pIN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.12.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R. SURESH KUMAR

Tax Case (Appeal) No.1107 of 2009

Adhithiya Gears Private Limited,
No.2-G, Lawson Road,
Cantonment, Tiruchirapallai. Appellant/Appellant

..Vs..

The Assistant Commissioner of Income Tax,
Circle-I, Tiruchirapalli . Respondent /Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, CHENNAI 'B' Bench, Chennai, dated 19.06.2009 made in I.T.A.No.1812/Mds/2008.

Against the order of the Commissioner of Income Tax (Appeals), Tiruchirapallai, dated 22/07/2008 in ITA.No. 171/2007-08 and against the order of the Assistant Commissioner of Income Tax, Company circle - I, Tiruchirapallai, dated 30.11.2007 in PAN/GIR No. AACA9298F.

For Appellant : Mr.R.Kumar
for Mr.T.N.Seetharaman
For Respondent : Ms.Pushpa

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J U D G M E N T
(Judgment of this Court was delivered by DR.VINEET KOTHARI,J)

The Assessee has filed this Appeal raising Substantial Questions of Law arising from the order of the learned Income Tax Appellate Tribunal dated 19.06.2009 for Assessment Year 2005-2006, by which the learned Tribunal dismissed the Appeal of the Assessee by upholding the order of the Commissioner of Income Tax (Appeals) dated 22.07.2008 with respect to addition of Rs. 4,10,000/-(Rupees four lakhs only) under Section 68 of the Income Tax Act 1961 (for brevity “the Act”)

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in the hands of the Assessee Company.

2. This Appeal was admitted by the Co-ordinate Bench of this Court, on 03.11.2009 on the following Substantial Questions of Law:

> 1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the sum of Rs.4,10,000/- being loan from its Managing Director, is 'unexplained cash credit' assessable to tax as income of the appellate company under Section 68 of the Income Tax Act 1961?
>
> 2.Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in not accepting the evidence by way of confirmatory letters and sworn affidavits of its Managing Director and his creditors and treating the sum of Rs.4,10,000/- as unexplained and as the appellant company's income?

3.The learned counsel for the Assessee, Mr.Kumar submitted that unsecured loan given by the Managing Director of the Assessee Company Mr. Balasubramanian has been disallowed under Section 68 of the Act. The said Mr.Balasubramanian had taken cash loan from two persons his friend and relative viz., Mr.M.Rajagopalan a sum of Rs.3,00,000/- and Ms.Dhanam wife of Sridhar a sum of Rs.1,00,000/-. Both these persons were relative and close family friend who advanced a sum of Rs.4,00,000/- and the Managing Director of the Company himself, who was drawing annual salary of Rs.60,000/-advanced a sum of Rs.10,000/- and thus a total sum of Rs.4,10,000/- was given as unsecured cash loan to the Assessee Company, which has been disallowed by the authorities as unproved cash credits in the hands of the Assesee Company under Section 68 of the Act giving rise to the aforesaid questions of law. The learned counsel for the petitioner further submitted that Affidavits of these three persons viz.,Mr.Balasubramanian, the Managing Director of the Assessee Company, Mr.N.Rajagopalan, paternal uncle of the Managing Director and Ms.S.Dhanam, family friend of the Managing Director were furnished before the Asssessing authority, but without controverting the said Affidavits by any manner of cross examination, the learned Assessing authority rejected the same and held that the Assessee failed

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to prove the genuinenesses of unsecured loan of Rs.4,10,000/- and made additions under Section 68 of the Act which has been upheld by the first appellate authority as also by the Tribunal. Therefore he submitted that the orders of the learned Tribunal should be quashed by this court in the present Appeal, answering the aforesaid questions of law in favour of the Assessee.

4.Per contra, the learned counsel for the Revenue, Ms.Pushpa vehemently submitted that these are categorical findings of facts arrived at by the authorities, which do not require any interference, as no substantial Questions of law arises in the present case and further the burden of proof lies on the Assessee to prove not only creditworthiness but also the genuineness of the Creditors. Since the money in question was not routed from the banking channels and no documentary evidence was produced by the Assessee, therefore the authorities were justified in in disallowing the un-explained cash credits and the same does not call for any interference by this Court in the present Appeal filed by Assessee.

5. We have heard the learned counsels at length and perused the materials placed on record.

6.The findings of three authorites below are quoted below for ready reference:

7. From the Order dated 30.11.2007 of Assistant Commissioner of Income Tax, Company Circle-I, Tiruchirapalli.

> "7.0: Un-explained cash credit u/s 68 of the IT Act, 1961:
>
> 7.1: The MD of the company Mr. Balasubramanian has advanced an unsecured loan of Rs.4,10,000/-, during the previous year relevant to the Assessment year 2005-06. During the course of assessment proceedings it was stated that the MD Of the company has obtained loan from Mr. M. Rajagopalan (Rs.3,00,000) and Mr. S. Dhanam (Rs.1,00,000) and same was given to the company. To this affect the MD of the Company has given an affidavit dated 05.09.2007 and in that affidavit he stated that he has Introduced Rs. 4 lakhs as unsecured loan in his personal capacity but not as a loan from the above two people, in order to avoid a legal

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consequences u/s 58 A of the Companies Act. In other words, if the above two loans are taken in to the books of the company directly, those loans tent amounts to same acceptance of deposits under said section.

7.2: If the loan taken by the MD from the above parties was true, to that effect he must have shown in his return of income as a loan given to company. But on perusal of the return of Income filed by the MD of the Company it was found that there is no mention about the loans taken from the above two parties. In reply to my pre-assessment notice the assessee has stated that it is true that the Managing Directors not given a note in his return of income because he did not maintain Individual books of accounts and also it did not have any income or tax implications on his part. It was again has claimed that the Managing Director did not have adequate knowledge about the implications of transactions even if no Income / tax effect is involved and he regrets for the same. The assessee again submitted that the failure of the assessee to prove the genuineness of the transaction emanates from a technical non compliance and prayed that Section 68 may not be invoked and the explanations of the company accepted.

7.3: Before proceeding further, let us see the provisions of the section 68 of the Income Tax Act, 1961. The said section is reproduced below.

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."

In simple words if assessee offers no explanation or gives an explanation which is not satisfactory to the Assessing

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Officer, the credit found in the Books of Accounts need to be charged as Income of the assessee for that year.

7.4: It is now a settled principle of law that on account of various judgments that the assessee has to prove the following three things with regard to credits appearing in the books of accounts.

1. Identity of the creditor.

2. Genuineness of the transaction and

3. Credit worthiness of the creditor.

7.5: In this connection, let us see the facts of the case. The Managing Director of the company Shri. M. Balasubramanian has introduced Rs. 4,10,000 in the books of the company during the previous year relevant to the assessment year 2005-06. He is assessed to Income tax vide PAN AJYPM3282B with Income Tax Officer, Range-III, Chennai. The only source of Income for him as per his return of Income filed for assessment year 2005-06 is salary of Rs.60000, received from the assessee company i.e., M/s. Adhithiya gears P Ltd. The return of Income filed by the assessee did not mention anything about loan given by him to the company.

7.6: During the course of assessment proceedings the assessee was asked to Indicate the mode of the loan given by the Managing Director to the company and prove his credit worthiness. No evidence is produced to prove that the loan of Rs.4,10,000 of has been routed through the banking channel. If it is genuine transaction the Managing Director must have produced the evidence of bank account from which the amount have been paid. Even the relevant entry in the bank statements of the company has not been produced. It clearly indicates that the genuineness of the transaction is not established.

7.7: Now let us see the creditworthiness of the Managing Director. As it already indicated the only source of income for

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him is salary of Rs.60000 received from the assessee company. During the course of hearing, the assessee was asked to explain the creditworthiness of the creditor. I was informed that the Managing Director of the company has in turn obtained loan from the following persons and same was introduced in the company as unsecured loan.

Sl No	Name and address of the Person	Amount	Remarks
1	N. Rajagopalan, S/o. Narayana lyer New no 5(old No 7), IV cross st, Indira Nagar, Adayar, Chennal-20	3,00,000	He is brother of the father of the M.D
2	S. Dhanam, W/o. L Sridhar, Plot no 36, Charles Nagar, Mangadu, Chennai.	1,00,000	Family friend of the M.D
3	M. Balasubramaman MD of the company	10,000	
	Total cash credit introduced by the Managing Director	4,10,000	

To this effect, the Managing Director has submitted affidavits from the above two parties and he also submitted the affidavit stating that he has received loan from the above two parties and he added 10000 from his savings and introduced total amount of Rs.4,10,000 as a loan in the company.

The mute (Sic! moot) question to be answered is whether the assessee has proved creditworthiness of the creditor or

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not. As shown in the remarks column of the above table that the above two persons are related to the Managing Director of the company by blood and other business links. It is not the duty of the assessing officer to prove that the credit worthiness of the persons who have allegedly have given loans to the M.D. It is the creation of the assessee that the MD has obtained loan from the above two people and same has been introduced in the books of the company.

7.8: It Is very clear from the above discussion that the assessee has failed to prove the creditworthiness of the Managing Director and this is proved by the return income filed by the MD of the company where in no information is given about the loan taken by him from the above two persons and same was given to the company as a loan. Besides, all transactions are appears to be in cash as assessee failed to submit the bank details through which payments are received. The assessee has again has claimed that Rs.10,000 has provided by the MD out of his personal savings, but failed to prove that how he has met his family expenses out or the salary of Rs. 60000 and Rs.10000 out of salary income.

7.9: It is beyond doubt that the assessee has failed to prove the genuineness and creditworthiness of the creditor. Reliance is placed on the following case law and assess the unexplained cash credit in the hands of the company.

Burden is on assessee to prove source of receipt - The law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee is on him. Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the Income of the assessee and no further burden lies on the revenue to show that the Income is from any particular source - Roshan Di Hatti Vs CITkj (1977)

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107 ITR 93B (SC)

7.10: Under these circumstances, I charge Rs.4,10,000 as Income of the assessee for the assessment year 2005-06. "

8.From the Order dated 22.07.2008 of CIT (Appeals)

"5. Disallowance of un-explained cash credit amounting to Rs.4.10 lakh u/s 68 of the Income Tax, 1961:-

Briefly, the case of the Assessing Officer is that Shri N. Balasubramanian, Managing Director of the Company has given a loan of Rs 4.10 lakh in cash to the Appellant Company. Shri N. Balsubramanian is assessed to tax with Income-tax Officer, Range III, Chennai and had declared income from salary at Rs 60,000/- in assessment year 2005-06. Therefore, he did not have adequate capacity to give loan of Rs 4.10 lakh to the Appellant Company in cash. Consequently, the Appellant Company had failed to prove the genuineness of this loan. During the course of the assessment, Assessing Officer verified whether this transaction is genuine. It was explained by the creditor namely Shri N. Balasubramanian that he had taken a loan of Rs 3 lakh from N. Rajagopalan and Rs 1 lakh to Shri S.Dhanam and remaining Rs 10,000/- was contributed by him from his personal savings. The Assessing Officer found that in his return of income filed for the Asst. Year 2005-06, Shri N. Balasubramanian has declared his income from salary at Rs 60,000/- but he has not mentioned anything about loan taken by him in cash and given to the Appellant Company. Therefore, the Assessing Officer has concluded that the Appellant Company has failed to prove the credit worthiness of the creditor and also the genuineness of the Creditor. Therefore, he has added back a sum of Rs 4.1 lakh as un-explained cash credit in the hands of the Appellant Company.

5.1. During the appellate proceedings, it was argued by

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Shri K. Venkata Ramanan, Chartered Accountant that Shri N. Balasubramanian, Managing Director of the Company had given a loan of Rs 4.10 lakh to the Appellant Company because the Appellant Company was prohibited u/s 58A of the Companies Act from accepting the deposit from the public. Therefore, the Managing Director had taken loan from other two persons in his individual capacity and then passed on the loan amount to the Appellant Company. Shri N. Balasubramanian did not maintain individual books of accounts and did not have adequate knowledge about the implication of these transactions. The identity of the creditor has been duly established. Therefore, addition made by the Assessing Officer may be deleted.

5.2. I have carefully gone through the speaking assessment order passed by the Assessing Officer on this issue and also the submissions made by the Authorized Representative of the Appellant Company. I am inclined to agree with the views of the Assessing Officer that the Appellant company has failed to prove the credit worthiness of the creditor and also the genuineness of the transactions. Therefore addition of un-explained cash credit u/s 68 is correct. Shri M. Balasubramanian, Managing Director of the Company was working on a salary of Rs 60,000/- per year and did not have adequate capacity to give a loan of Rs 4.10 lakh to the Appellant Company. Pre-ponderance of the probability suggests that it was un-disclosed income of the Appellant Company which has been introduced back in the Company in the disguise of loan alleged to have been given by the Managing Director of the Company. The Assessing Officer has built a fool proof against the Company because the alleged loan accepted by the Appellant Company from Shri M. Balasubramanian, Managing Director of the Company was found to be not reflected in the income tax return of Shri M. Balasubramanian who also

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did not have the capacity to advance such large sum to the Company. Therefore, I confirm the addition of Rs 4.10 lakh as made by the Assessing Officer u/s 68 of the Income tax Act, 1961. No relief is called for on this issue."

9. From the Order dated 27.07.2007 of the Income Tax Appellate Tribunal

"10. After considering the rival contentions and the materials on record, we find that it is an undisputed fact that the loan transaction recorded by the assessee is not through the banking channel but only in cash. It is also an undisputed fact that the Managing Director of the assessee was not having the capacity of giving the loan amount of Rs.4,10,000/- because he himself has admitted only salary income of Rs.60,000/-. The only explanation in this respect was that the said Managing Director of the assessee has taken the loan of Rs.4,00,000/- from two persons and then given the same to the assessee company. We fail to understand as to why the assessee has opted this route of taking the loan instead of directly taking the loan from the persons from whom the Managing Director of the assessee has taken the loan. Moreover, when the Managing Director of the company has not disclosed his entire loan transaction in his return of income, then the explanation given by the assessee is not plausible much less to the satisfaction of any person of ordinary prudence. It is a well settled law that the onus is on the assessee to prove the genuineness and creditworthiness of the transaction. In the facts and circumstances of this case, we find that the assessee has failed to prove the genuineness of the transaction when the entire transaction itself is doubtful as it is not through the banking channel and the route adopted by the assessee is not a convincing and normal practice in the ordinary course of business. Even otherwise, the loan could have been arranged by the Managing

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Director but in that case the creditors should have been the persons who have given the loan and not the Managing Director. In view of the above discussion, we find no error or illegality in the order of the lower authorities, qua this issue. The same are Upheld. "

10. A conjoint and combined reading of all the three orders of the Authorities below though on the face of it appear to be findings of facts and this Court may not be inclined to dispute the findings of facts in a casual manner, but if the findings of facts are perverse, it is not binding on the Court under Section 260 A of the Act, as this Court is not only concerned with the Substantial Questions of Law arising from the orders of the Tribunal, but if there are glaring defects in the manner of arriving at the findings of facts, then it vitiates the orders of the Assessing authority as well as the Appellate Authorities. The explanation given by the Assessee Company for the said unsecured loan of Rs.4,10,000/- in question was in the form of evidence produced by the Assessee Company viz., the three affidavits of Mr.Balasubramanian, the Managing Director of the Assessee Company, Mr.N.Rajagopalan, paternal uncle of the Managing Director and Ms.S.Dhanam, family friends of the Managing Director which were placed on record before the Assessing authority himself. Further the Managing Director was present with the Chartered Accountant during the course of Assessment proceedings. But, from the record of the Assessing authority, we do not find any kind of examination of these Affidavits or cross examination by the Assessing authority of these persons. The Affidavit of Mr.N.Rajagopalan, inter alia states that he is a retired employee of the Southern Railways and out of his retirement benefits received, he advanced a sum of Rs.3,00,000/- (Rupees three lakhs only) to his brother's son who is the Managing Director of the Assessee Company. The other Affidavit of Ms.Dhanam shows that she has advanced a sum of Rs.1,00,000/- (Rupees one lakh only) as loan to the Managing Director of the Assessee Company, from the amount received out of the business carried out by her husband and agreed to take interest at the time of final settlement.

11. In the absence of any cross examination or rebuttal or controverting of these Affidavits, the learned Assessing Authority could not have concluded that the Assessee has failed to adduce the evidence to prove the identity of the creditor, genuineness of the transaction and creditworthiness of the creditor. The Managing Director who was drawing a sum of Rs.60,000/- p.a. as salary had advanced only a sum of Rs.10,000/- out of the sum of Rs.4,10,000/-. He has also

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stated the reason for taking cash loan in his Affidavit dated 05.09.2007 about the adverse legal consequences under Section 58A of the Companies Act, 1956, as the direct cash deposits will tantamount to the acceptance of Deposits, in violation of Section 58A of the Companies Act. Therefore, the Managing Director, for obtaining the required unsecured loan, had chosen the route of taking cash loans from his own relative and friend and had given the same to the Assessee Company without attracting Section 58A of the Companies Act. About the non- mentioning of the said fact in his own return of income, the said Managing Director has explained that since he was not maintaining the Books of Accounts and nor he furnished any Balance Sheet, he was not bound to give any note for the same in his Return of Income, as there was no statutory requirement for disclosing the personal cash loan taken by Managing Director in the Return of Income, where only income earned during the year is required to be disclosed and not the loan taken during the year. In the absence of maintaining of the Books of accounts, there was no question of producing the Balance sheet with the Return of Income, which was a reasonable explanation and these explanations of the Managing Director at least required the consideration on the part of the Assessing Authority as the said Assessing Authority enjoyed the powers of a Civil Court but he has not undertaken the exercise of cross examination in respect of the Affidavits filed by the Managing Director and two other persons as aforesaid. Without undertaking this exercise, the conclusions drawn by him in the Appeal proves that he has failed to discharge his duty and therefore such foundation less findings cannot be sustained, as they are perverse.

12.The Appellate Authorities higher in hierarchy, though enjoying the same co-extensive powers, also could have undertaken the said exercise, but even they failed to do so. On the contrary, the observations of the learned CIT (Appeals) that the Assesseing authority has made out, a foolproof case under Section 68 of the Act, leaves much to be desired.

13. The authorities under the Act and tax gatherers have wide powers and it is their solemn duty and obligation under the Act to discharge their assessment functions in a regular and proper manner. Justice not only must be done but should be seen to be done and this principle of fairness applies even at the level of Assessing authority under the Act. The half hearted enquiry and half-baked conclusions into such exercise, as revealed before the constitutional Courts in the appeals in respect of the assessments taking place years ago, leaves a bad taste and the constitutional Courts cannot swallow down such irregularities and illegalities on the part of the assessing authority. Without sending a clear and

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strong message to such authorities that it is the bounden duty of the authorities below to discharge their functions properly, fairly and earnestly in accordance with law. The power to make additions under Section 68 of the Act of the un-explained cash credit, requires such an exercise to be undertaken by the authorities in a diligent, just and fair manner. But we do not find any such solemn exercise undertaken by the Authorities in the present case.

14. The affirmation of findings of the Assessing Authority by the Appellate authorities in the present case without undertaking similar exercise also cannot be sustained. They just glossed over and mechanically affirmed the findings of Assessing Authority. Therefore, we are inclined to remit the case back to the Assessing Authority for the limited purpose of holding enquiry on the issue of additions made under Section 68 of the Act in the present case.

15. We allow this Appeal filed by Assessee only for this limited purpose and remand the case back to the Assessing Authority without answering the Substantial Questions of Law at this stage and grant six months time to the Assessing authority to complete the said exercise. The Assessing authority shall summons all the three concerned persons above and after proper examination of such witnesses and then cross examination and after weighing such evidence, shall arrive at fresh findings on the said issue, within a period of six months.

With these observations, this Tax Case Appeal is disposed of.
No order as to costs.

Sd/-
Assistant Registrar (CCC)

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Sub Assistant Registrar

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To

1. Assistant Commissioner of Income Tax,
Company Circle-I, Trichy.

2. Commissioner of Income-Tax (Appeals)
Tiruchirapalli.

3. Income Tax Appellate Tribunal,
   Bench 'B" Chennai.

+1cc to Mr.T.N.Seetharaman, Advocate, S.R.No. 100916
+1cc to Mr.M.Swaminathan, Advocate, S.R.No. 101343

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