IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.08.2021

CORAM

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

Judgment Reserved On	Judgment Pronounced On
10.08.2021	23.08.2021

W.A.No.1791 of 2021
and
C.M.P.No.1181 of 2021

M/s.Vishwatej Developers Private Limited,
Rep., by its Director, Mr.Muralikrishnan,
Trimex Towers, No.1, Subbaraya Avenue,
C.P.Ramaswamy Road, Alwarpet,
Chennai-600 018. .. Appellant

-vs-

1.Assistant Commissioner of Income Tax,
Company Circle V(2),
121, Nungambakkam High Road,
Chennai-600 034.

2.Assistant Commissioner of Income Tax,
Company Circle V(3),
121, Nungambakkam High Road,
Chennai-600 034.

3.Deputy Commissioner of Income Tax,
Company Circle V(3),
121, Nungambakkam High Road,
Chennai-600 034. .. Respondents

Appeal under Clause 15 of the Letters Patent against the order dated 15.06.2021 made in Writ Petition No.1103 of 2011.

For Appellant : Mr.P.H.Aravind Pandian,
Senior Counsel
assisted by Mr.G.Baskar

For Respondents : Ms.Hema Muralikrishnan,
Standing Counsel

******

JUDGMENT

T.S.Sivagnanam, J.

This appeal, by the writ petitioner, is directed against the order dated 15.06.2021, which is a common order in two writ petitions and the appellant has preferred this appeal as against the decision rendered in W.P.No.1103 of 2011.

2.In this judgment, the appellant shall be referred to as "the assessee" and the respondents as "the Revenue.

3.The assessee had challenged the assessment order passed by the first respondent herein under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2007-08.

4.The challenge to the assessment order was on the following grounds:-

4.1.The assessee had filed their return of income on 29.09.2008 admitting loss and the return was processed under Section 143(1) on 24.08.2009. Thereafter, the case was taken up for scrutiny on 29.09.2009 by the second respondent herein and the assessee responded to the notice issued by the authorities and filed documents and records responding to all the queries raised. However, no order of assessment was passed by the third respondent and while so, the first respondent issued notice under Section 143(2) on 16.10.2010 stating that the files have been transferred to him.

4.2.The assessee appeared before the first respondent and invited the attention of the first respondent to the documents and records, which were placed by the assessee. The assessee would contend that the first respondent without considering any of the documents and materials, mechanically completed the assessment by order dated 30.12.2010, impugned in the writ petition.

4.3.It is submitted that the first respondent had invoked Section 68 of the Act and erroneously concluded that the entire share capital of more than Rs.316 Crores invested by the foreign company in accordance with the provisions of the Companies Act and complying with all the applicable Rules and Regulations and after securing approval from the Foreign Investment Promotion Board (FIPB) and the Reserve Bank of India (RBI), represents unexplained investment of the assessee. Therefore, it is submitted that the order of assessment establishes an arbitrary approach and total non-application of mind. Further, it is submitted that in terms of Section 68, show cause notice was required to be issued to the assessee in

the event, the Assessing Officer considering any credit in the books of the assessee to represent unexplained investment of the assessee. The said provision not only requires notice to be issued, but also explanation to be called for from the assessee in respect of the investment and if no explanation is offered, the Assessing Officer is entitled to treat the investment as unexplained income of the assessee. The assessee would state that this procedure has been given a go-by by the first respondent.

4.4.Further, it is submitted that the Assessing Authority has not discussed the shareholders' position of the company, as it existed during the previous year ended 31.03.2008. Further, from the details produced by the assessee, it is seen that had it been properly perused, it would go to show that the investment was made by the foreign company, which was controlled by the Government of UAE and while so, the Revenue referred to financial statement for the year ended 31.12.2008 and has come to erroneous conclusion with regard to the shareholding of the investment company. Further, even on the facts stated by the first respondent, the investment company has substantial resources far in excess of the the investment made

in the assessee company. Further, the Assessing Officer has not even noticed that the investment by the foreign company has been made pursuant to the approval by the FIPB and the Government of India in terms of approval dated 19.05.2008, that the remittance of fund from abroad is through normal banking channel, that the investment by the foreign company has been approved by the RBI, and that the foreign inward remittance certificate has been issued by the authorized dealers (Banks) in respect of the share capital invested by the foreign company. Further, the shareholders agreement between the Indian promoter and the oversees investor was also on record. Apart from that, there was a Memorandum of Understanding (MoU) and Joint Venture (JV) Agreement between the foreign investor and the Tamil Nadu Industrial Development Corporation (TIDCO). The Assessing Officer failed to advert to any of the documents while completing the assessment. Further, the assessee had furnished the audited financial statements of the foreign investor, its Memorandum of Articles and certificate of incorporation etc., and these documents were never adverted to by the Assessing Officer.

4.5.Further, it is submitted that Section 68 only requires the assessee to prove the sources of investment and nothing more. Therefore, it is contended that the assessment is bad in law, is in violation of the principles of natural justice and is in gross violation of the provisions of the Act and therefore, liable to be set aside.

5.The Revenue resisted the prayer sought for by the assessee by raising a preliminary objection with regard to the maintainability of the writ petition on the ground that as against the order of assessment, the assessee has a remedy of filing of an appeal before the appellate authority and therefore, the writ petition was liable to be dismissed as not maintainable.

6.On facts, it was contended that the assessee had stated in the writ petition that during the period from March, 2007 to April, 2008, Rakeen (P.) Ltd., Mauritius had received a remittance of US$ 12,35,00,000 (Rs.316,36,35,930/-) from its parent company in UAE, viz., RAK Properties P J K UAE and the said amount was partly invested in the share capital of the assessee-company by the Mauritius Government. According to the

Revenue, this averment is incorrect, since it is the UAE company that had invested in the assessee-company. The financial statement of the UAE company for the period ending 31.12.2008 confirms that the UAE company had only invested in the assessee-company and this would go to show that the Mauritius company had been used by the UAE company to hoodwink the taxing authorities in India whereas, it is actually the UAE company which has made the investment in the assessee-company.

7.Further, with regard to the transfer of the case to the file of the first respondent, the Revenue contended that consequent to the transfer, the first respondent issued notice under Section 129 read with Section 143(2) and it is not a fresh notice under Section 143(2) as alleged by the assessee. It is submitted that the assessee was given an opportunity of hearing and the Authorized Representative of the assessee has signed the order sheet which will go to show that hearing was granted to the assessee. Further, the addition towards share application money was made only after examination of all the documents, which were placed by the assessee at the time of assessment proceedings and it is incorrect to state that the documents were

not considered by the Assessing Officer. Further, it is submitted that particulars of Mauritius company were called for to examine the issue of addition of share application money and the assessee's representative had made submissions during the hearing, which was granted and also relied on certain decisions. Further, it is submitted that the assessee was put on notice about the impugned addition during the course of hearing on 27.12.2010 and the assessment was finalized on 30.12.2010. The assessee could not satisfactorily explain the nature and source of the receipt.

8.It is further submitted that the assessee had received crores of rupees as funds and not offered the same to tax and it cannot plead hardship without producing evidence regarding the availability of funds. On the above pleadings, the writ petition was heard by the learned Single Bench and by the impugned order, the writ petition has been dismissed primarily on the ground that the assessee was not justified in not availing the appellate remedy provided under section 246A of the Act. Assailing the correctness of the said order, the appellant is before us by way of this appeal.

9.It is submitted by the learned Senior Counsel for the appellant that the learned Single Bench erred in dismissing the writ petition without taking note of the fact that no sufficient opportunity was granted to the assessee during the assessment proceedings and since the assessment was getting time barred, it was hastily and hurriedly completed on 31.12.2010 without even conducting any enquiry on account of lack of time. Further, it is submitted that the Assessing Officer failed to issue show cause notice before making an assessment by invoking Section 68 of the Act and this being a statutory requirement, non-compliance of the same will vitiate the entire addition. Further, on facts, it is submitted that the investment was made by a foreign company, which was controlled by the Government of Ras Al Khaimah, UAE and cannot be treated as unexplained investment under Section 68 of the Act. Further, the entire share capital having been invested by foreign company and having been approved by FIPB, remittance of funds from abroad being through normal banking channel after grant of approval by RBI cannot be treated as unexplained investment of the assessee. Further, in spite of production of foreign inward remittance certificate issued by the authorized dealers (Banks) in respect of the share

capital investment by the foreign company, the investment cannot be treated as unexplained investment. Further, it is submitted that Section 68 of the Act could have never been invoked, as the assessee has categorically established the identity of the investor, the creditworthiness of the investor and the genuineness of the transaction and these aspects were not taken into consideration when the writ petition was heard and dismissed. Further, the learned Writ Court ought to have seen that the assessee had produced voluminous materials and documents before the Assessing Officer, which were never adverted to and in particular, the certificate of incorporation of Rakeen Private Limited, tax residency certificate of Rakeen Private Limited and licence issued by Government of Ras Al Khaima – RKA investment authority to Rakeen Development PJSC.

10.Further, it is submitted that the assessee has produced balance sheet of Rakeen Private Limited, Mauritius and Rakeen PJSC, UAE as at 31.12.2007 and that of Rakeen Private Limited as at 31.12.2008 to establish the creditworthiness of the investors and without taking note of these materials, the Writ Court had dismissed the writ petition on the ground of

availability of alternate remedy, when the case of the assessee is that these documents were never considered by the Assessing Officer. Further, the learned Writ Court ought to have noted that there were no complicated facts which are required to be adjudicated and since the approval has been issued by FIPB and RBI, it will clearly go to show that the addition made under Section 68 is not sustainable. Further, the learned Writ Court ought to have followed the decision of the High Court of Bombay in ***PCIT vs. Aditya Birla Telecom Ltd., [Income Tax Appeal No.1502 of 2016 dated 26.03.2019]*** where the facts were identical. Further, the learned Writ Court had relied on a decision in W.P.No.3144 of 2016 dated 15.04.2021, which is not applicable to the facts of the assessee's case.

11.The learned Senior Counsel for the appellant had painstakingly taken us through the findings recorded by the Assessing Officer and the various documents, which were referred to by him in the course of argument to establish that the assessee had proved the creditworthiness of the investors, it has established the identity of the investors, the genuineness of the transaction and apart from producing approval of FIPB and RBI and the

funds were routed through normal banking channel and the banks, viz., the authorized agents have given foreign inward remittance and ignoring all thee documents, the assessment was completed and therefore, the learned Writ Court ought to have interfered with the assessment order impugned in the writ petition.

12.Mrs.Hema Muralikrishnan, learned Standing Counsel appearing for the respondents sought to sustain the order passed in the writ petition reiterating that the appeal remedy provided to the assessee under Section 246A of the Act is an effective remedy and factual details cannot be agitated by the assessee in a writ petition and it is incorrect to state that there are no complication on facts, as the entire issue revolves around facts and the Assessing Officer has considered all the documents and the stand taken by the assessee and has discussed with regard to the nature of investment as well as the creditworthiness of the Dubai company in the assessment order and if according to the assessee, the order is erroneous, then the assessee has to challenge the same by filing an appeal before the appellate authority and the writ petition was rightly dismissed by the learned Writ Court.

13.In support of her contention, the learned counsel placed reliance on the decision of the High Court of Gujarat in ***Blessing Construction vs. Income-tax Officer*** reported in ***(2013) 32 taxmann.com 366 (Guj.)*** wherein, it was held that the genuineness of the transaction having not been established, addition was justified.

13.1.Reliance was placed on the decision in ***CIT vs. N.R.Portfolio (P.) Ltd.*** reported in ***(2014) 42 taxmann.com 339 (Delhi)*** for the proposition that creditworthiness and genuineness of share money depends on nature of relationship between the parties, object, terms and quantum of investment, types of investor, creditworthiness of recipient etc.

13.2.For the same proposition, reliance was placed on the decision in the case of ***Rajmandir Estates (P.) Ltd. vs. PCIT, Kolkata*** reported in ***(2016) 70 taxmann.com 124 (Cal.).*** This judgment was affirmed by the Hon'ble Supreme Court reported in ***(2017) 77 taxmann.com 285 (SC).***

14.On the above grounds, the learned Standing Counsel seeks to sustain the order passed in the writ petition.

15.Heard Mr.P.H.Aravind Pandian, learned Senior Counsel assisted by Mr.G.Baskar, learned counsel for the appellant and Ms.Hema Muralikrishnan, learned Standing Counsel for the respondents.

16.Section 68 of the Act deals with "cash credits". It states that where any sum is found credited in the books of assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year.

17.The first argument of the appellant is that no show cause notice was issued before the addition was made by resorting to Section 68 of the Act. The statutory provision does not specifically state that a show cause notice is required to be issued. What is required is that where any sum is found credited in the books of the assessee and it is pointed out by the Assessing Officer, the assessee is required to offer an explanation about the

nature and source thereof and if the assessee offers no explanation or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax. Admittedly, in the instant case, the assessee has been put on notice and the assessee had participated in the assessment proceedings and submitted their explanation. The Assessing Officer has discussed about the two companies, viz., the Mauritius company and the Dubai company and pointed out that from the balance sheet of the assessee-company, a sum of Rs.127,52,05,650/- was received as share capital from the Mauritius company and Vishwatej Project Pvt. Ltd., which was incorporated on 10.01.2007. The assessee was called upon to furnish the source for the above amount, which was received as share capital. The assessee explained stating that the company was incorporated on 20.02.2007 in the name of Rakindo Developers Pvt. Ltd., and later changed as Rakindo Kovai Township Ltd. The Assessing Officer questioned the source for the fund for the share application money and the assessee stated that an amount of Rs.127,47,05,650/- was received from M/s.Rakeen (P.) Ltd., Mauritius and Rs.5,00,000/- was received from Indian Promoter. The Assessing Officer has stated that there was no proof filed by

the assessee to substantiate its existence and claimed to have 100% share capital transferred from Rakindo Developers PJSC (FZE) Dubai. Further, the company has no entity, but it is just a conduit to transfer funds to India from Mauritius and this, according to the Assessing Officer, is evident from the consolidated balance sheet of the Dubai company.

18.Next the Assessing Officer proceeds to analyse the Dubai company and has mentioned that on perusal of the balance sheet of the Dubai company, it is noticed that the promoters of the Dubai company had diverted/transferred funds to various concerns during the year. Once again, the assessee has been called upon to explain and the assessee was represented by an authorized representative, who had stated that Reyada Investment Ltd., was holding 48% of shares in the Dubai company originally. On such submission being made, the Assessing Officer verified the consolidated financial statement for the year ended 31.12.2008 and found that the percentage has got reduced to 19% from 48% thereby converting them as minority shareholders. It was further stated that that similar disinvestment was also done by Pak Properties PJSC and Pak

Airways JSC from 26% to 10.5% each respectively. Thus, the Assessing Officer has concluded that the erstwhile major shareholders have diverted their investment in the concern. Further, M/s.Al Hamra Real Estate Developers had purchased 49% shareholding in Rakeen Developers PJSC (FZC), Dubai and become major shareholder in the group and RAK Investments is holding 11.0% share in the said company and thus, they have a major role to play in the day-to-day affairs of the company and it is no more a Government company. However, the Assessing Officer has recorded that it is seen from the above mentioned documents that during the year, the original shareholders have transferred their shares to the extent of 60% and retained only 40% and therefore, they became minority and did not have any say in the company's business.

19.Further, the Assessing Officer pointed out that though the name of Rakeen (P.) Ltd., Mauritius appeared at 35 of notes, on a perusal of the consolidated balance sheet of the Dubai company as on 31.12.2008, it is seen that nothing is mentioned about the investment in the Mauritius company by the Dubai company and as per the details filed before the

Income Tax Department, it shows that US$ 12,35,00,000 was received from Rakeen Developers PJSC (FZC) by Rakeen (P.) Ltd. Thus, the Assessing Officer concluded that the value of US$ 12,35,00,000 is more than dhirams for which Rakeen Developers PJSC (FZC) do not have the source to fund it. Thus, the Assessing Officer concluded that the transfer of amount from Rakeen Developers PJSC (FZC) to Rakeen (P.) Ltd., has not been proved.

20.Further, the consolidated balance sheet of the Dubai company ended 31.12.2008 was again examined wherein, it was found that an amount of AED 457,413,538 was shown to have invested in the shares of the associated/equity accounted investees and when compared to the previous year, it was found that Rakeen Developers PJSC (FZC) had invested AED 424,205,882 during the year. Therefore, the Assessing Officer pointed out that the funds have been directly invested by the Dubai company whereas, the assessee stated that the funds have been provided by the Dubai company to the Mauritius company and from Mauritius to the Indian companies. If it is so, it should have been reflected in the balance sheet of the Dubai company either as loan or in the form of investment in shares in the name of

the Mauritius company and on perusal of the consolidated balance sheet ended 31.12.2008, more particularly, note 14 and 22, it does not indicate either the loan or investment in the name of the Mauritius company. Therefore, the Assessing Officer concluded that the assessee has not proved the genuineness and creditworthiness of the Mauritius company and therefore, the entire share application money was treated as undisclosed income and added to the returned income by applying Section 68 of the Act.

21.Further, the balance sheet of the assessee-company was also examined and it was found that the foreign promoter has brought in Rs.127.52 Crore as share application money and the Indian promoters/shareholders should have made an equivalent contribution. However, only Rs.1,00,000/- was shown to have been brought in the form of share capital by the Indian promoters. Further, the Assessing Officer on verification has stated that the assessee-company had converted 20 shell companies to acquire lands and the source for acquisition of lands is none other than the amounts advanced by floating 20 shell companies by the group of the assessee-company and the details were mentioned in the

annexure to the assessment order. With these observations and findings, the assessment has been completed.

22.On a perusal of the above findings, as recorded by the Assessing Officer, it will be evidently clear that the entire controversy involved in the matter is fully factual.

23.We do not agree with the submission that the assessee did not have adequate opportunity to put forth their case, as the Assessing Officer has recorded that the assessee has been represented by the authorized representative and if according to the assessee, the documents have not been properly appreciated or to be appreciated in the manner as decided by the assessee, it is for the assessee to agitate the same before the appellate authority and there is no justifiable or valid reason for the assessee to bypass the appellate remedy available under the Act.

24.We are conscious of the fact that the writ petition was of the year 2011 and was pending before this Court all these years. Under normal circumstances, the Writ Court will not relegate the parties to avail the alternate remedy, as it will be too harsh on the writ petitioner to avail the

alternate remedy after nearly 10 years. However, in the instant case, we have no other option because, the entire controversy is factual. The onus is on the assessee to establish the genuinity of the transaction and the source of the investment. To dislodge the findings recorded by the Assessing Officer, a deeper examination into the facts has to be done and such exercise cannot be undertaken in a writ petition. That apart, there is an allegation that the assessee has floated 20 shell companies for the purpose of raising funds for acquisition of the lands. The Assessing Officer has gone on record to state that the Dubai company, which was stated to be a Government company, is no longer a Government company on account of the change in the shareholder pattern. To dislodge these findings, the assessee has to necessarily bring in facts and documents to establish their stand and this cannot be permitted to be done in a writ petition. As mentioned above, the onus to prove the identity, the creditworthiness and genuineness of the transaction is solely on the assessee and merely because statutory approvals have been obtained by the assessee, viz., FIPB and RBI will not sanctify the transaction especially when according to the Assessing Officer they are all unexplained investment. The explanation offered by the

assessee was found to be not acceptable. Therefore, if according to the assessee, the finding of fact recorded by the Assessing Officer is incorrect, then it is all the more necessary for the assessee to approach the appellate authority and dislodge such findings of fact recorded by the Assessing Officer. Thus, we are of the clear view that the assessee cannot be permitted to avoid the appellate remedy available under the Act.

25.For all the above reason, the writ appeal fails and the same is dismissed with an observation that if the assessee is aggrieved by the assessment order, it is well open to the assessee to file a statutory appeal and if the assessee wishes to do so, then the appellate authority while computing limitation shall exclude the period from the date of filing of the writ petition till the receipt of the certified copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

(T.S.S., J.) (S.S.K., J.)
23.08.2021

abr

To

1.The Assistant Commissioner of Income Tax,
Company Circle V(2),
121, Nungambakkam High Road,
Chennai-600 034.

2.The Assistant Commissioner of Income Tax,
Company Circle V(3),
121, Nungambakkam High Road,
Chennai-600 034.

3.The Deputy Commissioner of Income Tax,
Company Circle V(3),
121, Nungambakkam High Road,
Chennai-600 034.

T.S.Sivagnanam, J.
and
Sathi Kumar Sukumara Kurup, J.

(abr)

Pre-delivery Judgment made in
W.A.No.1791 of 2021

23.08.2021