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M/S. ANIS AHMAD AND SONS

v.

COMMISSIONER OF INCOME TAX
(APPEALS), KANPUR & ANR.
(Civil Appeal No. 582 of 2008)

B

JANUARY 22, 2008

(P.P. NAOLEKAR AND LOKESHWAR SINGH PANTA, JJ.)

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Income Tax Act, 1961 – s.131 – Assessment Year 1984-85 – Assessee filing return as a Commission Agent – But Assessing Authority treated assessee as Trader and accordingly assessed taxable income – Matter went upto Appellate Tribunal which remanded the matter to Assessing Authority – On remand, Assessing Authority issued summons to ten traders under s.131(1) – Five traders appeared and gave evidence in favour of assessee – Other five traders residing outside the State did not appear as they could not be served with the summons, for which, Assessing Authority drew adverse inference against the assessee and passed order treating it to be a Trader – Correctness of – Held: Not correct – Assessee cannot be held responsible for non-appearance of the five traders residing outside the State – It led satisfactory evidence that its business is only that of the Commission Agent and not that of a Trader – Moreover, for earlier assessment year, Assessing Authority had accepted assessee as Commission Agent.

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Assessee-appellant filed income tax return for the Assessment year 1984-85 as a Commission Agent for Traders of raw hides and skins. The Assessing Authority, however, treated assessee as a 'Trader' and accordingly assessed its taxable income. The matter went upto the Appellate Tribunal, which remanded the matter back to the Assessing Authority. On remand, the Assessing Authority issued summons to ten traders under section

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131(1) of the Income Tax Act, 1961. Five traders appeared and gave evidence in favour of the assessee, but the other five traders, who were residing outside the State, did not appear as they could not be served with the summons. The Assessing Authority drew adverse inference against the assessee by treating its transactions with the absentee traders as having been done by the assessee in the capacity of a Trader and not as a Commission Agent. Assessee filed appeal which was allowed by the Commissioner of Income Tax (Appeals). The Appellate Tribunal, however, upheld the decision of the Assessing Authority. High Court concurred with the findings recorded by the Assessing Authority as confirmed by the Appellate Tribunal and dismissed the appeal *in limine*.

In appeal to this Court, the contention of the assessee is that for non appearance of the traders summoned by the Assessing Authority, no fault could have been laid upon the assessee and the Assessing Authority, the Appellate Tribunal as well as the High Court was not justified in drawing adverse inference against the assessee holding it to be a 'Trader'.

Allowing the appeal and restoring the order passed by the CIT(Appeals), the Court

HELD: 1.1. For the year 1983-84, the Assessing Authority had accepted the claim of the assessee-appellant dealing in the business of hides and skins as 'a Commission Agent'. The assessee filed a chart of payments made to the purchasers by the traders through the assessee acting as a Commission Agent. The five traders, who appeared before the Assessing Authority, supported the claim of the assessee to be 'a Commission Agent' and not 'a Trader' and the Assessing Authority accepted their evidence holding the assessee as a Commission Agent in respect of the transactions conducted with them by the traders. The assessee could not be held responsible for non-appearance of those five

A traders to whom the summons were issued by the
Assessing Authority, as they are residing outside the State
of U.P. For non-appearance of those traders, no adverse
inference ought to have been drawn by the authorities
below and the assessee has led satisfactory evidence that
B its business is only that of the Commission Agent and
not 'a Trader' dealing in the goods. [Para 12] [1028-A, B,
C, D, E]

1.2. The subject-matter of assessment for the year
1984-85 was opened by the Revenue after a lapse of about
C 10-11 years holding the assessee as 'Trader' in respect of
dealers living outside the State. The assessee could not
be treated unequally between those traders who had
appeared before the Assessing Authority and supported
the claim of the assessee and on the contrary drawing
D adverse inference against the assessee for non-
appearance of other five traders to whom summons of
the Assessing Authority could not be served. On this
ground itself, the order of the Assessing Authority cannot
be found reasonable, tenable and justified. The Assessing
E Authority for the assessment year 1983-84 had accepted
the claim of the assessee having acted as Commission
Agent in respect of the same articles which were brought
by the sellers to the *Arhatdaars* (Commission Agents) in
the *Mandi* (Market) for sale. [Para 12] [1028-E, F, G, H;
F 1029-A]

1.3. The Commissioner of Income Tax was right in
holding the assessee as an '*Arhatiya*' (Commission Agent)
for the year 1984-85 and not as 'trader' as held by the
Assessing Authority and accepted by the Income Tax
G Appellate Tribunal as well as by the High Court. [Para 13]
[1029-A, B]

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 582
of 2008.

H From the final Judgment and Order dated 1.11.2004 of

the High Court of Judicature at Allahabad in I.T.A. No. 94 of 2004. A

Subramonium Prasad, Varuna Bhandari Gugnani and R.C. Kohli for the Appellants.

T.S. Doabia, V. Gulati and B.V. Balaram Das for the Respondents. B

The Judgment of the Court was delivered by

LOKESHWAR SINGH PANTA, J. 1. Leave granted.

2. This appeal has been filed by the appellant-firm against the judgment and order dated 01.11.2004 passed by the High Court of Judicature at Allahabad in Income Tax Appeal No. 94/2004. By the impugned judgment, the High Court dismissed the appeal of the appellant *in limine* and affirmed the order dated 15.01.2004 of the Income Tax Appellate Tribunal, Lucknow Bench. C D

3. The facts in short are as under:-

The appellant-firm (hereinafter referred to as "the appellant-assessee") is carrying on business as Commission Agent in raw hides and skins. The raw hides and skins comprises of buffalo hides, cow hides, *katta* and *katai* or goat and sheep skins. The goods are brought in the *Mandi* (market) by *Vyaparis* (traders) through trucks. These *Vyaparis* go to different *Arhatdaars* (Commission Agents) of their choice where they get the goods counted. The amount is first entered in the *Bilti* Register, after that bundles are prepared and each *Vyapari* is given his Lot Number. Sometimes, the *Vyaparis* requested the *Arhatdaars* (Commission Agents) to pay the freight charges of the trucks. The *Arhatdaar* opens account of each *Vyapari* in his Ledger Book where numbers of different types of pieces of raw hides are entered without entering the money value thereof. The *Vyaparis* sometimes stayed in the *Mandi* for 4 or 5 days to study the market themselves and then they would give instructions to *Arhatdaars* for selling their goods. E F G

4. When goods are sold, the sale price minus commission and other charges are credited in the account of the *Vyaparis* H

A and commission charges or other charges receivable are credited in the relevant accounts and full sale price of the goods is debited to the account of the purchaser. The *Arhatdaars* shall maintain full details such as weight rate, the name of *Vyaparis* whose goods are sold and name of the purchasers in *Taul/*
B *Shumar Bahi*. This book contains original entry. Thereafter, entries are passed through *jakar* and posted in relevant accounts of ledger. This practice is being followed by each and every *Arhatdaar*. The *Vyaparis* paid the balance amount generally in
C cash, in installments or full after receipt of the amount from the customers. The rate of commission on different type of hides and skins is settled by the Association and no *Arhatdaars* can charge anything more on that account.

5. The appellant-assessee filed income tax return for the assessment year 1984-85 declaring Rs. 1,32,830/- as its total
D income as Commission Agent. The Income Tax Officer, Circle –II, Kanpur, *vide* assessment order dated 13.03.1987 framed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) has treated the appellant-assessee as ‘a Trader’ and not as ‘a Commission Agent’ and assessed its
E total income Rs.4,06,810/- for payment of income tax. He issued penalty notice under Section 271(1)(a) and 271(1)(c) and 273(2)(a) of the Act, separately.

6. Being aggrieved, the appellant-assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The
F Commissioner of Income Tax *vide* order dated 04.04.1988 partly allowed the appeal. The appellant-assessee and the respondent–Income Tax Department feeling aggrieved against the order of the Commissioner of Income Tax filed two separate appeals before the Income Tax Appellate Tribunal. The Tribunal
G by order dated 19.08.1993, without going into the merits of the case, set aside the assessment order and remanded the file back to the Assessing Officer to re-scrutinise the entire accounts after giving the appellant-assessee an opportunity of being heard and also giving the appellant-assessee an opportunity of filing
H any evidence in support of its claim that there was no

discrepancy in its accounts as pointed out by the Assessing Officer or as found out by Commissioner of Income Tax (Appeals) in his order dated 04.04.1988.

7. On remand, the Assessing Officer issued summons to ten traders under Section 131(1) of the Act. In response to the summons, five traders appeared and gave evidence in favour of the appellant-assessee. The remaining five traders did not appear because they could not be served with the summons as they were residing outside the State of U.P. The Assessing Authority has drawn adverse inference against the claim of the appellant-assessee and assessed Rs.2,30,704/- as total income for the assessment year 1984-85 treating the transaction with the absentee traders as having been done by the appellant-assessee in the capacity of 'Trader' and not as 'Commission Agent'.

8. The appellant-assessee has assailed the impugned order dated 29.03.1996 of the Assessing Authority before the Commissioner of Income Tax (Appeals), who *vide* his order dated 09.06.1997 set aside the said order by holding as follows:-

"The appeal relates to a fairly old year, for which reason the scope for enquiry has been reduced, now. In my opinion, it was rather arbitrary to treat the appellant as dealer in respect of outside U.P. parties who did not appear before the A.O. while accepting him as an 'Arhatiya' in respect of those who appeared before the A.O. The A.O. did not get any enquiry done from the said 'Arhat Market'. Therefore, in my opinion, it is no longer desirable to stretch this dispute. Accordingly, the A.O. is directed to accept the appellant as an 'Arhatiya' for this year and also to accept the profit from commission shown by him"

9. The Revenue, feeling aggrieved, preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal by its order dated 15.01.2004 allowed the appeal and held that the appellant-assessee has failed to produce any evidence that

A the transactions, in question, were not conducted by the appellant–assessee as ‘Vyapari’ but the transactions were conducted on commission basis. Being aggrieved against the said order, the appellant–assessee filed Income Tax Appeal before the High Court. The High Court, as noticed above, has
B concurred with the findings recorded by the Assessing Authority as confirmed by the Appellate Tribunal and dismissed the appeal *in limine*. Now, the appellant–assessee is before this Court.

C 10. We have heard Mr. Subramaniam Prasad, the learned counsel for the appellant–assessee and Shri T.S. Doabia, learned Senior Advocate for the respondents, and with their assistance examined the material on record. The learned counsel for the appellant–assessee submitted that the High Court has committed grave error of fact and law in dismissing
D the appeal *in limine* without proper appreciation of the facts and legal proposition of law. According to him, for non-appearance of the traders summoned by the Assessing Authority, no fault could have been laid upon the appellant–assessee and the Assessing Authority, the Appellate Tribunal
E as well as the High Court are not justified in drawing adverse inference against the appellant–assessee holding it to be ‘Trader’ in relation to the transactions conducted by the appellant–assessee of the same goods in the same manner as was conducted with the traders whose evidence was accepted by
F the Assessing Authority.

11. *Per contra*, the learned senior counsel appearing on behalf of the respondents has sought to support the order of the Assessing Authority which has been confirmed by the Appellate Tribunal as well as by the High Court, contending that this Court
G in exercise of its discretionary jurisdiction under Article 136 of the Constitution of India shall be slow in interfering the well-reasoned orders of the authorities and the High Court based upon the proper appreciation of the facts in issue and the law.

H 12. Having considered the respective contentions of the

learned counsel for the parties and having gone through the entire material on record, we are of the view that the impugned judgment and order of the High Court cannot be sustained. The record reveals that for the year 1983-84, the Assessing Authority had accepted the claim of the appellant-assessee dealing in the business of hides and skins as 'a Commission Agent'. The appellant-assessee filed a chart of payments made to the purchasers by the traders through the appellant-assessee acting as a Commission Agent. The five traders, who appeared before the Assessing Authority, have supported the claim of the appellant-assessee to be 'a Commission Agent' and not 'a Trader' and the Assessing Authority has accepted their evidence holding the appellant-assessee as a Commission Agent in respect of the transactions conducted with them by the traders. The appellant-assessee could not be held responsible for non-appearance of those five traders to whom the summons were issued by the Assessing Authority, as they are residing outside the State of U.P. For non-appearance of those traders, no adverse inference ought to have been drawn by the authorities below and the appellant-assessee has led satisfactory evidence that its business is only that of the Commission Agent and not 'a Trader' dealing in the goods. Now, the subject-matter of assessment for the year 1984-85 has been opened by the Revenue after a lapse of about 10-11 years holding the appellant-assessee as 'Trader' in respect of dealers who are now living outside the State of U.P. The appellant-assessee could not be treated unequally between those traders who had appeared before the Assessing Authority and supported the claim of the appellant-assessee and on the contrary drawing adverse inference against the appellant-assessee for non-appearance of other five traders to whom summons of the Assessing Authority could not be served. On this ground itself, the order of the Assessing Authority cannot be found reasonable, tenable and justified. As noticed above, the Assessing Authority for the assessment year 1983-84 had accepted the claim of the appellant-assessee having acted as Commission Agent in respect of the same articles which were brought by the sellers

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A to the *Arhatdaars* in the *Mandi* for sale.

13. In this view of the matter, the Commissioner of Income Tax is right in holding the appellant-assessee as an '*Arhatiya*' (Commission Agent) for the year 1984-85 and not as 'trader' as held by the Assessing Authority and accepted by the Income Tax Appellate Tribunal as well as by the High Court.

14. In the result, for the foregoing reasons, this appeal is allowed and the order of the High Court dated 01.11.2004 passed in I.T.A. No. 94/2004 upholding the order dated 15.01.2004 of the Income Tax Appellate Tribunal, Lucknow Bench, in ITA No. 1170/Ald/1997 for the Assessment Year 1984-85 and the original order of the Income Tax Officer dated 29.03.1996 holding the appellant-assessee as 'Trader' and not 'Commission Agent' are quashed and set aside and as a result thereof, the order dated 09.06.1997 recorded by the Commissioner of Income Tax (Appeals) II Kanpur, in Appeal No.CIT(A)II/5/ITO.2(7)/96-97/67 shall stand restored. The parties, however, are left to bear their own costs.

B.B.B.

Appeal allowed.

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