Ltd. or any other person which could be connected to the notings contained in the seized paper. In these circumstances, the explanation given by the assessee being reasonable and possible, the decision of the Tribunal in accepting the contention of the assessee cannot be faulted. As held by the Apex Court in the case of P.R. Metrani V/s. CIT (287 ITR 209), the presumption under Section 132(4A) is a rebuttable presumption and in the present case, the assessee has successfully rebutted the presumption. In these circumstances, the fourth question raised by the revenue cannot be said to be a substantial question of law arising out of the order of the Tribunal.

22. The last question raised by the revenue relates to the Tribunal deleting the proportionate dis-allowance of deduction under Section 80-IA of the Act made by the A.O. On verification of the seized papers, the A.O. noticed that the assessee was at times getting the manufacturing work done on job work basis from other units. The assessee explained that whenever there was excess purchase order, the assessee used to supply raw materials and get the manufacturing done from the other units of the assessee. It was contended that both the units constituted the integral part of the assessee and therefore, no disallowance could be made in the

block assessment especially when the seized material does not suggest that the transactions were such which would not be disclosed in the regular assessment. The A.O. rejected the contention of the assessee on the ground that 80IA deduction would not be available to the extent the goods are manufactured from outside agencies on job work basis.

23. Whether deduction under section 80IA is available only on production made in the assessee's own unit or such deduction is available even to the production obtained from outside agencies on job work basis was the question raised in the assessee's own case even in the earlier assessment years for AY 1993-94, 1995-96 to 1998-99 (see page 37 of the appeal paper-book). Therefore, when the assessee has been claiming deduction under section 80IA even on goods manufactured from outside agencies, there is no reason to suspect that the assessee would suppress the above facts in the assessment years in question and consequently make disallowance under section 80IA of the Act in the block assessment order.

24. The A.O. had also made disallowance of deduction under section 80IA of the Act for AY 1999-2000 and 2000-01 on the ground that the workers working in the Nandini Unit of the assessee were less than the minimum workers specified under section 80IA(2) of the Act. The Tribunal has accepted the explanation given by the assessee that the Nandini Unit and the Silvassa Unit form integral part of the assessee and therefore taking the employees in both the units the condition set out in section 80IA(2) stands complied with. The Tribunal further held that no case was made out for making disallowance in the block assessment. Even before us, the

learned counsel for the revenue could not point out the material seized during search which according to the A.O. were not or would not have been disclosed by the assessee. If there is any discrepancy in the regular books maintained by the assessee, then the same is required to be dealt with in the regular assessment and not in the block assessment. Accordingly, we hold that the last question raised by the revenue cannot be said to be a substantial question of law arising out of the order of the Tribunal. It is not necessary for us to deal with each of the decisions relied upon by the counsel for the revenue as there is no dispute as to the ratio laid down therein and in the facts of the present case, the facts and evidence appreciated by the Tribunal does not suffer from any infirmity.

25. In the result, we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

(J.P. Devadhar, J.) (Dr. D.Y. Chandrachud, J.)