

आयकर अपीलीय अधीकरण, न्यायपीठ – “ए” , कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

(समक्ष) श्री महावीर सिंह, न्यायीक सदस्य एवं श्री सी.डी.राव, लेखा सदस्य ,)
[Before Sri Mahavir Singh, J.M. & Sri C.D. Rao, A.M.]

आयकर अपील संख्या / I.T.A No. 959/Kol/2010
Assessment Year : 2006-2007

Income Tax Officer, Ward-8(3), Kolkata -vs.- M/s. Pacific Apparels Limited, Kolkata
(अपीलार्थी /Appellant) (प्रत्यर्थी/Respondent)

For the Appellant (अपीलार्थी) : Shri Ranjit Kumar Saha, D.R.

For the Respondent (प्रत्यर्थी) : S/Shri R.P. Agarwal & M. Katuruka, AR.

सुनवाई की तारीख/Date of Hearing : 02.01.2012

घोषणा की तारीख/Date of Pronouncement : 21.02.2012

आदेश/ORDER

Per Shri C.D. Rao, Accountant Member/ श्री सी.डी.राव, लेखा सदस्य :-

This appeal filed by the Revenue is against the order of Id. Commissioner of Income-Tax-VIII, Kolkata dated 26.02.2010 for the assessment year 2006-07. The only issue raised by the Revenue's appeal relating to the deletion of addition of Rs.39,00,000/- on account of share application money.

2. Brief facts of the issue are that while during the scrutiny assessment, the Assessing Officer observed that out of Rs.40,68,500/- received by the assessee towards share capital account, an amount of Rs.39,00,000/- relating to the share application money in respect of M/s. Shree Enterprises and M/s Anuj Traders has doubted the transactions and after issuing summons under section 131 and after recording statement of assessee as recorded at pages 2 & 3 of the assessment order finally concluded at pages 4 & 5 as under :-

“This case is totally covered by the decision of the Hon'ble Supreme Court in the case of McDowel & Co. Ltd. –vs.- CTO (1985) 154 ITR 148. The assessee relied on the decision of the Hon'ble Apex Court in the case of CIT –vs.- Orissa Corporation Pvt. Ltd. 159 ITR 78. But here, summons under section 131 was issued, copies were given to the assessee for cross examination and it is seen that Sri Ashok Kr. Sharma is not traceable at the address given. All the Bank accounts are closed now. Sri Ashok Kr. Sharma did not file any return for the

AY 2006-07 showing any hint of the huge cash deposit in it's a/c. with Kotak Mahindra Bank in the name of M/s. Anuj Traders and Shree Enterprises.

Shri Ashok Kr. Sharma is not traceable, so whose money is this? Here, the assessee is the beneficiary because at last, the money has been transferred to it's a/c. and the assessee has withdrawn the money from it's a/c.

From the chart as given above, it is clear that the cash were deposited to the bank and withdrawn from the same branch simultaneously. This can only happen when there is a direct relation between the cash depositor and the cash withdrawer. All the above deposit and withdrawn have been done after 4-00 p.m. i.e., after the normal banking hours of working. Moreover, it is seen that the A/c. of M/s. Anuj Traders and Shree Enterprises are opened with 'zero' balance. It is very uncommon where bank A/c. is opened without any deposit. This can only happen when there is other A/c. in the same bank of the same group and there is some influence over the bank to open those A/cs. From the copies of the A/c. opening forms of the above two A/cs., it is seen that there is clearly written about some third party funding. But the branch authority, now stated that as the A/cs. are opened with 'zero' balance, there was no third party funding and if there be any third party, being such an old case there is nothing written regarding who is the third party. It can only happen when there are some group companies maintaining their A/c. with the same bank. So, it is clear that Sri Ashok Kr. Sharma, somehow got a PAN and his identity was used to open bank A/c in different names with the help of its trade license and as huge cash was deposited in that bank in those A/cs. which ultimately transferred to the assessee's bank A/c as share application money.

So the assessee's case is totally covered by the decision of the Hon'ble Calcutta High Court in the case of Hindusthan Tea Trading Co. Ltd Vs. CIT (2003) 263 ITR 289.

In view of the above, the claim of share application received Rs.39,00,000/- and of cash withdrawn by the assessee company through it's a/c. through the A/c. of M/s. Anuj Traders & Shree Enterprises are added to the total income of the assessee, being income from undisclosed sources, which has been transacted through a colourful transaction with the sole intention to avoid taxes. In view of the above, Rs.39,00,000 is added to the total income of the assessee u/s.68 of the IT Act, 1961".

3. On appeal, after taking into consideration of the various submissions, which were recorded by Id. CIT(Appeals) in his order at pages 14-16 finally deleted the addition made by the Assessing Officer by observing that at pages 18 & 19 of his order as under :-

"Hon'ble Delhi High Court in the case of Divine Leasing & Finance Limited [2008] 299 ITR 268 (Delhi) has considered the previous judicial decisions in this matter.

In deciding the issue, their Lordship observed, “In this analysis, a distillation of the precedents yields the following propositions of law in the context of section 68 of the Income-tax Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc., it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; and (7) the Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation.”

There is no imputation in the assessment order that the basic documents which have been mentioned in the Hon’ble High Court’s order cited above have not been submitted by the appellant before the AO. No dispute has been raised in the assessment order that the share applicant has an identity of its own and proof of such identity has been submitted before the AO. The fact that transactions have taken place through banking channels, thereby attesting to their genuinity, is mentioned by the AO himself in his order. It is also to be noted that the AO mentions in Page-3 of the assessment order that, the subscriber, being M/s. Shalini Properties & Developers Pvt. Ltd. is the holding company of the appellant. No question as to creditworthiness of the subscribers has been raised by the AO in the assessment order.

In the above scenario, in my opinion, the addition made by the A.O. is not sustainable in law.

In this context it would be relevant to refer to the Hon’ble Supreme Court’s decision in the case of CIT Vs. Lovely Exports [216 CTR 195] wherein their Lordships observed “Can the amount of share money be regarded as undisclosed income under Sec. 68 of I.T. Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their Individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment”.

The Hon’ble Apex Court’s observation is practically the last word on the subject. It should also be mentioned that the above legal proposition has been followed by the Hon’ble ITAT, Kolkata in its orders in the case of M/s. Bear Bull Distributors (P) Ltd., (ITA No.1731/Kol/2008, & ITA No. 1652/Kol/2008), M/s. Howrah Gases Ltd. (ITA No. 270/Kol/2009), and M/s. Yashwi Securities Pvt. Ltd. (ITA No. 1276/Kol/2008). Keeping in view these judicial

pronouncements, I am satisfied that the conditions for invoking Section 68 are not satisfied in this case. This ground of appeal is accordingly allowed”.

Aggrieved by the order of Id. CIT(Appeals), Revenue is in appeal before the Tribunal.

4. At the time of hearing before us, Id. D.R. appearing on behalf of Revenue by referring to the observations made by the Assessing Officer in the assessment order and to the table given by the Assessing Officer at page 4 as under -

Cash deposit on 25.11.2005 at Park Street Branch of Kotak Mahindra Bank				Cash withdrawal on 25.11.2005 from the same Bank & Branch		
Anuj Traders		Shree Enterprises		Pacific Apparels		
Rs.9,00,000	4.26 P.M.	Rs.4,00,000	4.27 P.M.	Chq. No.000004	Rs.13,00,000	4.28 P.M.
Rs.9,00,000	4.37 P.M.	Rs.4,00,000	4.38 P.M.	Chq. No.000005	Rs.13,00,000	4.39 P.M.
Rs.9,00,000	4.49 P.M.	Rs.4,00,000	4.50 P.M.	Chq. No.000006	Rs.13,00,000	4.51 P.M.

contended that the action of Id. CIT(Appeals) in deleting the same by taking into consideration of the submissions filed by assessee is not justified. Therefore, he requested to set aside the order of Id. CIT(Appeals) and confirm the order of Assessing Officer on this issue.

5. On the other hand, Id. counsel appearing on behalf of the assessee by referring to the copies of the correspondences with two share applicants, i.e. M/s. Shalini Properties & Developers (P) Ltd. and M/s. Kotak Mahindra Bank Limited and by referring to the various Tribunal orders, which were placed at pages 51 to 75 of the paper book, contended that the action of Id. CIT(Appeals) is justifiable in the facts and circumstances of the case. Therefore, he requested the Bench to uphold the order of Id. CIT(Appeals).

6. After hearing the rival submissions and carefully perusing the material available on record, it is observed that though the Assessing Officer has mentioned that cash deposits made by the share applicant companies are related to the cash withdrawal in the case of assessee. This is not supported by the chart given by the Assessing Officer at page 4, which was reproduced in the preceding paragraph 4 of this order. From that table, it is evident that cash deposits by M/s. Anuj Traders as well as M/s. Shree Enterprises on 25.11.2005 is much prior to the cash withdrawals made by the assessee-company. Therefore, the observations made by the

Assessing Officer in the assessment order is not sustainable under the law and Id. CIT(Appeals) has rightly deleted the same. Therefore, we find no reason to interfere with the order of Id. CIT(Appeals) and uphold his order and reject the ground of appeal taken by the Revenue.

7. In the result, the appeal filed by the Revenue is dismissed.

परिणामतः विभाग का अपील खारिज किया जाता है।

ORDER PRONOUNCED IN THE OPEN COURT ON 21/ 02 /2012.

खुली अदालत में स्पष्ट आदेश 21/02/2012.

Sd/-

[Mahavir Singh /महावीर सिंह]

Judicial Member/ न्यायीक सदस्य

Dated : 21/ 02/ 2012

Sd/-

[C.D. Rao/ (सी.डी.राव)]

Accountant Member/ लेखा सदस्य

Copy of the order forwarded to:

1. M/s. Pacific Apparels Limited, 5, Russel Street, 1st floor, Kolkata-71
2. ITO, Ward-8(3), Kolkata, 'Aayakar Bhawan', P-7, Chowringhee Square, 5th floor, Room No. 5/17, Kolkata-700 069.
3. Commissioner of Income-tax (Appeals)- ,Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata

(True Copy)

By Order

Assistant Registrar, I.T.A.T., Kolkata

Laha, Sr. P.S.