

In the High Court of Judicature at Madras

Reserved on : 07.7.2017

Delivered on : 11.8.2017

CORAM :

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO

AND

THE HONOURABLE MR.JUSTICE M.S.RAMESH

TCA Nos. 435 and 436 of 2013
and MP.Nos.1 and 1 of 2014

M/s.Lalitha Jewellery Mart P. Ltd.,
No.123, Usman Road, Chennai-17.

... Appellant in Both TCAs

Vs

The Deputy Commissioner of Income
Tax, Company Circle II (4),
Chennai. ... Respondent in TCA.435 of 2013

The Assistant Commissioner of Income
Tax, Company Circle II (4),
Chennai. ... Respondent in TCA.436 of 2013

APPEALS under Section 260A of the Income Tax Act against the common order dated 15.4.2013 made in ITA.Nos.2180 and 1871/MDS/2010 on the file of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, for the assessment year 2007-08, against the Order of the Commissioner of Income Tax (Appeals) III in I.T.A.No.598/09-10/A III dated 08.09.2010 and against the Order of the Assistant Commissioner of Income Tax, dated 31.12.2009 in PAN/GIR No.AAACL 1523A in Assessment year 2007 - 2008.

For Appellant : Mr.N.Muralikumar for
M/s.McGan Law Firm

For Respondents : Mr.T.R.Senthilkumar, SC

COMMON JUDGMENT

NOOTY.RAMAMOHANA RAO, J

These appeals under Section 260A of the Income Tax Act, 1961 (henceforth called the Act) have been preferred by the assessee challenging the correctness of the common order passed

by the Income Tax Appellate Tribunal, 'C' Bench, Chennai dated 15.4.2013 in ITA Nos.2180 and 1871/ MDS/2010.

2. The following substantial questions of law have been framed while admitting TCA.No.435 of 2013 on 25.2.2014 :

"(i) Whether the Appellate Tribunal is correct in confirming the assessment of share capital contributions as unexplained credit/ investment within the scope of Section 68/69 of the Act in spite of the material evidence filed before them and the lower authorities establishing clearly/discharging of initial burden/onus statutorily vested on the appellant company to provide the source ?

(ii) Whether the Appellate Tribunal is correct in law in confirming the assessment of share capital contributions as the income of the appellant company even though there were no materials in their possession of the respondent/Assessing Officer establishing such facts apart from mere suspicion as well as establishing perversity both on facts and in law in rendering their decision ? and

(iii) Whether the Appellate Tribunal is correct in law in sustaining the assessment of share capital contributions as the income of the appellant company on the application of the deeming provisions in Section 68/69 of the Act even though there was no legal mandate for the appellant company to establish/prove the 'source for source' ?"

3. The following substantial question of law has been framed while admitting TCA.No.436 of 2013 on 25.2.2014 :

"Whether the Appellate Tribunal is correct in law in confirming the disallowance of expenses incurred on gifts and compliments for the purposes of business within the scope of Section 37(1) of the Act for want of further evidence even though such evidence were available in the records of the respondent undisputably in view of the impounding order passed earlier ?"

4. The assessee is a company carrying on business in gold and manufacture of jewellery and trading. With a view to expand its business by opening branches at several places, the appellant company raised the share capital of Rs.21,96,60,000/-

from four different investors through account payee cheques or by way of transfer from one bank account or the other to that of the assessee. The assessee has reflected the increased share capital in its return for the assessment year 2007-08 filed on 12.11.2007. The assessment has been picked up for scrutiny under Section 143(2) of the Act by drawing a notice dated 11.9.2008. A survey was also conducted under Section 133A of the Act on 26.2.2009. The scrutiny assessment was completed on 31.12.2009.

5. During survey operations, two gold purchase vouchers bearing Nos. 237 and 239 dated 20.2.2007 aggregating to Rs.4,90,00,000/- (Rupees four crores and ninety lakhs) have come for scrutiny and the concerned purchaser Sri.Shahul Hameed was issued with summons under Section 131 of the Act to appear before the Assessing Officer. Sri.Shahul Hameed appeared accordingly on 7.10.2009 and gave his statement. Though, at the first instance, Sri Shahul Hameed denied having purchased or sold any gold to and from the assessee, but, however, later on, he furnished the details of the sources for purchase of the gold from the assessee. Rejecting the claim of gold purchases made by Sri Shahul Hameed, the Assessing Officer has recorded the said inflated transactions as the source for capital contribution aggregating to Rs.5.75 Crores by the said Sri.Shahul Hameed. In so far as the capital contribution made by Sri.Shahul Hameed for purchase of 35,000 shares of the assessee is concerned, a sum of Rs.5.25 crores has been paid through cheque Nos. 852593, 852594 and 852595 drawn at ICICI Bank, T.Nagar on 20.2.2007. For purchase of 3333 shares, a sum of Rs.50 lakhs has been remitted through cheque No.833026 of the State Bank of India dated 20.2.2007. In consideration of this payment, aggregating to Rs.5.75 crores, shares were allotted by the assessee on 30.3.2007 to the said Sri.Shahul Hameed.

6. Similarly, in the case of Sri.Prakash Chand Jain, who has also been allotted shares by the assessee company, the sources of the said individual for contributing to the share capital of the assessee company have been explained. Sri.Prakash Chand Jain was allotted 33333 shares for Rs.5 crores, whereas Heritage Creations, Nehru Palace, New Delhi was allotted 65333 shares for Rs.9,80,00,000/- (Rupees nine crores and eighty lakhs only). Another individual Smt.Savitri of Royapet, Chennai was allotted 9440 shares for Rs.1,41,60,000/- (Rupees one crore forty one lakhs and sixty thousand only).

7. The Assessing Officer has held that though monies were routed through banking channels, the explanation offered by the assessee company is not acceptable, as the said explanation was not convincing and satisfactory. In so far as the said Sri.Shahul Hameed is concerned, the Assessing Officer has

noticed that the said individual initially purchased gold through one of his firms and later on, sold the gold again to the assessee company and thereafter, the sale proceeds were paid over for acquiring the shares. This sort of cycling and re-cycling of funds does not carry any conviction and hence, the addition to the share capital has been treated as 'income' in the hands of the assessee.

8. The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals) [henceforth called the CIT (Appeals)]. The CIT (Appeals) has found that all the investors have been identified and that the transactions have been carried on through banking channels. Therefore, the CIT (Appeals) had arrived at a conclusion that the assessee had discharged the onus cast on it under Section 68 of the Act and that they had received the money from those persons, against which payment, respective shares were allotted and hence, it may not be the concern of the Assessing Officer to find out as to why the investors have chosen to invest in the assessee company. Hence, the CIT (Appeals) has deleted the addition of the amount aggregating to Rs.21,96,60,000/- (Rupees twenty one crores ninety six lakhs and sixty thousand only) contributed by the four individual members towards the share capital of the company from computation of income of the assessee.

9. Aggrieved by this decision of the CIT (Appeals), the Revenue preferred the second appeal before the Income Tax Appellate Tribunal.

10. While making the assessment order, a further sum of Rs.10,45,913/- (Rupees ten lakhs forty five thousand nine hundred and thirteen only) was added towards income by disallowing the expenditure said to have been incurred by the assessee in buying the compliments and gift articles to be presented to it's customers. The Assessing Officer has disallowed the claim, as no evidence to support the purchase of such gift articles has been brought before it. The CIT (Appeals) has also held that the assessee has not produced any evidence to support the claim of expenditure for the gift articles and hence, he did not find any error in the order of the Assessing Officer disallowing the said expenditure and then adding it to the income of the assessee. To this extent of denial of the expenditure incurred towards purchase of gift articles to be presented to the customers, the other appeal has been preferred by the assessee before the Income Tax Appellate Tribunal.

11. Both the appeals have been heard by the Income Tax Appellate Tribunal and by the common impugned order dated 15.4.2013, the Tribunal allowed the appeal of the Revenue and dismissed the appeal of the assessee. It was urged before the

Tribunal that by a methodical cycling and re-cycling, the funds have been brought in to show as if contribution was made to the share capital of the assessee company whereas truth of it being that this is the actual income of the assessee, which is sought to be camouflaged by devising the scheme of contribution to the capital. It was urged, for instance, that M/s.Heritage Creations Private Limited invested a substantial amount for purchasing the shares of the assessee company. But, the said M/s.Heritage Creations Private Limited immediately sold the shares to another concern viz., M/s.AK Exports. M/s.AK Exports is owned by the Managing Director of the assessee company. The sale of shares of the assessee company to M/s.AK Exports has resulted in a huge loss of Rs. 8.82 Crores to M/s.Heritage Creations Private Limited and the business sense in incurring such a huge loss in a short span of time remained unexplained and hence, the transactions are all 'make believe management practices', rather than being cases of genuine transactions of investment.

12. The principal contention of the assessee in answer thereto was that two of the investors are from Delhi and the officers of the Income Tax Department at Delhi made necessary enquiries about them and no adverse report has been made by the Income Tax Department at Delhi against those two investors. Since all investments are made through the banking channels, the assessee has discharged the onus that was lying on it for purposes of proving the sources of its sources. When once the source of its sources has been explained, it is no concern of the assessee company to go further and establish the genuineness or the credit worthiness of the sources of the assessee. In other words, when once the investors of the assessee company are traced out and the monies have been shown to have been received by the assessee through banking channels from them and those sources have identified their respective sources and they were also investigated for a while by the Department, but having found no adverse material against them, cannot now disallow the said investment received by the assessee on one ground or the other. According to the learned counsel for the appellant, assessee is only required to explain the sources of investment and when once that gets established, it is for the Department to proceed against the investors in case those investors have not properly explained their own resources for investing in the assessee company. It was further urged that it is not the concern of the assessee company to find out as to why the investors have chosen to invest in the assessee company. It is also equally not the concern of the Department as to why a fabulous amount of premium has been paid for acquiring the shares of face value of Rs.10/-, in as much as the valuation of the shares of the assessee company is altogether a different matter and the Income tax Department has no regulatory control in that regard.

13. Before proceeding further, it is only appropriate to notice the contents of Section 68 of the Act. It reads as under :

"68. Where any sum is found credited in the books of an 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 :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in Clause (23FB) of Section 10."

14. It is clear from the above provision that burden, initially, is cast upon the assessee to offer an explanation about the nature and source of the money found credited in its books of account and if that explanation is not satisfactory in the opinion of the Assessing Officer, the sum so credited be charged as the income for the previous year. Similarly, if the assessee is a company and the sum is credited, consisting of share application money or share capital or share premium or any such amount, the assessee is required to offer satisfactory explanation about the nature and source of the sum credited to its book of account.

15. To understand the rationale behind this provision, it is only apt to refer to the judgment of the Supreme Court rendered in the case of Commissioner of Income Tax (Central), Calcutta v

Daulat Ram Rawatmull [reported in (1973) Vol.87 ITR 349], it has been set out therein as under:

"Before dealing with the facts of this case, we may advert to the principles which should govern the decisions of the court in such like cases. Findings on questions of pure fact arrived at by the Tribunal are not to be disturbed by the High Court on a reference unless it appears that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to which they have come; and this is so, even though the High Court would on the evidence have come to a conclusion entirely different from that of the Tribunal. In other words, such a finding can be reviewed only on the ground that there is no evidence to support it or that it is perverse. Further, when a conclusion has been reached on an appreciation of a number of facts, whether that is sound or not must be determined, not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting as a whole [Sree Meenakshi Mills Ltd. Vs. Commissioner of Income-Tax [1957] 31 ITR 28 : [1956] SCR 691 (SC)]."

16. When a Court of fact acts on material partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. Likewise, if the Court of fact bases its decision partly on conjectures, surmises and suspicions and partly on evidence, in such a situation, an issue of law arises [Dhirajlal Girdharilal Vs. CIT [1954] 26 ITR 736 (SC)]. The Court went on to hold that a person can still be held to be the owner of a sum of money even though the explanation furnished by him regarding the source of that money is found to be not correct. Thus, the explanation regarding the source of money furnished by the person was not satisfactory does not automatically lead to a conclusion that that the money does not belong to that particular person, but belongs to the other automatically.

17. More importantly, the Supreme Court, in Daulat Ram, has laid down the following principle, which has a direct bearing upon the controversy at issue and it reads as under:

"The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of Biswanath, the burden lay on the department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination...."

(Emphasis is mine)

18. Similarly, in the case of CIT, Orissa Vs. Orissa Corporation P. Ltd. [reported in (1986) Vol.159 ITR 78], the Supreme Court has held as under:

"To what extent the assessee had an obligation to discharge the burden of proving that these were genuine incomes has been considered by this court in Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288. This court was concerned there with the encashment of high denomination notes. In that case, some unexplained high denomination notes were treated as the undisclosed income of the assessee. This court held that when a court of fact arrives at its decision by considering material which is irrelevant to the enquiry, or acts on material, partly relevant and partly irrelevant, and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises, whether the finding of the court is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises, nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures and surmises. In that case, the so-called hundi racket in which the assessee was alleged to

have been involved was not proved. That was only a suspicion of the Revenue."

19. It would also be appropriate to notice the observation of the Supreme Court in the case of Orissa Corporation P.Ltd., at page 83, as under :

"In Sreelekha Banerjee Vs. CIT [1963] 49 ITR 112, this Court held that if there was an entry in the account books of the assessee which showed the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money was and to prove that it was not income. The Department was not at that stage required to prove anything. It could ask the assessee to produce any books of account or other documents or evidence pertinent to the explanation if one was furnished and examine the evidence and the explanation. If the explanation showed that the receipt was not of an income nature, the Department could not act unreasonably and reject that explanation to hold that it was income. If, however, the evidence was unconvincing, then such rejection could be made. The Department cannot by merely rejecting a good explanation unreasonably, convert good proof into no proof."

20. Again in the case of Sumati Dayal Vs. CIT [reported in 214 ITR 801], at page 805, the Supreme Court has clearly explained the point of approach to be followed both by the assessee and the Department, in the context of Section 68 of the Act, in the following words :

"It is no doubt true that in all cases, in which, a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee [Parimisetti Seetharamamma [1965] 57 ITR 532 at page 536]. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the

assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee viz. the receipt of money and if he fails to rebut it, the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably [Sreelekha Banerjee's case (1963) 49 ITR (SC) 112 at page 120]. "

21. A Division Bench of the Delhi High Court in the case of CIT Vs. Stellar Investment Ltd., [reported in 192 ITR 2870, has pointed out the approach to be adopted in this type of matters, as under :

"It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself."

22. The above view on the point of approach to the subject has been approved by the Supreme Court in CIT Vs. Stellar Investment Ltd., on 20.7.2000, in Civil Appeal No.7968 of 1996.

23. Applying the legal principles noticed supra, let us examine as to how the issue has been handled by the Assessing Officer at the first instance. The Assessing Officer disallowed the investments made towards the share capital of the assessee. As was noticed supra, three individuals and one company claimed to have made contributions to the capital. Each of these investments has been faulted by the Assessing Officer. The Assessing Officer has essentially based his findings on certain information gathered during survey. During the said survey

operations, two purchase vouchers bearing Nos.237 and 239 were found and voucher No.237 relates to purchase of gold jewellery for an amount of Rs.1,72,30,572/- and voucher No.239 relates to purchase of fine gold worth Rs.3,17,69,428/-. Both the vouchers, put together, accounted for a sum of Rs.4.90 Crores.

24. The name of the seller was noted as M/s.Sun Land Properties Private Limited. Hence, the statement of the Managing Director of the said company was obtained for the ostensible purpose of verifying the genuineness of the purchases made by the assessee. Sri.Shahul Hameed, the Managing Director of the said company, appears to have categorically rejected that he ever had any purchase or sale transaction with the assessee either in bullion or in old gold jewellery.

25. Thereafter, the Managing Director of the assessee company has been confronted with that rejection of transaction by the Managing Director of M/s.Sun Land Properties and the Managing Director of the assessee company has confirmed the purchases made by the assessee and he, in turn, rejected the statement of Sri.Shahul Hameed as to why he has been denying the sale made by him in spite of the vouchers containing his (Shahul Hameed) signature as proof of sale of gold by him to the assessee company.

26. It is worthy to notice that in the profit and loss account, the assessee company has debited a sum of Rs.5,11,04,113/- towards purchase of old gold jewellery. Further, for verifying the apparent contradictions, summons were issued to Sri.Shahul Hameed on 15.9.2009, in response to which, he appeared on 07.10.2009. A sworn statement was taken from him. He clearly stated that earlier they had purchased gold jewellery and fine gold from the assessee and they were again sold in the same year for a short term gain. When he was specifically confronted with regard to purchase vouchers bearing Nos.237 and 239 dated 20.2.2007, Sri.Shahul Hameed had categorically stated that M/s.Sun Land Properties Private Limited purchased and sold the jewellery and bullion from and to the assessee during that period. He was also asked to furnish necessary details. He also furnished all the details relating to the purchase of gold by M/s.AK Exports and the assessee company.

27. The Assessing Officer then asked the said Sri.Shahul Hameed to produce his accounts and he also produced his sources of payments, as they (M/s.Sun Land) received substantial sums of money from various contracting parties of theirs between 18.7.2007 and 04.10.2007. Thereafter, the Assessing Officer assigned the following reasons for not believing the statement of Sri.Shahul Hameed :

"By going through the above details, anyone can understand that the submission by Sri.Shahul Hameed does not rescue the case due to firstly not producing any of the above parties from whom the money was received by him and further even if for the sake of argument we accept that the receipt was there, the question still remains that how the money received during the period 18.7.2007 and 01.10.2007 can be used for the purchase of standard gold and new jewellery during 18.11.2006 to 20.2.2007, which was at least five months prior to the date of the alleged receipts."

28. The Assessing Officer, in spite of tracing the investor of the assessee and in spite of the said source of the assessee explaining its own sources, which run to several crores of rupees, prefers to reject it on the ground that Sri.Shahul Hameed has not produced the parties, who paid his firm monies. It is a clear perverse view. It is plainly unthinkable that the assessee should have secured the presence of the contracting parties of its investors. The assessee, being a business enterprise, can trust the credit worthiness of its investors and not unduly worry as to whether the investor has been properly maintaining its books of accounts and is managing its affairs prudently. It is all the more so, when the assessee receives the money through approved Banking channel. It is clear that the Assessing Officer is indulging in surmises and conjectures. It is plainly obvious that the Assessing Officer has concentrated all his energies to discredit the credit worthiness of the said Sri.Shahul Hameed. More importantly, the Assessing Officer has glossed over the fact that Sri Shahul Hameed invested a sum of Rs.5.75 Crores, whereas the Vouchers 237 and 239 cover a sum of Rs.4.9 Crores only. The difference in between the two is no less significant amount, running to Rs.85.00 lakhs. Similarly, when it came to the investment made by Sri.Prakash Chand Jain, this is what has been set out by the Assessing Officer in paragraphs 2.8.3 and 2.8.4 :

"In the meantime, based on survey information, further enquiries were done through the office of the Additional Director of Investigation, New Delhi with respect to the alleged investment in the case of Sri.Prakash Chand Jain in the assessee company. The enquiry revealed that in response to the summons issued by O/O ITO (Inv.) Unit III, Delhi, on behalf of him, one Sri.K.V.S.Gupta, FCA appeared with power of authorization and gave the following

information. Through the enquiries, it was gathered that Sri.Prakash Chand Jain is a non resident Indian stationed in Dubai, engaged in the business of jewellery in the name and style of M/s.Al Mowaiji Jewellers LLC in Dubai. He is being assessed in India for his income earned in India to tax with ITO, Ward 19(2) and New Delhi. He had filed return to the Department for the assessment years 2007-08 and 2008-09 declaring taxable income of Rs.1,84,730/- and Rs.3,97,680/- respectively. However, the payment for the investment was shown to have been made from Dubai by withdrawing the amount in the bank account of AL Mowaiji Jewellers LLC with Standard Chartered Bank, Deira Branch, Dubai vide bank draft No. DDD219070321009 dated 21.3.2007 favouring M/s.Lalitha Jewellery Mart Private Limited.

Except the only information available on record that one Sri.Prakash Chand Jain has applied for the shares in the assessee company and got allotted with the shares, nothing is available to prove further."

By the above observation of the Assessing Officer, it is clear that he is looking for proof of resources of the investors of the assessee and such proof is beyond the realm of possibility of production by the assessee. The Assessing Officer has adopted a totally unreasonable attitude and was acting unreasonably. That was exactly what was frowned upon by the Supreme Court in Sreelekha Banerjea's case, (1963) 49 ITR (SC) 112.

29. When it came to M/s.Heritage Creations Private Limited, in paragraph 2.9.2, it has been noted as under :

"During the survey in the statement recorded, the CMD of the assessee company stated that the investment was actually made by one Sri.Sanjay, who was said to be his friend, through the company M/s.Heritage Creations Private Limited, Delhi. In the meantime, based on the survey information, further enquiries were done through the office of the Additional Director of Investigation, New Delhi with respect to the investment in the case of M/s.Heritage Creations Private Limited in the assessee company. The enquiry revealed that in response to the summons issued by O/O ITO

(Inv.), Unit III, Delhi, nobody has appeared to the office, however, a reply letter was filed in the above mentioned office.

Through the enquiry it was gathered that the company has shown a major portion of income by job work and minor portion of it by sale and purchase of assets and investments. The company operates a bank account with Centurion Bank of Punjab, Nehru Place, New Delhi with the account No.12CA11101371. As per the information filed by the company, it has been shown that it has invested in the shares of the assessee company during March 2007 to an extent of Rs.9,80,00,000/- with the premium. As an explanation to the source, it has shown the advances received in respect of IMT/Manesar Project from ITC Limited vide MOU/agreement dated 23.8.2007, for which, the company had furnished copies of the bank account, MOU, etc. Further, as per the submission, it was also in receipt of share application money from AEZ Infratech Private Limited during the financial year 2006-07. As per the submissions, the following were the receipts from ITC Ltd to the party :

Date	Ch.No.	Amount	Bank
8.2.2007	953586	1,51,00,000	HDFC Bank
19.3.2007	955019	9,74,00,000	HDFC Bank
19.3.2007	955018	1,00,00,000	HDFC Bank
19.3.2007	955017	2,00,00,000	HDFC Bank
19.3.2007	955016	25,00,000	HDFC Bank
	Total	14,50,00,000	HDFC Bank"

Even when the investor of the assessee demonstrated its resources, the Assessing Officer still has suspicion.

30. When it came to the investment made by Smt.Savithri, it was explained by the assessee company that her husband Sri.M.S.Kandasamy was a Director of the assessee company till his death and therefore, the legal heirs of M.S.Kandasamy agreed

and instructed the assessee company that the amounts due to Sri.Kandasamy may be paid to their mother Smt.K.Savithri and that they have no objection for any such payment made to her. That was the reason why a sum of Rs.65,61,374/- was claimed as due and payable to Sri.Kandasamy by the date of his death on 1.8.2005. It is Smt.Savithri, who favoured allotment of shares instead and accordingly applied for allotment of 4,374 shares. She also applied for the balance of 5,166 shares duly making payment through cheques drawn at ICICI Bank, T.Nagar.

31. Thus, the assessee company has completely explained the sources of investments received by it. It has also disclosed the identity of such investors. The Assessing Officer traced out and reached all the four investors of the assessee. He also found as a fact that all the payments have been received through banking channels. Hence, the burden cast on the assessee stood discharged. But yet, the Assessing Officer disallowed and added the amount to income of the assessee. In this context, it is apt to take note of the crisply worded order of the Supreme Court in the case of CIT Vs. Lovely Exports (P) Ltd. [reported in (2008) 216 CTR 195 (SC)], which runs as follows :

"Can the amount of share money be regarded as undisclosed income under Section 68 of IT 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 Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law."

That is the precise reason as to why the Appellate Commissioner - CIT (Appeals) allowed the appeal of the assessee.

32. Now, let us examine the order passed by the Tribunal. In paragraph 26, the Tribunal declined to give credence to the payments received by the assessee through banking channels in the following words :

"It is true that all the transactions doubted by the Assessing Officer were made through banking channels. This is the anchor of the arguments advanced by the assessee before the lower authorities. We also do agree that making payment of money through cheques, demand drafts and bank transfers, is one of the ingredients to prove the genuineness of the payment. But, at the same time, we have to be cautious to the fact that such transactions made through banks do

not conclusively prove that those transactions have been entered in the same way explained by an assessee. The fact that a payment has been made by cheque or draft by itself does not conclusively prove that the person making such payment had enough resources in his hands to make such payment. It is always possible to transact through banking channels and still manipulate the original character of the amount as to whom it belonged and how it was earned. Therefore, we cannot decide this appeal only on the ground that the payments objected in this case have been effected through banking channels."

33. In paragraph 27, the Tribunal proceeded to examine the absence of commercial wisdom of the investors in purchasing the shares of the assessee company for two fold reasons. The first one was that the Managing Director and his wife hold 98.5% of the share capital of the assessee company and consequently, it is a completely family held concern. Therefore, the investors will not be able to gain any control over the affairs of the assessee company, by their investment. The second is that there is no reason set forth as to why the assessee company's shares should be picked up at a higher premium of Rs.1,490/-. The reason assigned by the Tribunal in the concluding part of paragraph 27 reads thus :

"They are all business people. Therefore, the decision of those business people to invest in the share capital of the assessee company by paying such a huge premium needs to be reasonably demonstrated before the Assessing Officer. The explanation offered by the assessee is not convincing at all."

34. In paragraph 28, it went into the dynamics of the financial capacity of Sri.Shahul Hameed to invest in the assessee company and it has arrived at a finding that at the time when Sri.Shahul Hameed purchased jewellery and gold, funds are not available with him. It concluded their enquiry in paragraph 30 in the following terms :

"It is very difficult to accept the contentions of Sri.Shahul Hameed as genuine when we go through the long journey of exercise carried out by him to raise funds, thereafter to purchase gold, again thereafter to sell the gold and then invest in the shares, etc. The explanation offered

by the assessee is very incredible. It is not at all convincing."

35. When it came to the investments made by Smt.Savithri, the finding of the Tribunal is to the following effect :

"Here also the flow of fund is very circular. It first goes from the books of the assessee company, and then it comes to the assessee company through the medium of Smt.Savithri. We are of the view that Smt.Savithri might be a convenient name lender in the whole exercise carried out by the assessee company. It is also to be seen that she did not appear before the Assessing Officer."

36. When it came to Sri.Prakash Chand Jain, the issue is concluded in paragraph 32 in the following words :

"Except the address provided in the paper, there was nothing available before the Assessing Officer to verify the genuineness of the investments made by the so called parties. It is stated that Shri.Prakash Chand Jain is big businessman in Dubai. Of course the money came through his bank account. But, there is no other communication from him."

37. In the case of M/s.Heritage Creations Private Limited, the issue is concluded on the strength and basis that the shares of the assessee company have been sold within a year to M/s.AK Exports, which is the proprietary concern of the Managing Director of the assessee company and in that process, sustained a loss of Rs.8.82 Crores and hence, the Tribunal concluded the issue holding that the Assessing Officer has rightly held that the amounts brought in by the assessee company into its share capital and share premium accounts are unexplained and they have to be treated as income of the assessee company and accordingly reversed the order of the CIT (Appeals).

38. The Tribunal has also rejected the appeal preferred by the assessee with regard to rejection of expenditure incurred by it for purchase of gifts and compliments to be given to customers. Though for a company of having turnover of Rs.150 Crores the expenditure incurred towards purchase of gifts and compliments amounting to Rs.10,45,913/- is a reasonable amount, but on the ground that the vouchers have not been produced before the Assessing Officer, the expenditure in that regard was disallowed.

39. The assessee pointed out that the vouchers are impounded by the Assessing Officer and hence, they were prevented from producing the same before the Assessing Officer. The Tribunal noted that the assessee was not without any remedy and that they could have secured copies of the vouchers, which are impounded by the Assessing Officer and thus, the assessee could have established the genuineness of the expenditure incurred. This concurrent finding of fact could not have been challenged without producing any reasonably acceptable evidence that expenditure claimed was truly incurred. The fact that the assessee has reported a turnover of Rs.150.00 crores is no proof of the actual expenditure it claimed to have indulged in buying articles of gifts or complimentaries.

40. We agree that if the assessee is in a position to produce copies of vouchers for the expenditure incurred by it towards purchase of gifts and compliments, the failure to produce evidence in support of the expenditure is a justifiable reason for the Assessing Officer to disallow the expenditure claim.

41. However, the main theme, upon which, the Assessing Officer as well as the Tribunal proceeded to discredit the investors of the assessee is completely erroneous. They are both looking for proof beyond doubt. They are proceeding on an element of suspicion that the amounts of investments are really those of the assessee, which have been ploughed back by the assessee, whereas the settled principle of law is that any amount of suspicion, however strong it might be as well, is no substitute for proof. Suspicion is not sufficient enough to lead to a conclusion that the investments received by the assessee company are all manipulated receipts and on that basis, recorded a finding that the explanation of the assessee is not satisfactory.

42. On the other hand, the legal principle enunciated by the Supreme Court, as noticed supra by us, is that so long as the proof and identity of the investor and the payment received from him is through a doubtless channel like that of a banking channel, the receipt in the hands of the assessee towards share capital or share premium does not change its colour. The money so invested in the assessee company would still be the money available and belonging to the investors. The consistent principle followed is that the investors' sources and credit worthiness cannot be explained by the assessee. If the Department has a doubt about the genuineness of the investors capacity, it is open to it to proceed against those investors. Without taking such a course of action, the Assessing Officer and the Tribunal are proceeding on conjectures that the assessee has, in fact, ploughed back the money. The very approach of the

Assessing Officer and the Tribunal are completely opposed to settled legal principles enunciated and they have arrived at conclusions contrary to the legal principles on the subject. Further, they are finding fault with the assessee for the alleged failure of its investors in proving beyond doubt that they have the capacity to invest at the moment they did in the assessee company. That is clearly a perverse view, as the assessing officer is not expected to perform a near impossibility. The assessee cannot call upon its investors to disclose all such business transactions they carried on in the immediate past and as to how much they made from their respective business enterprises. The assessee cannot also call upon its investors to prove their good business sense in investing in the assessee company, as such investors cannot gain any controlling stake.

43. In the result, the questions of law framed in TCA.No.435 of 2013 are answered in favour of the assessee and against the Revenue. Hence, TCA.No.435 of 2013 is allowed. Consequently, MP.No.1 of 2014 is closed. 44. The question of law framed in TCA.No.436 of 2013 is answered in favour of the Revenue and against the assessee. Hence, it is dismissed with costs. Consequently, MP.No.1 of 2014 is also dismissed.

45. It is seen that on 25.2.2014, vide orders passed in MP.Nos.1 and 1 of 2014, it was recorded that a sum of Rs.4 crores was already remitted by the appellant company. In view of the common judgment rendered in these appeals, the said sum of Rs.4 Crores be adjusted towards any other dues of the appellant company for the subsequent assessment years.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dixit/rs

To

- 1.The Presiding Officer,
Income Tax Appellate Tribunal,
'C' Bench, Chennai.
- 2.The Deputy Commissioner of Income Tax,
Company Circle II (4),
Chennai.

3.The Assistant Commissioner of Income Tax,
Company Circle II (4),
Chennai.

+2cc's to Mr.T.R.Senthil Kumar, Advocate, S.R.Nos.58421 & 58420
+2cc's to M/s.McGan Law Firm, Advocate, S.R.Nos.58645 & 58646

TCA.Nos.435 & 436 of 2013
of 2014
&
MP.Nos.1 and 1 of 2014

MG (CO)
CA(04/10/2017)



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