

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 7538/2012**

ITA 307/2012

Date of decision: 05.12.2012

PRATIBHA FINVEST P.LTD Petitioner

Through : Sh. K.R. Manjani, Advocate.

versus

ITO WARD 14 (3) , NEW DELHI Respondent

Through : Sh. Karan Khanna, Sr. Standing
Counsel.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The assessee is aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) dated 10.01.2011; it seeks to appeal under Section 260A of the Income Tax Act. The question of law sought to be urged in the said appeal is:

“Whether the Tribunal fell into error in upholding the addition of Rs.1,10,896/- as income earned by way of commission for providing accommodation entries?”

2. In the writ petition, the order of the ITAT, refusing to entertain the appellant’s application under Section 254(2) and rectify its order – made in

the appeal, has been impugned.

3. The brief facts of the case are that pursuant to search operations conducted on certain third parties, characterized as “accommodation entry providers”/”bogus share applicants”, a report was furnished by the Investigation Wing of the Income Tax Department to various AOs. Relying upon one of these reports, the AO, in the present appellant’s case, issued notice under Section 147, seeking to reopen the assessment proceedings. The relevant part of the notice, recording the AO’s “reasons to believe” why reassessment was necessary – states as follows:

“The investigation wing on the basis of enquiries conducted/information collected has sent the names and addresses and bank accounts of the beneficiaries and also the value of entry taken by such beneficiaries from different entry operators. The names of entry giver and bank accounts of the beneficiaries and also the value of entry taken by such beneficiaries from different entry operators. The names of entry giver and bank accounts through which the entry was given has also been informed by the Investigation Wing. One such beneficiary is M/s. Pratibha Finvest Pt. Ltd.

As per report of Inv. Wing, M/s. Pratibha Finvest Pvt. Ltd. had received accommodation entry amount of Rs.5,08,687/- in the F.Y. 2000-01 relevant to A.Y. 2001-02 under the garb of share application money/share capital/bogus gifts.

In view of the above discussion, I have reason to believe that income at least the extent of Rs.5,08,687/- for A.Y. 2001-02 had escaped assessment within the earning of the provisions of Section 147(b) of the IT Act, 1961. To bring to tax the income which has escaped assessment, I proposed to issue notice under Section 148 of the IT Act, 1961.”

4. The reassessment proceedings culminated in the AO’s order dated

04.12.2008, whereby the sum of Rs.1,10,896/-, being 2% of the total unexplained balance of Rs.54,44,816 in the bank account was treated as income in the assessee's hands by way of commission on hawala entries and added back to its income.

5. The assessee carried the matter in appeal to the CIT(A); the latter called for a remand report. The assessee had contended that the AO had passed its decision entirely on the Investigation Wing's report and had not independently applied his mind. Para 4.1 of the Commissioner(A)'s order deals with this aspect in length and also discusses the remand report. The relevant parts of the said order are as follows:

“4.1 Before me, the Ld. AR submitted that the AO has not applied his mind judiciously in coming to the conclusion that the appellant was an entry operator. The Ld. AR submitted that the AO has based his decisions on the basis of report of the Investigation Wing and has not applied his own mind. For the sake of convenience, the relevant portion of the AR's submission is reproduced below:

“.....so far as transaction of Rs.5,08,687/- as mentioned in the reasons recorded is concerned, in this connection as already been submitted on the date of last hearing that appellant company is a NBFC company and is engaged in the business of financing activity and purchase and sale of shares. During the year under consideration assessee company has sold the 5000 equity shares of Patel Care India Pvt. Ltd to a stock broker namely M/s. H.B. RELAN & Co. Copy of contract note and bill issued by the broker, filed with AO during the course of hearing is enclosed herewith for your honour ready reference. No defect is pointed out. On the sale of these shares appellant company has earned the profit of Rs.8,687/-. Shares were acquired by the assessee company in the year f.y. 1997-98. Acquisition of shares is also not disputed by AO and the transaction has been accepted by AO.

Regarding the addition made by AO as an alleged entry operator @ 2% commission earned on the basis of deposits of Rs.55,44,816/- in bank account is concerned in this connection firstly it is clarified that deposit in the bank account is Rs.51,44,650/-. As a matter of fact AO has taken the wrong amount. This is further stated before your honour that credit transaction in the bank account is on account of interest received from various parties and or refund of old deposits and all the transaction has been carried out in the normal course of business. Copy of bank account along with narration of entries and confirmation filed the appellant company during the course of assessment proceedings as desired by AO are enclosed herewith for your honour's ready reference. No defect has been pointed out by AO. Addition has been made arbitrarily without bringing any adverse material.

In view of above mentioned facts and documentary evidences placed on record your honour will appreciate that:

- 1. AO has not brought any material on record to prove and establish that deposits of amount in the bank account of H.B. Relan & Co. belongs to the assessee company or cash/clearing is deposited by the person hired by the appellant company or its related person.*
- 2. No evidence/statement is brought on record by the AO to prove that cash has been paid by the appellant company in lieu of cheque received.*
- 3. Nature of business and old shares held by Assessee Company is not disputed by AO.*
- 4. Credit in the bank account is also in respect of interest income received or received back of its own money advanced to the parties in the normal course of its business.*
- 5. No material/evidence/documents/statement has been*

confronted to the assessee company.

6. AO has not verified and examine the correctness of the information of investigation unit.

In view of the above your honour is requested to allow the appeal filed by the appellant and oblige.”

4.2 The submissions of the AR were forwarded to the AO for his comments vide this office letter dated 09.02.2010. The AO in his remand report dated 22.02.2010 has rebutted the claim of the appellant. It would be convenient to reproduce the relevant portion of the AO’s remand report:

“Information in this case was received from Investigation Wing, Unit-VI, New Delhi, to the effect that the assessee company was engaged in providing accommodation entries for monetary benefits. As per the enquiries conducted by the Investigation Wing the assessee was one of such entry operator. Accordingly, notice u/s 148 was issued for the year under consideration, after obtaining prior approval of the Addl. CIT, Range-14, New Delhi. Form the bank statement it was noticed that the assessee has a credit balance of Rs.55,44,816/- in his bank account. Further it was noticed that the assessee has deposited cash on various dates in his bank account during the period under consideration. The assessee could not substantiate its claim with supporting documentary evidence during the assessment proceedings. As the assessee was an entry operator, as per information received, an amount of 2% of the credit in the bank account amount to Rs.55,44,816/- was treated as income towards providing accommodation entries during the period under consideration.

The assessee has not asked for copy of the reasons recorded during the assessment proceeding and it was only on 20.10.2009 that the assessee has asked for reasons for reopening which were provided to him. There is no calculation mistake as pointed out by the AR of the assessee with regard to

the credits in the bank account. Since the assessee was completed on the basis of information received from Investigation Wing, the Assessing Officer rightly made the addition

In view of the facts and circumstances, as discussed at length above, the contentions raised by the assessee during the appellate proceedings are not correct and the appeal of the assessee may be decided on merits.”

A copy of the remand report was made available to the appellant for his comments on 11.03.2010. However, the appellant has not given any comments on the remand report.”

6. On the basis of the materials, the CIT(A) held that the assessee claimed to engage in the business of sale and purchase of shares and financing, and showed a loss of Rs. 2.01 lakhs in share trading. The CIT(A) noticed that no documentary evidence was forthcoming. The AO says that other income claimed as consisting of commission received and commission paid was unsupported by evidence. The CIT(A) consequently rejected the appellant's contentions. The appellant carried the matter further in appeal to the ITAT which upheld the reopening of assessment. As far as the merits are concerned, the ITAT, after narrating the sequence and discussing the materials as well as the contention, observed as follows:

“21. With regard to the addition made, it is seen, that before the CIT(A) the assessee company had submitted that it was an NBFC engaged in the business of financing activity and purchase and sale of shares; that during the year, it had sold 5000 equity shares of Patel Care India Pvt. Ltd. to a stock broker, namely, M/s. H.B. Relan & Co., that on the sale, the assessee had earned a profit of Rs.8687; that the shares had been acquired by the assessee company in financial year 1997-

98; that such acquisition of shares had also not been disputed by the AO and the transaction had been accepted; that apropos the deposit of Rs.55,44,816 in the assessee's company account, the AO had taken a wrong amount; that further, the credit in the bank account was on account of interest received from various parties and/or refund of old deposits; that all the transactions had been carried out in the normal course of the business of the assessee; that a copy of the bank account along with narration of entries and confirmation had been filed before the AO; that no defect was pointed out by the AO therein and the addition had been made arbitrarily without bringing any adverse material; that the AO had not brought any material on record to prove that the deposits of the amounts in the bank account of H.B. Relan belonged to the assessee company or that the cash/clearing had been deposited by a person hired by the assessee company or its related person; that nothing had also been brought on record to prove that cash had been paid by the assessee company in lieu of cheques received; that neither the nature of business of the assessee company, nor the old shares held by it had been disputed by the AO; that the credit in the bank account was in respect of interest income received or received back by the assessee's own money advanced to the parties in the normal course of its business; that no material or evidence or documents or statement had been confronted by the AO to the assessee company; and that the AO had not verified the correctness of the information of the Inv. Wing.

22. The matter was remanded by the CIT(A) to the file of the AO for his comments.

23. In the remand report dated 22.2.10, the AO had rebutted the assessee's claim stating, *inter alia*, that the assessee had deposited cash in its bank account on various dates during the period under consideration; and that the assessee had remained unable to substantiate its claim with supporting documentary evidence, in the assessment proceedings.

24. On being confronted with the AO's Remand Report, the assessee company did not file any rejoinder before the CIT(A).

25. The CIT(A) took into account of the above. This included the evidence now pointed out as having been filed by the assessee. It was on due consideration of the matter that the CIT(A) found that the assessee had remained unable to explain the credit balance of Rs.5544816 in its bank accounts. Though it had been held out by the assessee that the credit in the bank account was from interest received from various parties and/or refund of old deposits concerning transactions carried out in the normal course of the assessee's business, from the returned income filed by the assessee, it was seen that the assessee had declared a total income of Rs.13047 only, though the assessee claimed to have engaged in the business of purchase and sale of shares and in financing activity. The categorical factual observation of the CIT(A) that the assessee had not been able to establish that the transactions routed through its bank accounts, including the cash deposits, were genuine business transactions, remained unhinged. Further, the assessee company was shown to have declared a loss of Rs.201313 in share trading. However the genuineness of such share trading transactions remained unestablished, since no documentary evidence was filed to prove such genuineness. This aspect of the matter has also remained uncontroverted. Furthermore, though the commission received, amounting to Rs.461900 and commission paid, amounting to Rs.214260/- had been shown, there was no evidence filed of either services rendered for receipt of commission or of services obtained for payment of commission. Moreover, likewise, though an amount of Rs.1,80,000/- had been claimed in the P&L A/c of the assessee company as salary paid, again, no evidence to support such commission, was furnished.

26. It was from the above that the CIT(A) concluded and, in our considered consideration, correctly so, that the assessee company had not been carrying on any actual business activity. The addition of Rs.110896 was, therefore, rightly confirmed by

the CIT(A), and we hereby uphold such action of the CIT(A). Accordingly ground no. 5 is also rejected.”

7. It is contended on behalf of the appellant that the Tribunal and the lower authorities completely misdirected themselves and overlooked the materials, which included the supporting documentary evidence in respect of each entry and transactions reflected in the books. It was submitted that the appellant had, during the reassessment proceedings, entirely submitted its records and disclosed the same to the AO. It is, therefore, urged that the findings of the ITAT as well as the CIT(A) are perverse as they have not even adverted to the materials produced.

8. The assessee had lastly contended that the additions made by the AO and sustained by the Commissioner(A) and later by the ITAT cannot be upheld because they do not form part of the “reasons to believe”, which in the first instance, impelled the Department to reopen the proceedings. In this regard, the assessee relies upon the decision of this Court in *Ranbaxy Laboratories Ltd. v. CIT* 336 ITR 136. In that case, the Court had held that once the assessing officer assumes jurisdiction to reopen proceedings under Section 148, he cannot, in the absence of any material with regard to the rationale for the reopening, independently make additions in respect of other income which escapes assessment. Learned counsel also relied upon the judgment of the Rajasthan High Court in *Dr. Devender Gupta v. CIT* 2011 (336) ITR 59 (Raj). This Court is of the opinion that the amplitude of the powers under Section 147 and 148, despite the amendment brought about by Explanation 3 to Section 147, is not as restricted as is sought to be contended in this case. The said Explanation undoubtedly has been added recently; to this Court’s mind it clarifies what existed previously. Speaking

on this, the Supreme Court in *V. Jagan Mohan Rao and Others v. Commissioner of Income Tax and Excess Profits Tax*, A.P. 1970 (75) ITR 373, stated that:

“.....under Section 34 for the assessment year 1944-45 were legally valid. It was stated on behalf of the appellant that in any case the Income Tax officer could have legitimately assessed one-third share of the income which was due to the assessee according to the judgment of the Madras High Court and there was escape only to the extent of two-thirds share of the income. This argument is not of much avail to the appellant because once proceedings under section 34 are taken to be validly initiated with regard to two-thirds share of the income, the jurisdiction of the Income Tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income Tax officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section(2) of section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under Section 34(1)(b) the Income Tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.”

9. In the opinion of this Court, the law as it existed always was that if a valid notice under Section 147 was issued by the AO, the scope of scrutiny and final assessment made in the reopening proceedings was not conditioned upon the material which impelled him to issue notice. To hold such a view would be to impinge on the concededly wide power conferred upon the Revenue in Section 147/148 and undermine its objective. Consequently, the

appellant's contentions in this regard are rejected.

10. This Court has carefully considered the submissions. As regards the challenge to the reopening of proceedings is concerned, the Court is satisfied that the notice under Section 147 reflected due application of mind to objective material furnished to the AO, i.e. by way of Investigation Report which could have given rise to a bonafide belief, legitimately falling within Section 147. As regards other issue, i.e. addition of Rs.1,10,896/- is concerned, this Court notices that this question was again gone into elaborately by the CIT(A), who, however, sought for remand report. A careful reading of the paras 4.1 to 4.3 of the appellate Commissioner's order would reveal that the materials produced before the AO and also discussed by the AO in the remand report were taken into consideration. Furthermore, it is not as if the entire amount of Rs.55,44,816/- which was shown to be the balance in the bank account of the appellant is sought to be added back. In that regard, the assessee's explanations were somewhat accepted. The Revenue has proceeded on the footing that the appellant provided some services and charged him only to the commission reasonably earned by it, i.e. Rs.1,10,896/-. Being a pure question of fact, this Court cannot, exercising jurisdiction to consider substantial questions of law, convert it into a third Court of fact and examine the concurrent findings.

11. As a result of the above discussion, the Court is satisfied that the ITAT's order does not call for any interference.

12. For the above reasons, the Court does not find any substantial question of law which requires to be answered in the appeal. Similarly, the petition seeking intervention of Court under Article 226 in respect of the ITAT's order rejecting the application for rectification is devoid of merits.

Both are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.V.EASWAR
(JUDGE)

DECEMBER 05, 2012
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