

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 83 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 84 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 85 OF 2016
ALONWITH
INCOME TAX APPEAL NO. 463 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 465 OF 2016

The Principal Commissioner of
Income Tax (Central)-4Appellant
V/s.
M/s. Acquatic Remedies Pvt. Ltd.Respondent

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Mr. N.C. Mohanty, Advocate for the appellant.

Mr. F.V. Irani a/w. Mr. Atul Jasani, Advocate for the
respondent.

CORAM :- M.S. SANKLECHA, &
SANDEEP K. SHINDE, JJ.

DATE : 30TH JULY, 2018.

P.C. :-

1. These Appeals under Section 260A of the
Income Tax Act, 1961 (the Act), challenge the common
impugned order dated 17th April, 2015 passed by the
Income Tax Appellate Tribunal (the Tribunal). The

common impugned order relate to Assessment Years 2005-06 to 2011-12. These five appeals are in respect of Assessment Years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10.

2. The Revenue has urged the following identical questions of law in all these five Appeals, for our consideration:

(A). *Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in deleting the addition made under Section 68 of the Act, without appreciating the fact that the assessee had failed to discharge its onus in terms of Section 68 of the Act by not furnishing evidence to substantiate the genuineness of the transaction, identity and creditworthiness of the shareholders/investors ?*

(B) *Whether, on the facts and in the circumstances of the case and in law, the Tribunal has erred in deleting the addition of 5% of cash purchases as profit by way of*

discount, without appreciating the fact that the assessee had failed to furnish supporting evidence to prove the identity of the party and genuineness of such purchases ?

(C) Whether, on the facts and in the circumstances of the case and in law, the Tribunal has erred in deleting the addition of 2% as unexplained expenses by way of commission/service charges paid for arranging accommodation bills ?

Brief Facts :

3. On 1st September, 2009 a survey was conducted on M/s. Globe Pharma by the Investigation Wing of the appellant-Revenue. During the course of the survey, it was found that M/s. Globe Pharma was issuing bogus accommodation bills to various concerns including the respondent-assessee and its sister companies. Consequently, on 9th September, 2010 a search operation was conducted on the premises of the respondent and its sister companies.

4. Consequent to the above, notice under Section 153B of the Act was issued to the respondent for Assessment Years 2005-06 to 2009-10. Thereafter, assessment orders dated 30th March, 2013 were passed under Section 153(3) read with 153A of the Act by the Assessing Officer for Assessment Years 2005-06 to 2009-10 making additions under the following heads :-

- (a) on account of introduction of share capital as unexplained cash credit under Section 68 of the Act ;
- (b) on account of bogus purchases;
- (c) on account of commission paid at 2% for accommodation bills ; and
- (d) on account of cash discount at 5% on cash purchases.

5. Being aggrieved, the respondent filed appeals before the Commissioner of Income-Tax (CIT (A)) from the assessment orders dated 30th March, 2013 for the

subject assessment years. In Appeal, the CIT(A) for subject Assessment Years confirmed the addition on account of unexplained cash credit under Section 68 of the Act relating to introduction of share capital. However, the CIT (A) by common order dated 19th September, 2014 partly allowed the Appeal to the extent of deleting commission of 2% in respect of the share capital and on account of 5% discount on purchases in respect of share capital. This, while upholding the assessment orders dated 30th March, 2013 under Section 68 of the Act.

6. Being aggrieved, both the Revenue, as well as, the respondent-assessee filed Appeals to the Tribunal. The respondent challenged the impugned order of the CIT(A) to the extent, it upheld the addition under Section 68 of the Act on account of share capital and in respect of part confirmation on account of commission and cash discount. The Revenue challenged the order of the CIT (A) on account of part

deletion on account of commission and cash discount in respect of share capital. The Tribunal, by the impugned order dated 17th April, 2015 allowed the Appeal of the respondent on issue of cash credit and also in respect of commission and cash discount as held by the CIT (A) while dismissing the Revenue's Appeal.

7. The appellant-Revenue is in appeal before us from the order dated 17th April, 2015 of the Tribunal for the Assessment Years 2005-06 to 2009-10.

8. **Regarding Question (A) :**

(a). Mr. Mohanty, Learned Counsel appearing for the Revenue challenges the order dated 17th April, 2015 of the Tribunal on this issue on the following grounds :

- (i) that the identity and creditworthiness of the shareholders is not established; and
- (ii) the genuineness of the transaction not being established, the Tribunal ought not to have allowed the respondent-assessee's

appeals for the Assessment Years 2005-06 to 2009-10.

(b). So far as the identity is concerned, we find that the persons who invested in the shares of the respondent-assessee had PAN numbers allotted to them which was made available by the respondent to the Assessing Officer. Besides, the shareholders had also filed Affidavits before the Assessing Officer pointing out that they had invested in the shares of the respondent-assessee out of their own bank accounts. Copies of acknowledgement of Return of Income of the shareholders was also filed. The respondent also requested the Assessing Officer to summon the shareholders. These evidences have not been shown to be incorrect. Therefore, this objection with regard to identity of the shareholders not being established does not survive.

(c) So far as, the creditworthiness of the

investors is concerned, Mr. Mohanty seeks to rely upon the decision of the Delhi High Court in the case of **Commissioner of Income-Tax Vs. Nipun Builders & Developers Pvt. Ltd. 350 ITR 407**. This, in support of his submission that the source of the funds of the shareholder-investor in the respondent-assessee's company was not considered by the Tribunal. Thus, where the creditworthiness of the investor is not established by finding out the source of the source, the deletion of cash credit was not justified. We are concerned in these Appeals with Assessment Years prior to Assessment Year 2013-14. It was only with effect from 1st April, 2013 i.e. from the Assessment Year 2013-14 that a proviso was added to Section 68 of the Act which required the person investing in shares of any Company to satisfy, if required by the Assessing Officer, the source of the funds which enabled the investments in shares. Infact, our Court in **Commissioner of Income Tax-1 V/s. M/s. Gagandeep Infrastructure Pvt. Ltd.** (Income Tax Appeal No. 1613

of 2014) rendered on 20th March, 2017 and in **The Pr. Commissioner of Income Tax-5 V/S. M/s. SDB Estate Pvt. Ltd.** (Income Tax Appeal No. 1356 of 2015) rendered on 27th March, 2018 has held that the requirement to explain the source of the source of the funds in respect of the investment as shareholders in which the public are not substantially interested as share application money is only prospective as it is introduced w.e.f. 1st April, 2013. The Delhi High Court in the case of *Nipun Builders and Developers* (supra), held the creditworthiness of the shareholder was not accepted, as the source of the funds of the shareholder was not explained. This was for a period prior to Assessment Year 2013-14 and the subsequent introduction of the proviso to Section 68 of the Act was not considered by the Delhi High Court. We are bound by the decisions of this Court in *Gagandeep Infrastructure Pvt. Ltd.* (supra). Besides, before the Delhi High Court in *Nipun Builders and Developers* (supra), the identity of the shareholders was not established as the summons sent were

returned with a remark 'no such company" and the same was confirmed by the Inspector of the Income-Tax Department. No PAN of the shareholder was also submitted before the Assessing Officer. It was in the above context, that the Delhi High Court decision was rendered. Thus, completely different facts from the present case, where even affidavits of the shareholders were filed who on oath stated that the investment in the respondents was made from their Bank Accounts. Thus, the initial burden was discharged by the respondent in respect of creditworthiness of the investor and nothing has been shown by the Revenue to doubt the same and/or steps taken and result thereof. Thus, this objection of lack of creditworthiness of the shareholder also does not survive.

(d). So far as the genuineness of the investment by the shareholders is concerned, Mr. Mohanty placed reliance upon the statement dated 9th September, 2010 of Kamlesh Jain who was an employee, as well as, the

shareholder of the respondent-assessee and on the fact that during the course of the search, certain blank transfer forms were found in the possession of the respondent-assessee. Besides, it is submitted that the shares were supposed to be finally transferred to the family members of the Directors of the respondent assessee company at a discounted price. We note that, the impugned order of the Tribunal records the fact that copies of the share application form, share allotment Register and Bank Statements showing receipt of funds were on record. Moreover, all the shareholders had filed Affidavits declaring the fact that they are investing in the respondent-Company by issuing of cheques from their Accounts. As pointed earlier, the PAN details of the shareholders was also submitted to the Assessing Officer. Moreover, the statement of Kamlesh Jain dated 9th September, 2010 relied upon by the Revenue in terms, deals with his investment in a group company viz. Aqua Formations (P) Ltd and not with the investment made in respondent-assessee Company.

Infact, the statement very categorically states that, he did not intend to purchase any shares of Aqua Formulations (P) Ltd. but no such declaration is made in respect of the investment made by him in the respondent-assessee Company. The statement dated 9th September, 2010 made by Kamlesh Jain does not in any manner, state that the investment made in the respondent-assessee Company was an investment which he did not want to make. So far as the shares allegedly/supposedly being taken by the members of the family of the Director of the respondent is concerned, the statement made by Mr. Jain dated 9th September, 2010 is not with regard to the respondent, Company but in respect of its sister company. Thus, there is no conclusive evidence in support of the above submission in the context of the respondent. In any case, this would not necessarily lead to a conclusion that the original investment made by the shareholder in the respondent-assessee was not genuine. This, at the highest, may give rise to suspicion but it does not prove

that the investment made originally in the respondent-assessee's Company was not genuine. Thus, not in the nature of cash credit as alleged by the Revenue.

(e). In fact, the impugned order of the Tribunal, on examination of facts, has come to the conclusion that the investment made by the shareholders is not hit by Section 68 of the Act. It records, that the entire basis of the Revenue's case is based on surmise that the respondent was taking bogus purchase bills and cash was introduced in the form of share capital without any evidence in support. Therefore, the view taken by the impugned order of the Tribunal on facts is a possible view.

(f). Thus, this Question as proposed does not give rise to substantial question of law. Thus, not entertained.

9. **Regarding Question no.(B) :**

(a). The contention of the Revenue is that, when purchases have been made in cash, the respondent would have necessarily received a discount on the price from the seller of the goods. According to Mr. Mohanty for the Revenue, cash purchases from the grey market would necessarily be at a discount.

(b). The above submission on behalf of the appellant-Revenue is not supported by any material on record. It proceeds, as held by the impugned order of the Tribunal, purely on the basis of surmise that the cash purchases would necessarily involve a discount which has been offered to and availed of, by the respondent-assessee. This submission is not backed by any cogent or demonstrative evidence.

(c). In the above circumstances, the view taken by the Tribunal on this issue is an entirely possible view on the facts and calls for no interference.

(d). Thus, this question, as proposed also does not give rise to any substantial question of law. Thus, not entertained.

10. Regarding Question No.(C) :

(a). The Assessing Officer had made an addition on account of commission paid at 2% for obtaining accommodation bills treating the same as unexplained expenditure. The accommodation entries, according to the Assessing Officer were taken to enable showing bogus purchases and use the cash to make investment through dummy shareholders.

(b) However, before us, there is no challenge to the impugned order of the Tribunal holding that the additions on account of bogus purchases is not sustainable. In such a case, there is no reason why the 2% commission would have been allegedly paid on accommodation bills. Thus, there is no unexplained expenditure as even according to the Revenue, before

us, there are no bogus purchases.

(c). Thus, the view taken by the Tribunal in the present facts is a possible view and therefore this Question does not give rise to any substantial question of law. Thus, not entertained.

11. Accordingly, all five Appeals are dismissed.

No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)

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