



IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 03.05.2024
DELIVERED ON: 13.05.2024

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/232/2023

(IA NO: GA/1/2023)

BALGOPAL MERCHANTS PRIVATE LIMITED

VERSUS

THE PRINCIPAL COMMISSIONER OF INCOME TAX -2, KOLKATA

Appearance:-

Mr. J.P. Khaitan, Sr. Adv.

Mr. Pratyush Jhunhunwala, Adv.

Ms. Sretapa Sinha, Adv.

Mr. Samit Rudra, Adv.

.....For the Appellant.

Mr. Om Narayan Rai, Sr. Adv.

Mr. Soumen Bhattacharjee, Adv.

.....For the Respondent.



JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, C.J.)

1. This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated May 04, 2023 passed by the Income Tax Appellate Tribunal “B” Bench Kolkata in Income Tax Appeal (ITA) No. 456/Kol/2019 for the assessment year 2012-2013. The assessee has raised the following substantial questions of law for consideration:-

- (i) *Whether the Tribunal can examine facts and/or issues which were not in contention before the Assessing Officer?*
- (ii) *Without prejudice to the aforesaid, whether the Tribunal ought to give the appellant an opportunity to file documents and submissions countering the issues raised by it and the failure to do the same renders the order of the Tribunal to be in gross violation of the principles of natural justice?*
- (iii) *Whether the identity and creditworthiness of subscribers to the share capital and the genuineness of the transaction be doubted on account of a non-compliance to a notice issued under section 131 of the Act, especially since the notice was received after the completion of the assessment, and without considering the other documents and submissions filed by the appellant in support of the same?*
- (iv) *Whether the findings and observations of the Tribunal with respect to the identity and creditworthiness of the shareholders and the genuineness of the transaction are erroneous, perverse and contrary to law?*
- (v) *Whether the Tribunal could have rejected the genuineness of a share subscription transaction on the basis of a possible future*



use of the property acquired using the premium received?

(vi) Whether the creditworthiness of a shareholder can be doubted on the basis of the fact that the investment in immovable property was made by it using the share premium received by it?

(vii) Whether the understanding of transfer of rights held by under an agreement for sale can be regarded as a part of the consideration for allotment of shares or reason for higher valuation of shares subsequently allotted?

2. We have heard Mr. J.P. Khaitan, learned Senior Advocate assisted by Mr. Pratyush Jhunjunwala, Ms. Sretapa Sinha and Mr. Samit Rudra, learned advocates appearing for the appellant assessee and Mr. Om Narayan Rai, learned Senior Standing Counsel along with Mr. Soumen Bhattacharyya, learned Senior Standing Counsel appearing for the respondent department.

3. The assessee filed the return of income disclosing a total income of Rs. NIL. The return was processed under Section 143(1) of the Act. Subsequently, the case was selected for scrutiny and notices under Section 143(2) and 142(1) were issued and served on the assessee. In response to the said notice, the authorised representative of the assessee appeared and filed details as called for. The assessing officer noted that the business of the assessee is only investment and during the previous year, the assessee had received huge share application money along with the premium. Summons under Section 131 were served on the directors of the assessee calling upon them to produce the proof of identity/Pan Card, list of companies where the directors was a director or shareholder from the assessment year 2008-2009



and the date of appointment along with DIN, proof of acknowledgement of filing personal income tax return, copies of the accounts, proof of address, copy of bank statement of the companies reflecting all transactions during the period 01.04.2011 to 31.03.2012 with complete narration and source of funds, to produce the directors of the investors companies along with the proof of photo identity and copy of bank statements of their compliance reflecting all transactions during the period 01.04.2011 to 31.03.2012 with complete narration and source of funds and right up on justification of large shares premium. The assessing officer records that there was no complaints from the directors of the assessee company in response to the summons issued under Section 131 of the Act and therefore the identity, genuineness and creditworthiness of the share applicant companies were not established because the primary issue regarding the due diligence done, the steps taken for protection of the funds and most importantly the reason for investment in a company with no track record and that to with such huge premium was not clarified. Further since the assessee did not furnish the details of the shareholders, and hence the identity of the shareholders was questionable.

4. The assessing officer observed that in the light of the preponderance of probability and normal human behaviour, it may be easily inferred that the entire transaction lacks substance. The assessee company has been recently incorporated without any proven track record and does not in any way justify the high share premium. Further the assessing officer holds that the facts of the case clearly reveal that the receipt of share application



money is only a façade for conversion of unaccounted money and the non-appearance of the directors only strengthen this point.

5. The assessing officer referred to the decision of this court in **Commissioner of Income Tax Versus Precision Finance Private Limited 2008 ITR 465** as well as the decision of the Indore Bench of the tribunal in the case of **Agarwal Coal Corporation Private Limited Versus Assistant Commissioner of Income Tax 63 DTR 20** and observed that merely because the companies were registered with ROC, were filing the return of income having Pan Card/bank accounts will not go to establish the identity of the company as they might have been existing on paper or in the real sense at the time of registration that were specifically found to be non-existent.

6. Further the assessee failed to produce the directors or the employees of the share applicants and the addition is required to be made under Section 68 of the Act. The assessing officer thus completed the assessment under Section 143(3) of the Act by order dated 23.03.2015 holding that the amount of share application money received along with the premium amounting to Rs. 3,65,95,490/- which remained unexplained is to be added back under Section 68 of the Act. The assessee filed appeal before the Commissioner of Income Tax (Appeals) 15, (Kolkata) [(CIT(A)] contending that the order passed by the assessing officer was erroneous. The assessee's case before the CIT(A) was, it is a private company engaged in the business of trading and dealing in land, it allotted shares to associates with a view of



utilising its resources for the business plan of the assessee and had filed their return of income declaring NIL income.

7. Further it was submitted that the assessing officer failed to appreciate that all the amounts has been received through banks as share capital including premium and failed to examine the creditworthiness, genuineness and identity of investors and source of funds invested in spite of the assessee producing all documents before the assessing officer pursuant to the notices issued under Section 143(2) and 142(1) of the Act. The assessee contended that the summons issued by the assessing officer under Section 131 of the Act was received by the director after receiving the assessment order and therefore the assessee was denied proper opportunity of being heard. The CIT(A) by order dated 11.10.2018 dismissed the appeal filed by the assessee. Aggrieved by the same, the assessee preferred appeal to the learned tribunal.

8. Before the tribunal certain details were produced by the assessee contending that the first allotment shares were without premium on 30.03.2022. The second allotment was on 31.03.2012 with security premium to two companies. The assessee produced bank statement of the company and shares applications 1 to 5 received from five individuals. The second allotment made on 31.03.2012, share application forms, article and memorandum, audited balance sheet as on 31.03.2012 of M/s. Asthbhuja Mercantile Private Limited showing investments in the assessee company share application form and similar details of M/s. Maida Securities Limited showing investment in the assessee. Therefore the assessee contended that



they have proved the genuineness of the amount received towards share application and premium, established the identity of the investors and the creditworthiness of the investors.

9. Further it was contended that all transactions were through banking channels and the assessing officer should have verified the same to examine the genuineness, the investment of the assessee company was in land and at the time of transaction and in view of huge quantity of land, the cost of the land was very low but after development of the same the sale price would be highly profitable. Further the assessee contended that the assessee is presently having the investment activities in land and it is reporting loss because it is the first year of the company and no activities have been noted. The assessee company was valuing investments at book value whereas, the intrinsic or fair market value is much more and while issuing shares, fair market value of the asset has to be taken into account and the person paid the premium has factually benefited from the purchase of shares at premium. With the above submissions, the assessee sought for setting aside the order passed by the CIT(A).

10. The learned Senior Advocate appearing for the appellant assessee contended that the assessee did not have adequate opportunity before the assessing officer as the summons issued by the assessing officer was served after the assessment order was received and there has been no examination of the facts of the case despite details having been filed by the assessee by appearing in person in response to the notices issued under Section 143(2) and 142(1) of the Act. In such circumstances, the learned tribunal could not



have examined the issues which were not in before the assessing officer. Further the tribunal failed to give any opportunity to the assessee to file the documents and therefore the order passed is in the gross violation of the principles of natural justice. The creditworthiness of the shareholders cannot be doubted on the facts that the investment in immovable property was made by it using the share premium received by it. The tribunal erred in not considering the copies of the audited accounts for the financial year 2013-2014 and 2014-2015 showing that the parcels of land were reflected in its books of accounts and specific specimen copy of one of the agreements for sale and the sale deed and the Memorandum of Understanding dated February 20, 2012 were annexed thereto. The tribunal ought to have considered the intrinsic value of the land which justifies the premium charged from the share subscribers and erred in limiting their examination only to the facts that the previous year 2011-2012 was the year of commencement of business. Further it is submitted that the CIT(A) did not examine the facts and the documents which were placed before it rather the CIT(A) merely referred to several decisions and rejected the appeal. Thus, it is submitted that the entire matter may be remanded to the assessing officer for fresh consideration of all documents after affording adequate opportunity to the assessee.

11. Mr. Om Narayan Rai, learned Senior Standing Counsel appearing for the respondent submitted that the assessee was incorporated on 29.06.2011 and the assessment year under consideration is the very first year of the operation of the company which is a broken year considering the



date of incorporation. The assessee filed return of income reporting a total income at NIL. The assessee raised a share capital of Rs. 3,66,00,000/- comprising of share capital at Rs. 11,71,000/- and security premium of Rs. 3,54,29,000/-. The assessee did not comply with the summons issued under Section 131 of the Act. It is submitted that the assessee allotted shares to five individuals on 30.03.2012 without any premium at the face value of Rs. 10/- and on the very next day on 31.03.2012 allotted shares to two companies with a share premium of Rs. 4990/- per share.

12. The assessee in the grounds of appeal before the CIT(A) stated that the summons issued under Section 131 was received after receiving the assessment order whereas in the supplementary affidavit filed by the assessee, in this appeal, it is stated that the summons under Section 131 were never served on the assessee companies which is a contrary stand taken by the assessee. Further it is submitted that the company which purchased the shares at a premium of Rs. 4990/- per share namely Maida Securities Limited had raised a sum of Rs. 85,00,000/- as share application money. Similar is the case in respect of Astbhuja Mercantile Private Limited. The assessee had admitted before the CIT(A) that these companies are its associates. There is no explanation as to why on 30.03.2012 shares were allotted to five individuals without any premium and on the very next day i.e. on 31.03.2012 shares were allotted to companies with a premium of Rs. 4990/- per share.

13. The learned advocate also referred to the draft of agreement for sale which was placed as annexure in this stay application and also the



copy of Memorandum of Understanding dated 28.02.2012 between five individuals and the assessee company. Therefore, it is submitted that the assessing officer, the first appellate authority and the learned tribunal upon applying the proper tests laid down by the Hon'ble Courts had rejected the contentions of the assessee by appreciating the factual position and as such there is no substantial question of law arising for consideration in this case.

14. The learned advocate placed reliance on the decision of the Hon'ble Division Bench of this court in **Shankar Industries Versus Commissioner of Income Tax, Central Kolkata** ¹, the decision of the Hon'ble Division Bench of the High Court at Delhi in **Commissioner of Income Tax Versus Nipun Builders and Developers Private Limited** ² and the judgment of this Court in **Principal Commissioner of Income Tax Versus Swati Bajaj** ³.

15. In reply the learned Senior Advocate appearing for the assessee referred to the notice issued under Section 142 (1) of the Act dated 17.12.2014 and referred to the details which were called which include the name, address, PAN and jurisdictional AO of all directors with copy of their personal returns of the said assessment year and also the list of shareholders with complete postal address along with Form 2 and Form 5. Despite the assessee responding to the said notice and submitting all the details, the assessing officer did not advert to the same. In this regard, the reply sent by the assessee to the notice under Section 142(1) annexed to the

¹ (1978) 114 ITR 689

² (2013) 350 ITR 407

³ (2022) 446 ITR 56 (Cal)



supplementary affidavit in page 47 was referred to stating that the details called for were fully furnished. The shareholder's response was also referred to which is annexed to the supplementary affidavit in page 13 and 14 and in pages 27 to 30. Therefore, it may be submitted that the matter may be remanded back to the authorities for consideration of all the documents after affording opportunity to the assessee.

16. We have elaborately heard the learned advocates for the parties and carefully perused the materials placed on record.

17. The law on the subject is fairly well settled, the assessee as to the burden of proof would include the proof of identity of the investor, the capacity of the investors to advance the money and the genuineness of the transaction. The assessee has to prove these three factors by producing acceptable evidence and only then the onus shifts on the department.

18. In ***A. Govindarajulu Mudaliar Versus Commissioner of Income Tax***⁴ the Hon'ble Supreme Court pointed out that whether a receipt is to be treated as income or not must depend largely on the facts and circumstances of each case and where an assessee fails to prove satisfactorily, the source and nature of certain amount of cash received during the accounting year, the income tax officer is entitled to draw the inference that the receipts are of an assessable nature.

19. In ***Yadu Hari Dalmia Versus Commissioner of Income Tax***⁵ it was held that several Sections starting from Section 68 have been

⁴ (1958) 34 ITR 807

⁵ (1980) 126 ITR 48



introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even though there were judicial decisions covering some of the aspects. Even long prior to introduction of Section 68 in the statute book, the courts have held that where any amount were found credited in the books of assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the income tax officer, not satisfactory, the sums so credited could be charged to income tax as income of the assessee of the relevant previous year and that Section 68 was inserted in the 1961 Act, statutory recognition was given to a principle which had been clearly adumbrated judicial decisions. It was further held that Section 68 thus only codify the law as it existed before April 01, 1962 and did not introduce any new principle or rule.

20. In *Swati Bajaj*, the court was considering the cases relating to penny stocks and unreasonable rise in the price of shares over a short period of time and it was held that the onus is on the assessee to prove the creditworthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise that to within a short span of time and that such rise of price within a short period of time was a genuine move of the companies and creditworthiness coupled with genuinity and identity.

21. Recently this court has an occasion to deal with a case of an addition made under Section 68 in respect of investments in shares of a company which the assessing officer held to be not genuine and the companies had no creditworthiness and the identity had not been



established, in the case of **Principal Commissioner of Income Tax, (Central) - 2 Versus M/s. BST Infratech Limited ITAT 67 of 2024** dated 23.04.2024, the court took note of the various decisions on the point and it would be useful to refer to the relevant paragraphs of the said judgment:-

16. In **Commissioner of Income Tax Versus N.R. Portfolio Private Limited**⁶ the substantial question of law which was framed for consideration is whether the tribunal was right in deleting the additions under Section 68 of the Act and whether the decision of the tribunal is perverse.

17. With regard to the role of the assessing officer, the Hon'ble Court held that the assessing officer is both an investigator and an adjudicator; when a fact is alleged and stated before the assessing officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the assessing officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars, this may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The assessing officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. A universal procedure or method which should be adopted by the assessing officer when verification of facts is required cannot be laid down. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer and the same should be just, fair and should not cause harassment to the assessee or third person from whom the confirmation or verification is required.

⁶ (2014) 42 Taxmann.com 339 (Del)



18. *It was further held that the provisions of the Evidence Act are not applicable but the assessing officer being a quasi-judicial authority must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The principle of Preponderance of Probability applies. On the question of creditworthiness and genuineness of the transaction in the said case, the Hon'ble Court recorded the following finding:-*

19. *On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.*

19. *The doctrine of "Source of Source" or "Origin of Origin" was explained in the following terms:-*



24. We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of source of source' or „origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counter-productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which masquerade as



pretence should be exposed and not accepted.

20. *With regard to the identity, creditworthiness and genuineness of the transaction and the onus of prove the Hon'ble Court held as follows:-*

30. *What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.*

31. *Identity, creditworthiness or genuineness of the transaction is not established by merely showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is*



made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object and purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large.

21. In **Rajmandir Estates Private Limited Versus Principal Commissioner of Income Tax**⁷, one of the substantial questions of law which fell for consideration was whether the finding of the CIT(A) that unaccounted money was or could have been laundered as clean share capital by creating façade of paper work, routing the money through several bank accounts and getting the seal of statutory approval by getting the case re-opened under Section 147 suo motu and whether the same is perverse. The facts of the said case was noted wherein 19 out of the 13 applicants secured funds for the purpose of contributing to the share capital of the assessee therein, on account of share application money. In

⁷ 2016 SCC Online Cal 1237



other words, those 19 applicants collected funds on account of share application money in their respective companies and that money was contributed to the share capital of the assessee. 15 out of the 39 applicants procured the requisite funds by selling the shares and the rest of the applicants of shares, in the share capital of the assessee company, did not disclose the nature of receipt at their end though the source of funds were identified. Further the shares were offered to and subscribed by closely held companies owned by the promoter/director or their close relatives and friends. After noting the facts, the Hon'ble Court held that the identity of the alleged shareholders is known but the transaction was not a genuine transaction. The transaction was nominal rather than real; creditworthiness of the alleged shareholders is also not established because they did not have money of their own, each one of them received from somebody and that somebody received from a third person and therefore prima facie, shareholders are near namelenders.

22. In **Principal Commissioner of Income Tax, (Central – 1) Versus NRA Iron and Steel Private Limited** ⁸ the issue which fell for consideration is when share capital/premium is credited in the Books of Account of the assessee company, the onus of prove is on the assessee to establish by cogent and reliable evidence of the identity of the investor company, the creditworthiness of the investor and genuineness of the transaction, to the satisfaction of the assessing officer. The Hon'ble Supreme Court observed that the courts have held that in the case of cash credit entries, it is necessary for the assessee to prove not only the identity of the creditors but also the capacity of the creditors to advance money, and establish the genuineness of those transaction. The initial onus of proof lies on the assessee. The decision in **Roshan Di Hatti Versus Commissioner of Income Tax** ⁹ was referred to wherein it was held that if the assessee fails to discharge the onus by producing cogent

⁸ (2019) 15 SCC 529

⁹ (1977) 2 SCC 378



evidence and explanation the assessing officer would be justified in making the addition back into the income of the assessee.

23. The decision in **N.R. Portfolio Private Limited** was quoted with approval wherein it has been held that creditworthiness or genuineness of a transaction regarding share application money depends on whether two parties are related or known to each other, or mode by which parties approached each other, whether a transaction is entered into through written documentation to protect investment or whether the investor was an angel investor, the quantum of money invested, the creditworthiness of the receipt, object and purposes for which payment/investment was made etc. The incorporation of a company and payment by banking channel etc. cannot in all cases tantamount to satisfactory discharge of onus. The principles which emerge where sums of money are credited as share capital/premium was summarised as follows:-

13.1. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and creditworthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

13.2. The assessing officer is duty-bound to investigate the creditworthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

13.3. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack creditworthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not



have discharged the primary onus contemplated by Section 68 of the Act.

22. Bearing the above legal principles in mind, we now proceed to examine the case on hand.

23. The first issue is whether the summons issued under Section 131 were served/received by the assessee. The assessee has not taken a definite stand on the said issue as before the CIT(A), the assessee contended that the notice was received after receiving the assessment order. The said averments is absolutely vague since the assessee has not given the date on which they had received the notice nor the date they received the assessment order dated 23.03.2015. In the supplementary affidavit in paragraph 4 the assessee would state that the notice dated March 03, 2015 issued under Section 131 of the Act was never served on the assessee company and as such no compliance could be made on the same. This appears to be a contrary stand taken by the assessee to that of the stand taken by the CIT(A).

24. The learned Senior Counsel appearing for the assessee would explain by stating that paragraph 4 of the supplementary affidavit should be read to mean that it was never served on the assessee prior to the assessment being completed. In any event, the averment made by the assessee, before the CIT(A) at the first instance, stating that the notice was received after receiving the assessment order is a vague statement and appears to have not been established by producing documents before the



CIT(A). Therefore, we have to necessary hold that there has been non-compliance of the summons issued under Section 131 of the Act.

25. The CIT(A) while examining the case of the assessee took note of the factual position which is not in dispute namely the assessee was a newly incorporated company and it was in the first year of its operation that to a broken year. The CIT(A) on examining the facts found that the assessee company had no track record or asset base for demanding astronomical high premium per share at Rs. 4990/- defying all commercial and financial prudence and logic. Further the CIT(A) on facts found that there was no noticeable business activity or book value/earnings per share which can justify the very high share premium. The CIT(A) referred to various decisions with regard to the burden of proof on the assessee that he has to prove the identity and capacity of the subscriber company to pay share application money and it is not sufficient for the assessee to merely disclose address and the identities of the shareholders but the assessee has to show the genuineness of such individual and entities. Further the test of human probability has to be applied and it has to be examined as to the reason to invest in the shares of the assessee companies at such huge premiums. After noting the legal position, the appeal was dismissed.

26. One of the companies which had purchased shares at a premium of Rs. 4990/- per share namely Astbhuja Mercantile Private Limited appears be a company which does not have creditworthiness as could be seen from the director's report wherein it is stated that the company has earned a profit of Rs. 280/- against a profit of Rs. 130/- earned during the previous



year. In the note on financial statements, it is stated that the said company does not own any tangible or intangible fixed assets during the financial year under consideration. This financial statement is annexed to and forming part of the balance sheet as at 31.03.2012.

27. In the annexure to the report on financial statements as certified by the auditors of the assessee having audited the financial statements of the assessee which comprises the balance sheet as at 31.03.2012, the statement of profit and loss for the year then ended and a summary of the significant accounting policies and other explanatory information, in respect of fixed assets, it is stated that the company has no fixed assets. In the director's First Annual Report for the year ended 31.03.2012, it has been stated that the assessee has earned a loss of Rs. 4512.00 ps. These factors appear to have weighed in the minds of the assessing officer as well as the CIT(A) to doubt the genuineness of the transaction and charging a share premium of Rs. 4990/- per share with face value of Rs. 10/-.

28. The tribunal once again re-examined the factual position and found that on 30.03.2012, the assessee has allotted equity shares to five individuals, four of whom have same address namely Madan Biswas Lane, Howrah and the other person is from Kolkata. The shares were allotted at the face value of Rs. 10/- without any premium totalling Rs. 10,00,000/-. On the very next day i.e. on 31.03.2012, shares have been allotted to two companies namely Astbhuja Mercantile Private Limited and Maida Securities Limited with a premium of Rs. 4990/- per share. This in the opinion of the learned tribunal was beyond comprehension or in other words it will not



satisfy the test of preponderance of probability of human behaviour. There was nothing to indicate the identity, creditworthiness of the shares subscribers and the genuineness of the transactions. The learned tribunal has questioned the assessee as to how the valuation was arrived at for charging a premium of Rs. 4990/- per share. The explanation offered was that the assessee made its first allotment of shares to five individuals and all those individuals were dealing in land and the capital was therefore proportionately divided between them. The assessee made investments in land by raising share capital for which the cost of land was very low and would fetch good sale price at high profits after its development. The learned tribunal referred to the objects of the companies as contained in the Memorandum of Association and found that there is no reference to the activities of development of land or dealing in land as claimed by the assessee and the main object is dealing with merchandise and articles of all kinds with no reference to dealing or development of the land.

29. The learned Senior Advocate appearing for the assessee would point out that in the objects incidental or ancillary to the attainment of the main objects, one of the objects is to acquire estate or interest whatsoever and to hold develop, plan etc. In any event, the assessee miserably failed to establish before the fact finding authority that they had in fact, actively involved themselves in development of land and this is highly improbable as the assessee was incorporated only on 29.06.2011 and the assessment year under consideration namely 2012-2013 is the first year of operation of the company which is a broken year taking note of the date of incorporation.



Thus, the charging of premium of premium of Rs. 4990/- is illogical and there is no basis for fixing such an amount especially when on 30.03.2012 shares of the companies were allotted to five individuals without any premium and on 31.03.2012 it was allotted to two companies with a share premium of Rs. 4990/- per share. Further certain facts relating to the land held by the assessee was placed before the learned tribunal stating that the assessee acquired 490.51 decimals of land. The tribunal on examining the facts found there is nothing on record to demonstrate as to how this land was acquired in terms of their conveyance deed. The grounds which were raised before the learned tribunal touching upon the factual issue was considered by the tribunal and it was found that the submissions were general and vague in nature and in no way establishes the identity, creditworthiness of the share subscribers and the genuineness of the transactions. The learned tribunal also examined the financials of the two share subscribing companies and found that the source of investments by those two companies are also from the share capital and share premium raised by them while issuing their own shares to other closely held companies and those companies had no noticeable business activities.

30. The learned Senior Standing Counsel appearing for the revenue has drawn our attention to the nature of documentation between the five individuals who are allotted shares without premium and the assessee company. As seen earlier, the assessee was incorporated in June 2011. The assessee referred to a draft of agreement for sale dated 22.07.2011 entered into between the five individuals and Mr. Asit Das and others agreeing to



sale certain piece and parcel of the land for a sale consideration of Rs. 14,50,911/-. This is followed by Memorandum of Understanding dated 20.02.2012 between five individuals and the assessee wherein the five individuals claimed that they have exclusively acquired the rights to deal with the property sale, occupy and purchase valuable properties in Howrah and Uluberia, necessary agreements have been executed by them. It appears that five individuals referred to the agreement for sale dated 22.07.2014 as could be seen from the covenants therein a part payment of Rs. 10,911/- alone has been paid as against the sale consideration which was fixed at Rs. 14,50,911/-. The agreement does not appear to give any right nor the five individuals were put in possession of the land in question as the seller agreed to put the five individuals in possession after executing the sale deed and registering the sale in jurisdictional Sub Registrar's office. The sale transaction between the five individuals and the alleged land owners appears to have not taken place and out of the land owners who have stated to have signed the agreements for sale dated 22.07.2011, two of them are stated to have executed to a deed of conveyance in favour of the assessee dated 28.04.2014. In the Memorandum of Understanding dated 28.02.2012 which precedes the deed of conveyance, it is stated that the assessee will allot pari passu shares of Rs. 10/- each at par to the parties of the first part who are the five individuals which shall be in turn deemed to be the consideration to acquire the said interest in the land parcels. The effects of these documents were considered by the tribunal and it was not satisfied with the genuineness of the transaction more importantly noting that the assessee itself has claimed that there is no noticeable business activity



during the year. Thus, the tribunal ultimately concluded that the assessee has failed to establish the basic ingredients required to be established under Section 68 of the Act.

31. In the light of the above discussion, we hold that no question of law much less substantial question of law arises for consideration in this appeal. Accordingly, the appeal fails and is dismissed.

(T.S. SIVAGNAM, CJ.)

I Agree.

(HIRANMAY BHATTACHARYA, J.)

(P.A. - SACHIN)

