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

INCOME TAX APPEAL NO. 634 OF 2017
AND
INCOME TAX APPEAL NO. 635 OF 2017

Swastik Realtors
312, Swastik Disha Corporate Park,
Kohinoor Textile Printing Compound
Opp. Shreyas Cinema, LBS Marg,
Ghatkopar (West), Mumbai – 86. … Appellant

V/s.

Assistant Commissioner of Income Tax
15(3), Mumbai, Matru Mandir, I.T. Office,
Nana Chowk, Grant Road, Mumbai. ... Respondent.

Mr. Firoz Andhyarujina, Senior Advocate a/w. Manek Andhyarujina & Sameer Dalal for the Appellant.

Mr. A.R. Malhotra a/w. N.A. Kazi for the Respondent.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 13 AUGUST 2019.

P.C. :-

Swastik Realtors, the Assessee, has filed these two Income Tax Appeals challenging the common order passed by the Income Tax Appellate Tribunal, Mumbai dated 27 October 2016.

The Income Tax Appellate Tribunal, by the impugned order has dismissed the appeals filed by the Appellant- Assessee.

2. Appeal No. 634 of 2017 relates to Assessment Year 2007-08 and Appeal No.635 of 2017 relates to Assessment Year 2008-09. The Appellant urges the same questions of law in these two Appeals, and the Appeals are disposed of by this common order.

3. The Appellant – Assessee, is engaged in the business of construction and development of real estate. The Appellant filed its return of income on 26 October 2007 declaring total income of Rs.11,23,490/-. A notice was issued under Section 143(2) of the Income Tax Act, 1961 to the Appellant, calling for various details, and the information was supplied. On perusal of the balance-sheet of the Appellant, the Assessing Officer observed that the Appellant – had shown to have borrowed a sum of Rupees One crore from an entity by name M/s. Moxdiam. The investigation wing of the Income Tax Department initiated action under Section 133(A) of the Income Tax Act at the premises of Moxdiam. Inquiries were made and it was noticed by the Department that Moxdiam was indulging into a network of several bank accounts and conducting in the activity of accommodation entries, in popular parlance known as *hawala entries*. The statements of the persons concerned with Moxdiam were recorded under Section 131 of the Income Tax Act, who admitted that we are in business of providing hawala entries.

The Appellant was called upon to explain why Rupees One crore should not to be treated as unexplained cash credit. The Appellant took a stand that the amount was a loan from Moxdiam. The Assessing Officer disbelieved the version of the Appellant and held that the loan was fictitious and a sum of Rupees One crore needs to be credited as it is not satisfactorily explained. Further, the interest of Rs.93,000/- purportedly paid by the Appellant was not genuine and was disallowed being a fictitious expenditure. The Assessing Officer passed the order regarding the Assessment Year 2007-08 on 26 November 2009.

4. The Appellant filed an Appeal before the Commissioner of Income Tax Appeal. In the proceedings before the Commissioner (Appeals), the Appellant filed an affidavit of the partners of Moxdiam retracting the statement made before the Investigating Officer. The Appellant claimed that the loan transaction with Moxdiam was genuine and produced a confirmation letter. The Appellant also filed two affidavits of partners of Moxdiam dated 22 August 2008 and 18 February 2011. The Commissioner (Appeals) called for a report from the Assessing Officer.

5. Upon the remand report received from the Assessing Officer, the Commissioner (Appeals) considered the case of the Appellant regarding the theory of loan. The Commissioner (Appeals) noted the financial position of Moxdiam and held that

looking at the financial condition of Moxdiam it is not believable that M/s. Moxdiam could give a loan of Rupees One crore to the Appellant. The Commissioner (Appeals) also referred to the activities of accommodation entries (Hawala Entries) regularly indulged by Moxdiam and concluded there was nothing wrong with the finding of the Assessment Officer that the loan of Rs.1.00 crore was not genuine. The commissioner dismissed the appeal.

6. In respect of the Assessment Year 2008-09, the Assessing Officer had passed an order on 16 December 2010. In respect of the Rs.9,00,000/- claimed as interest on Rupees One crore was also considered as fictitious by the Assessing Officer The Appellant filed an Appeal against this assessment. The Commissioner (Appeals) dismissed the Appeal relying on the order passed regarding the Assessment Year 2007-08. The Commissioner (Appeals) held that the claim of deduction interest on the loan found to be fictitious could not be allowed as a deductible expenditure and disallowances by the Assessing Officer was justified.

7. The Appellant challenged these orders before the Income Tax Appellate Tribunal. The Tribunal assessed the evidence on record and concurred with the finding of fact rendered by both the authorities that the loan stated to be availed by the Appellant from Moxdiam was not a genuine loan. The Tribunal also relied on the statement made by the partners of Moxdiam, overall

circumstances and the financial position and dismissed the appeals by the impugned order.

8. We have heard Mr. Firoz Andhyarujina, learned Senior Advocate for the Appellant -Assessee and Mr. Malhotra, learned Counsel for the Respondents-Revenue.

9. Mr. Andhyarujina contended that the Appellant had satisfactorily explained the loan of balance amount for M/s. Moxdiam in its Books of Account. This substantiated all the ingredients of Section 68 of the Income Tax Act could not be included in the present facts. He submitted that though there is evidence on record that Moxdiam was indulging into accommodation entries it cannot *ipso facto* mean that the loan given by Moxdiam to the Appellant was not genuine. He submitted that the Appellant had produced the loan confirmation from Moxdiam, copy of the bank statement of Moxdiam reflecting the payment, copy of the acknowledgment of Return of Income filed by Moxdiam. He further submitted that the amount was received through crossed cheques and was repaid by the Appellant by crossed cheques. He submitted that tax was deducted at source which all will show that the loan was genuine. He submitted that the Appellant had discharged a burden and onus had shifted on the Revenue to show that the transaction was not genuine, which the Revenue has failed

to discharge. He submitted that the Tribunal has not considered various decisions relied upon by them. The learned Counsel submitted that the following questions of law as framed in the memo, therefore, arise for consideration in these Appeals:-

> *(1) Whether on the facts and circumstances of the case and in law the order of the Tribunal was justified in confirming the addition of Rs. 1.00 crore u/s. 68 of the Income Tax Act, 1961, when the Appellant has discharged its burden by producing the lender, bank statements showing the impugned transactions and financial statements, returns of income of the lender, payment of interest with tax deducted thereon ?*
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> *(2) Whether on the facts and circumstances of the case and in law the order of the Tribunal was right in not appreciating that when the Assessee satisfies the ITO as to the identity of the third party and also supplies such other evidence which will show, prima facie, that the entry is not fictitious the initial burden which lies upon him can be said to be discharged by him and that the burden shall then shift to the revenue to prove the contrary with sufficient and adequate material ?*
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> *(3) Whether on the facts and circumstances of the case and in law the order of the Tribunal was perverse in as much it dealt with the judgments relied upon by the Appellant without discussing the applicability of the ratios laid down in each case to the facts of the Appellants case in a summery fashion using a common reasoning for different propositions of law put forth by the Appellant ?*

(4) Whether on the facts and circumstances of the case, action of addition on account of providing accommodation entries should have been made in the hands of the lender and not the Appellant in the light of the Appellant discharging the initial onus placed upon it ?

(5) Whether on the facts and circumstances of the case, the Interest expenditure of Rs.93,000/- on loans taken for the purpose of business on the aforementioned loan cannot be held to be genuine interest when it was actually paid after deducting TDS via banking channels and duly accounted for in the books of the lender ?

10. The questions as raised can be summarized into two: findings of the genuineness of the loan i.e. questions (1), (2), (4) and (5) and second, the case-law cited by the Appellant before the Tribunal, i.e. question (3).

Re : questions (1), (2), (4) and (5)

11. Section 68 of the Income Tax Act 1961 governs the fact situation. It reads at the relevant time 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.

Thus where any sum is found credited in the books of an assessee; for which the assessee offers no explanation about nature and source, or the explanation is not satisfactory, the sum so credited may be charged to Income tax as the income of the assessee. The question before the authorities and the Tribunal was whether the explanation offered by the Appellant was satisfactory.

12. A statement of the partner of Moxdiam, Mr. Basant Jain was recorded under Section 131 of the Income Tax Act. To the question regarding the financial position, Mr. Jain stated under:-

> *Due to my unsound financial conditions and to earn bread and butter I used to issue accommodation bills, and therefore, I do not have equipment and apparatus used in diamond trade and under these circumstances, there is no stock or place for stock found in this premises, I have also no capacity to invest such huge sum or huge amount in purchase/import of diamonds. In real sense all the investment made belong to other, and I am not in a position to tell you their names and address as I disclose their identity there will be danger to my life.*

Thus, Mr. Jain has admitted that he cannot invest any considerable sum, and due to his unsound financial condition and to earn bread and butter, accommodation bills had to be issued. Though sought to be retracted, this admission before the officers is a significant circumstance. Further, Mr. Jain retracted his statement after two years and eight months. Such retraction was rightly held as not bonafide. An admission made during a survey of such proceedings can be relied upon by the Assessing Officer.

13. Further, the assessed income of Moxdiam for the year 2007-08 was Rs. 2,49,530/- and for the year 2008-09 it was Rs.1,64,596/-.Capital of the partners was Rs.1,00,000/-. as against the stated loan of Rs. 1 crore. This is another circumstance relied upon by the Tribunal and the authorities.

14. The Appellant had relied upon a decision of the Co-ordinate Bench of the Tribunal wherein one transaction of another person with Moxdiam was held to be a genuine transaction. The learned Counsel for the Appellant has sought to justify the financial position of Moxdiam trying to explain the nature of its activities. The learned Counsel submitted that once the genuineness of the lender and transaction is proved, then that should accrue to the benefit of the assessee.

15. It is now an admitted position that Moxdiam was indulging in accommodation entries. Majority of the activities of Moxdiam are of accommodation entries. It is the Appellant which seeks to assert a deviation from Moxdiam's regular activity of accommodation entry to contend that in Appellant’s case it was not

an accommodation entry, but a genuine loan. The burden on the Appellant to show the genuineness of the entry was thus heavier than situation where no such established evidence regards the lender indulging into accommodation entries exists. Such a burden cannot be casually shifted as contended. Merely because certain entries have been shown in the books of accounts of Moxdiam, they cannot be held to be conclusive and must be construed in light of all surrounding circumstances. The genuineness of the loan transaction, financial capacity, and the surrounding circumstances are some criteria for determination in such matters.

16. It is in this background that the claim of the Appellant it is dealing with Moxdiam was not for accommodation entry, but a genuine loan transaction, had to be tested by the authorities. Two authorities and the Tribunal have evaluated each piece of evidence to conclude that this transaction was not a genuine loan transaction. If the Tribunal has given more weight to some pieces of evidence *vis-a-vis* others, the conclusion is in the realm of assessment of the evidence. It cannot be said that the pieces of evidence relied upon by the Tribunal are irrelevant. The view taken by the Tribunal is thus on the assessment of evidence is not perverse, and merely because another view by re-appreciating the evidence is possible, it cannot give rise to a question of law as envisaged under Section 260A of the Income Tax Act.

Re : question (3)

17. The Tribunal has noted the decisions referred to by the Appellant and also by the Revenue. Following the principles laid down in the decisions in the case of *CIT v. Durga Prasad More*[1] *and Sumati Dayal v. CIT* [2], that the nature of the transaction will depend on facts and circumstances, the Tribunal rightly did not get weighed down by multiplication of decisions dealing with separate sets of fact. This approach adopted by the Tribunal would not lead to a substantial question of law as proposed by the Appellant.

18. Thus none of the questions raised by the appellant can in the present facts be called substantial questions of law for the consideration of the appeal.

19. The Appeals are dismissed.

NITIN JAMDAR, J. **M.S. SANKLECHA, J.**

1 (1971) 82 ITR 540 (SC)
2 (1995) 214 ITR 801(SC)