

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 07.12.2020

Delivered on 16.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.223 of 2020

(heard through video conferencing)

The Commissioner of Income Tax,
Chennai.

...Appellant/Respondent

Vs

Mrs.Manish D.Jain (HUF),
Chennai-79

...Respondent/Petitioner

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 04.9.2019 made in ITA.No.2982/Chny/2019 on the file of the Income Tax Appellate Tribunal, Madras 'C' Bench for the assessment year 2012-13.

and against order of the Commissioner of Income Tax (Appeals) V, Chennai - 34 dated 07/08/2018 in ITA.No.217/(IT(A)-5/2017-18 and against the order of the Income Tax Officer, Non Corporate Ward 5 (3), Chennai 06 dated 17/11/2017 in PAN.No.AAJHM6100N.

For Appellant : Mr.T.Ravikumar, SSC
Respondent: served and no appearance

JUDGMENT

T.S.SIVAGNANAM, J

This appeal, filed by the appellant - Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 04.9.2019 passed by the Income Tax Appellate Tribunal, Chennai 'C' SMC Bench (for brevity, the Tribunal) in ITA.No.2982/ Chny/2018 for the assessment year 2012-13.

2. We have elaborately heard Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the appellant - Revenue. Though the respondent is served and her name printed in the cause list, none appears for the respondent despite several opportunities. Hence, the matter is finally heard on merits.

3. The appeal has been admitted on 20.8.2020 on the following substantial questions of law :

"i. Whether on the facts and in the

circumstances of the case, the Tribunal was right in setting aside the well reasoned order passed by the Assessing officer for re-examination, especially when the assessing Officer had duly examined the matter while passing the assessment order?

ii. Whether on the facts and in the circumstances of the case, the Tribunal was right in remitting the issue back to the file of the Assessing Officer by quoting the decision in the case of Kanhaiyal and Sons (HUF) in ITA No.1849/Chny/2014 Sunil Kumar Lalwani and that Aashesh Kumar Lalwani wherein the onus has been shifted to the revenue with a direction that the Assessing Officer is to bring on record the role of the assessee in promoting the company and the relation of the assessee if any with that of the promoters and role of inflating of prices etc which exercise had already been done by the AO and the SEBI?

iii. Is not the finding of the Tribunal perverse especially when the decision of the Tribunal is contrary to the time tested principal that the person who asserts a fact has to discharge the initial burden cast upon him to show that the said facts are true and only thereafter the burden would shift to the department?"

4. The assessee, who is an Hindu undivided family (HUF), filed the return of income for the assessment year under consideration namely 2012-13 admitting a total income of Rs.4,79,590/- and it was processed under Section 143(1) of the Act. Subsequently, the case was reopened under Section 147 of the Act by issuance of a notice dated 02.12.2016 under Section 148 of the Act. The reason for reopening was based on an information received relating to bogus long term capital gains claim in a scrip of M/s.Bakra Pratisthan Limited trade. The Assessing Officer noted that the assessee, during the financial year 2011-12 relevant to the assessment year 2012-13, sold the scrips amounting to Rs.15,86,250/- and claimed exemption under Section 10(38) of the Act.

5. The assessee did not respond to the notice issued under Section 148 of the Act. Therefore, the assessee was informed by communication dated 04.8.2017 that the entire sale proceeds of shares of M/s.Bakra Pratisthan Limited to the tune of Rs.15,86,250/- were treated as the income of the assessee and would be assessed under the head 'income from other

sources'. The assessee was given one more opportunity to file their written submissions by 16.8.2017.

6. The assessee responded to this notice and filed the written submissions on 04.9.2017 along with a copy of ITR-V. The total income admitted was Rs.4,79,590/- and the assessee sought reasons for reopening. The reasons were furnished to the assessee by a communication dated 05.9.2017 and thereafter, the notice under Section 143(2) of the Act and the notice under Section 142(1) of the Act, both dated 08.9.2017, were issued.

7. The assessee appeared before the Assessing Officer, furnished details and stated that they had purchased 450 shares of M/s.Dhanlabh Merchandise Limited, which was later merged with M/s.Bakra Pratisthan Limited and the said 450 shares originally held by the assessee were converted into 4500 shares. The assessee purchased 450 shares of M/s.Dhanlabh Merchandise Limited at the rate of Rs.200/- per share for a total consideration of Rs.90,000/-. The assessee furnished a copy of the transaction report from M/s.Motilal Oswal Securities stating that it was a documentary proof to indicate purchase of shares, which were later converted into the shares of M/s.Bakra Pratisthan Limited on 28.12.2011.

8. The Assessing Officer, after going through the statements of the bank accounts highlighting the transactions made towards purchase of shares, found that the closing balance as on 02.3.2010 was Rs.5,607/- and that on 03.3.2010, there was a credit entry of Rs.90,000/- and a debit entry of Rs.90,000/-. The bank was called upon to explain the nature of transaction and the bank informed that it was a manual cheque, which was passed for clearing on the same day by a Calcutta company. This was found to be wholly impossible by the Assessing Officer. Hence, a communication dated 28.9.2017 was sent to M/s.Excellent Barter Private Limited calling for details under Section 133(6) of the Income Tax Act. However, the said communication returned with the postal acknowledgment 'not known'. The authorized representative of the assessee could not furnish any documentary evidence with respect to the sale of shares and he only furnished the copy of the bank account wherein on 03.1.2012, the amount of Rs.9,50,714/- was credited into the bank, which was described as 'RTGS-IN-WFIX-FIT' securities.

9. Thus, the Assessing Officer concluded that the purchase of 450 shares was a sham transaction and that the assessee could not discharge the onus cast upon her to prove the genuineness of the transaction by producing documentary evidence. The Assessing Officer held that in respect of payments made for the purchase of shares, they did not relate to the transaction and that no distinctive numbers were indicated in the sale bill dated

25.1.2010 issued by M/s.Excellent Batters Private Limited. The assessee did not provide the name of the applicant.

10. Thus, the Assessing Officer concluded that the transaction was not genuine and that the claim made under Section 10(38) of the Act towards sale proceeds could not be entertained. Further, the Assessing Officer took note of the investigation conducted by the Department at Calcutta as to how the stock prices raised more than 500-1000 times. The Assessing Officer considered the modus operandi followed by the assessee and found the entire claim made by the assessee to be bogus after rejecting the explanation offered by the assessee.

11. As against the assessment order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-5, Chennai-34 [for short, the CIT(A)] and it was dismissed by order dated 07.8.2018. Aggrieved by that, the assessee preferred further appeal before the Tribunal, which allowed the same by the impugned order by remanding the matter to the Assessing Officer to re-examine the issue regarding deduction under Section 10(38) of the Act. This order of remand was passed based upon an order of the Tribunal in the case of Kanhaiyalal & Sons (HUF) Vs. ITO [ITA.No.1849/Chny/2018 dated 06.2.2019]. The Revenue is before us challenging the said order passed by the Tribunal as being perverse.

12. The first and foremost aspect to be considered is as to whether the Tribunal was justified in remanding the matter to the Assessing Officer for a fresh consideration of the claim made by the assessee under Section 10(38) of the Act.

13. There is no dispute with regard to the power of the Tribunal to remand while exercising its jurisdiction under Section 254 of the Act. The Hon'ble Supreme Court, in the case of Hukumchand Mills Ltd. Vs. CIT [reported in (1967) 63 ITR 232] held that the Tribunal had power to remand the matter back to the Income Tax Officer. This decision was followed by the Hon'ble Supreme Court in the case of Martin Burn Ltd. Vs. CIT [reported in (1993) 68 Taxmann 346].

14. The question is as to when the power of remand can be exercised. For this proposition, it would be beneficial to refer to the decision of this Court in the case of Chola Mandalam MS General Insurance Co. Vs. Royal Sundaram Alliance General Insurance Co. Ltd. [reported in (2013) 357 ITR 597] wherein the Division Bench held as follows :

"17. In the background of the jurisdiction of the Tribunal as a fact finding authority, we feel that the Tribunal should have acted with greater

circumspection to order a remand particularly when the Revenue itself does not dispute that the materials were all those that were considered by the Assessing Officer. Remand is not a power to be exercised in a routine manner and should be used sparingly as an exception only when the facts warranted such course of action. We feel that the Tribunal should have arrived at its own conclusion on facts after due consideration of the materials before it which were no different from which was placed before the authorities below. Hence, we have no hesitation in setting aside the order passed by the Tribunal in remanding the matter back to the Income Tax Appellate Tribunal on the admitted fact that no fresh materials were placed before the Tribunal necessitating remand."

15. Thus, we are required to consider the issue as to whether the Tribunal was justified in remanding the matter to the Assessing Officer to reconsider the issue regarding the claim made by the assessee under Section 10(38) of the Act. On a reading of the order passed by the Tribunal, we find that the Tribunal did not interfere with the factual findings recorded by the Assessing Officer and the CIT(A) with regard to the transaction done by the assessee. Thus, unless and until the Tribunal found an error in the approach of the Assessing Officer or the CIT(A) and only after interfering with such a finding, the Tribunal could have exercised its power of remand. Even in such circumstances, the Tribunal was required to record reasons as to why the matter should be remanded and as to why the Tribunal could not decide the factual issue on the available material.

16. We find from the order passed by the CIT(A) that the assessee raised a vague contention that a thirty party statement was relied upon by the Assessing Officer without affording an opportunity to the assessee to confront the same and the decision was taken against the assessee. Unfortunately, the Tribunal did not examine as to whether such a contention raised before the CIT(A) was rightly decided or not. Further, from the grounds raised by the assessee before the CIT(A), we find that

they had not disputed the factual position, which had been brought out by the Assessing Officer in his order. Before the Tribunal also, we find that the assessee did not dispute the factual finding recorded by the CIT(A) in his order dated 07.8.2018. Thus, we have no hesitation to hold that the order of remand passed by the Tribunal was wholly unjustified, devoid of reasons and unsustainable in law.

17. Moving to the findings rendered by the Assessing Officer and the CIT(A) with regard to the nature of transaction done by the assessee, we find that there was absolutely no justification on the part of the Tribunal to interfere with the facts recorded by both the Lower Authorities. The gist of the modus operandi done by the assessee as could be culled from the order of assessment as well as the order of the CIT(A) is as follows :

"The assessee had purchased 450 shares of Dhanalabh Mercantile Limited which later merged with M/s.Bakra Prathisthan Ltd and the said 450 shares originally held by the assessee were converted into 4500 shares. All the purchases were made through off market ie. after closing of share markets and the assessee had never heard of the name of the scrip before. The amount of investments was very meager in some cases and huge profits were made by the assessee on the sale of unknown company shares. The name of the person and his details were not known to the assessee and the assessee was not able to produce the person before the Assessing Officer from whom the said shares were said to have been purchased. The letters sent to the address of the seller were all returned unserved and details of the Company were also not known to the assessee. The share certificate issued to the seller from whom the assessee had purchased and the certificates issued to the seller would be a month or so before the alleged sales to the assessee. The evidence was typed date of transfer on the back side of the share certificates and the bill for purchasing this scrip was shown as a proof and the date of bill would be the prior to the date of share certificate itself allotting the shares to the seller. In many cases, implying that the shares were sold to the assessee, even before the receipt of share certificate by the seller. The shares

were demated just before the sale of shares to the assessee , who was having no experience in share trading.

The Security Exchange Bureau of India (SEBI) had blacklisted nearly 14 brokers for their alleged involvement in manipulating the market prices and rigging the markets for jacking up the share prices. The Income Tax Department Investigation Wing which had conducted detailed investigation had unearthed shell companies which specialized in manipulating the market prices of the shares of certain listed company on the stock exchange by a group of persons working as a syndicate for the purpose of providing entries of tax exempt, bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash converting black money into white without payment of tax.

The profit made from the sale of scrip was multiple time the cost of the shares and sale price was not supported by the financial status of the company. The companies had shown very meager profits and were mostly loss making companies with negative earning per shares. These unknown companies never declared dividends and the Director's report did not show any projects or major events done in the operation of the company that would attract investors to trade in the scrip.

Same set of brokerages would be seen selling and buying the shares and the sale prices were increased with every trade and trading was done by the same of brokers and also the buyers who were not assessed to tax and had not filed return of income but have purchased large amount of shares. Even those persons who had filed the return of income had declared low income and all buyers would have made losses on account of trading in scrip.

Statements recorded from brokers/operators had admitted using shell companies who were the buyers trading in shares just to jack up the prices and to keep the volume of trade going so as not to come under the scanner of the SEBI. The buyers of the shares from the beneficiaries were found to

have common directors and common address and the shares were sold by the members of same family and same surname and same address or from the same town. Once the operators started rigging the prices of the shares through circular trading and increase the price of the shares with the help of brokers and bogus clients and arrived at optimum amount over a period of time. Once a period of one year was over (for claiming exemption) under long term capital gains under Section 10(38) the Operator asked the beneficiary to deliver the unaccounted cash. Once the unaccounted cash was delivered by the beneficiary, then the same was routed by the operator to the books of various papers/bogus companies which ultimately bought the shares belonging to the beneficiary at a very high price and these paper companies avoided direct cash trail. Thereafter the operator used to instruct the beneficiary to sell the shares with a particular lot on a particular day and time.

In the present assessee's case, the assessee has originally purchased 450 shares of face value of Rs.10/- each at Rs.200/- per share amounting to Rs.90,000/- of Dhanlabh Mercantile Ltd, Offline on 15.1.2010 from M/s.Excellent Barter Ltd, Calcutta. The said company was subsequently merged with M/s.Bakra Prathisthan Ltd and 4500 shares of M/s.Bakra Prathisthan Ltd., were allotted to assessee at Rs.10/- per share. The assessee sold 4500 shares of M/s.Bakra Prathisthan Limited on 03.01.2012 for Rs.15,83,623/-, which had acquired for Rs 90,000/-. The assessee had not furnished any documentary evidence to prove the genuineness of the transaction in respect of purchase and sale of shares. The assessee had not discharged the onus cast upon him to prove the genuineness of the transactions. The assessee had entered into engineered transaction to generate artificial long term capital gains and the Explanation offered by the assessee regarding the credit of Rs.15,86,250/- in its book was found to be unsatisfactory and therefore, the Assessing Officer held the same as unexplained cash credit which was added to the total income

of the assessee as per the provisions of Section 68 of the Act and assessed under the head Income from other sources."

18. The above facts have been culled out by the Assessing Officer as well as the CIT(A). If such is the case, it is not known as to whether there was any justification on the part of the Tribunal to interfere with the order and that too, by remanding the matter for a fresh consideration.

19. In the decision in the case of Sumati Dayal Vs. CIT [reported in (1995) 214 ITR 0801], the Hon'ble Supreme Court, while considering the aspect regarding burden of proof relating to cash credits, pointed out as follows :

"4. It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on 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 exemption provided by the Act lies upon the assessee. [See : Parimisetti Seetharamamma (supra) at P. 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, 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. (See: Sreelekha Banerjee (supra) at p. 120)."

20. The decision of the Hon'ble Supreme Court in the case of Sumati Dayal was followed in the decision of the High Court of Delhi in the case of Sanjay Kaul Vs. PCIT [reported in (2020) 119 Taxmann.com 470] wherein it was held that where the assessee was not a regular investor in shares and had only invested in high risk stocks of obscure companies with no business activity or asset, which were identified as penny stocks, the Assessing Officer had correctly concluded that the assessee had entered

into a pre-arranged sham transaction so as to convert unaccounted money into accounted money in guise of capital loss and therefore, the alleged short term capital loss was rightly disallowed.

21. A similar view was taken in the decision of the High Court of Bombay in the case of Sanjay Bimalchand Jain Vs. PCIT-1, Nagpur [reported in (2018) 89 Taxmann.com 196]. In that case, the assessee purchased shares of two penny stock companies for a lower amount and within a year, sold such shares at a higher amount. The assessee had not tendered cogent evidence to explain as to why shares in an unknown company had jumped to such a higher amount in no time and also failed to provide details of persons, who purchased the said shares and the transaction was held to be an attempt to hedge the undisclosed income as long term capital gain.

22. In the decision in the case of Suman Poddar Vs. ITO [reported in (2019) 112 Taxmann.com 329], the Delhi High Court upheld the order of the Tribunal, which held that the share transactions were bogus because the company, whose shares were allegedly purchased, was a penny stock. This decision was affirmed by the Hon'ble Supreme Court in the decision reported in (2019) 112 Taxmann.com 330.

23. In the decision of the Hon'ble Supreme Court in the case of PCIT, Central Vs. NRA Iron & Steel Private Limited [reported in (2019) 412 ITR 0161], the issue, which fell for consideration was as to whether in a case where share capital/premium was credited in the books of accounts of the assessee company, the onus of proof was on the assessee to establish by cogent and reliable evidence after identity of the investor companies, the credit worthiness of the investors and genuineness of transactions to the satisfaction of the Assessing Officer. While answering the issue, the Hon'ble Supreme Court, after referring to its decisions in the case of Sumati Dayal and CIT Vs. P.Mohankala [reported in (2007) 291 ITR 0278], held as follows:

"8.2. As per settled law, the initial onus is on the assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act. The assessee is expected to establish to the satisfaction of the Assessing Officer [CIT Vs. Precision Finance Pvt. Ltd. (1994) 208 ITR 465 (Cal.) :

- Proof of Identity of the creditors
- Capacity of creditors to advance money; and

- Genuineness of transaction.

This Court in the land mark case of Kale Khan Mohammad Hanif v. CIT [(1963) 50 ITR 1 (SC)] and Roshan Di Hatti v. CIT [(1977) 107 ITR (SC) 938] laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the assessee is not able to provide a satisfactory explanation of the nature and source of the investments made, it is open to the Revenue to hold that it is the income of the assessee and there would be no further burden on the Revenue to show that the income is from any particular source.

8.3. With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge.

The Delhi High Court in CIT v. Oasis Hospitalities Pvt. Ltd. [333 ITR 119 (Delhi) (2011)], held that :

"The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/ investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."

It has been held that merely proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.

In Shankar Ghosh v. ITO [(1985) 23 TTJ (Cal.) 20], the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The loan amount was rightly held to be the assessee's own undisclosed income.

8.4. Reliance was also placed on the decision of CIT v. Kamdhenu Steel & Alloys Limited and Others [(2012) 206 Taxman 254 (Delhi)] wherein the Court that :

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability.

.....

10. On the issue of unexplained credit entries/share capital, we have examined the following judgments :

i. In Sumati Dayal v. CIT [(1995) 214 ITR 801 (SC), this Court held that :

"if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably".

ii. In CIT v. P. Mohankala [291 ITR 278], this Court held that:

"A bare reading of Section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by

the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee.

The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature."

(emphasis supplied)

iii. The Delhi High Court in a recent judgment delivered in PR.CIT -6, New Delhi v. NDR Promoters Pvt. Ltd. (410 ITR 379) upheld the additions made by the Assessing Officer on account of introducing bogus share capital into the assessee company on the facts of the case.

iv. The Courts have held that in the case of cash credit entries, it is necessary for the assessee to prove not only the identity of the creditors, but also the capacity of the creditors to advance money and establish the genuineness of the transactions. The initial onus of proof lies on the assessee. This Court in Roshan Di Hatti v. CIT [(1992) 2 SCC 378], held that if the assessee fails to discharge the onus by producing cogent evidence and explanation, the AO would be justified in making the additions back into the income of the assessee.

v. The Guwahati High Court in Nemi Chand Kothari v. CIT [(2003) 264 ITR 254 (Gau.)] held that merely because a transaction takes place by cheque is not sufficient to discharge the burden. The assessee has to prove the identity of the creditors and genuineness of the transaction. :

"It cannot be said that a transaction, which takes place by way of cheque, is invariably sacrosanct. Once the assessee has proved the identity of his creditors, the genuineness of the transactions which he had with his creditors, and the creditworthiness of his creditors vis-a-vis the transactions which he had with the creditors, his burden stands discharged and the burden then shifts to the revenue to show that though covered by cheques, the amounts in question, actually belonged to, or was owned by the assessee himself." (emphasis supplied)

vi. In a recent judgment the Delhi High Court in CIT Vs. N.R.Portfolio (P) Ltd. [(2014) 42 Taxmann.com 339/222 Taxman 157 (Mag.) (Delhi) 21] held that the credit-worthiness or genuineness of a transaction regarding share application money depends on whether the two parties are related or known to each other, or mode by which parties approached each other, whether the transaction is entered into through written documentation to protect investment, whether the investor was an angel investor, the quantum of money invested, credit-worthiness of the recipient, object and purpose for which payment/investment was made, etc. The incorporation of a company, and payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus.

vii. Other cases where the issue of share application money received by an assessee was examined in the context of Section 68 are CIT v. Divine Leasing & Financing Ltd. [(2007) 158 Taxman 440] and CIT v. Value Capital Service (P.) Ltd. [(2008) 307 ITR 334].

11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the

satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.

.....
13. The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company - assessee had filed all the primary evidence, the onus on the assessee stood discharged.

The lower appellate authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the assessee Company - Respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility.

The Court/Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.

14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares,

where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee."

24. Bearing the principles laid down in the decision of the Hon'ble Supreme Court in the case of NRA Iron & Steel Private Ltd., in mind, if we examine the order passed by the Assessing Officer, we find that a detailed enquiry had been conducted by the Assessing Officer after affording an opportunity to the assessee. The assessee availed the opportunity through written submissions. The assessee was represented by an authorized representative and thereafter a finding had been rendered. The said finding was tested for its correctness by the CIT(A), who approved the same by order dated 07.8.2018.

25. We refer to the following factual findings rendered by the CIT(A) while dismissing the appeal filed by the assessee :

"2.1.In response to notices, the AR of the assessee Shri Omprakash Jain, B.Com, FCA of Om Jain & Associates, Chartered Accountants appeared and filed the details of purchase of 450 shares of M/s.Dhanlabh Merchandise Limited, later it was merged with M/s.Bakra Pratisthan Limited and 450 shares converted into 4500 shares. In this connection, the AR furnished the copy of sale bill dated 15.1.2010 of M/s.Excellent Barter Private Limited of Shaym Nagar WB 743127 wherein it is noticed that the assessee has purchased 450 shares of Dhanlabh Merchandise Limited @ Rs.200 each per share for a consideration of Rs.90,000/-. But the bill does not contain any distinctive numbers and it was stated 'as per Demat form'. The AR of the assessee also furnished the copy of transaction report from Motilal Oswal Securities as documentary evidence for purchase of these shares and later converted into M/s.Bakra Pratisthan Limited on 28.12.2011.

.....

2.2.....On the perusal of the same, it is noticed that the closing balance as on

02.3.2010 was Rs.5,607/-. On 03.3.2010, there was a credit entry of Rs.90,000/- and a debit entry with narration 'manual chg' Rs.90,000/-. As per the narration of the bankers, it is manual cheque only and the same was passed in clearing on the same day by Calcutta base company. It is not at all possible.

....

2.3. As it was held by the assessee the shares of M/s.Dhanlabh Merchandise Limited was purchased from M/s.Excellent Barter Pvt. Ltd. Of Shaym Nagar WB 743127, a communication dated 28.9.2017 was sent to M/s.Excellent Batter Private Limited calling for the following details under Section 133 (6) of the I.T. Act 1961. By the examination of the details and the same was returned unserved by the postal authorities with remarks 'not known'.

.....

Besides the above, the AR of the assessee has not furnished any documentary evidences with respect to the sale of shares of M/s.Bakra Pratisthan Limited. Instead, he furnished the bank account copy wherein on 03.1.2012, an amount of Rs.9,50,714/- was credited in the bank with description 'RTGS-IN-WFIX-FIT SECURITIES'. Considering the above fact, it is concluded as under :

2.4. The purchase of 450 shares of M/s.Dhanlabh Merchandise Limited is itself a sham transaction for the following reasons :

1. Based on the details filed by the AR of the assessee and the address was provided the assessee the communication sent by this office to M/s.Excellent Batters Private Limited.

2. The postal remarks is 'not known' only. The postal authorities did not mention that the person left or something else. The word 'not known' means that the address itself bogus or incorrect one.

3. Accordingly, it is established that there is no such person in that address having name M/s.Excellent Batters Private Limited.

4. It is onus on the part of the assessee to prove the genuineness of the transaction.

5. It is also noticed that the documentary evidence filed by the assessee towards payment made for purchase of shares also not related to this transaction.

6. In the absence of the distinctive nos., in the sale bill dated 25.1.2010 of M/s.Excellent Batters Pvt. Ltd., and hence, it is not known that to whom the shares were originally allotted and how the same was subsequently transferred to the assessee for that there is no documentary evidence produced. The assessee HUF not furnished the copy of name transfer application also.

7. It is also noticed from the AR of the assessee's submission dated 15.11.2017 that M/s.Excellent Batters P. Ltd., is a shareholder of M/s.Dhanlabh Merchandise Ltd., but there is no documentary evidence was filed by him.

8. As the assessee HUF itself has stated that the HUF is doing commodities trading, why off market transaction for purchase of shares not reported to BSE.

Considering the above fact findings, it is established that the purchase of 450 shares of M/s.Dhanlabh Merchandise Limited from M/s. Excellent Barter Private Limited by the assessee is itself a sham transaction. Accordingly, the documentary evidence furnished by the assessee towards purchase of shares of 4500 M/s.Bakra Pratisthan Limited is not a genuine one and hence, the claim of exemption under Section 10(38) towards selling of the same is not entertained.

7.11. It can be seen from the client statement of Shri Ashok Kumar Kayan that not only the assessee but the following members of the HUF family members have also invested in the said impugned shares :

SNo	Name	PAN	Amount
01	Karuna A Jain	AGTPJ5140K	25,46,855
02	Abhishek Jain	AEUPJ3242F	15,93,300
03	Abhishek M Jain HUF	AAJHA1645J	15,86,250

SNo	Name	PAN	Amount
04	Amit Kumar	AEEPA9942F	15,86,250
05	Amit Kumar I Jain HUF	AAJHA1641N	15,86,250
06	Hitesh M Jain HUF	AADHH3539N	10,57,500
07	Mamta M Jain	AFJPM4958B	9,52,290
08	Manish D Jain HUF (assessee)	AAJHM6100N	15,86,250
09	Nitin I Jain	AEPPN8578R	15,86,250
10	Nitu Amit Jain	AEZPJ1421K	22,21,695
11	Rajesh D Jain	AEOPR8702G	15,93,300
12	Shilpa M Jain	AGZPJ9692C	15,93,300
		Total	1,94,89,490

From the above table, it is established that the entire family involved in this operation to convert their black money into white. It is a sham transaction only.

.....

9. Considering the above factual position as also the legal position, it is held that the assessee has entered into an engineered transaction to generate artificial long term capital gains. As the explanation furnished by the assessee regarding the credits of Rs.15,86,250/- in its books is found to be unsatisfactory, the same are hereby held as 'unexplained cash credits' in the books of the assessee and accordingly added to the total income of the assessee in accordance with the provisions of Section 68 of the IT Act, 1961 and assessed under the head 'income from other sources' Penalty proceedings under Section 271(1)(c) read with Explanation 1 thereto are separately initiated for furnishing the inaccurate particulars of income with respect to the claim of capital gain made in

the light of the findings made in the preceding paragraphs.

.....
7.3.....However, in the present appeal, the appellant purchased the shares of M/s.Bakra Pratisthan Limited in off market. During the course of the hearing on 24.7.2018, the AR admitted that the assessee purchased the shares of M/s.Dhanlab Merchandise Limited in off market.

.....
7.4. These shares were purchased through off market and not through Stock Exchange.

The notice under Section 133(6) dated 28.9.2017 sent by the Assessing Officer to M/s.Excellent Barter Private Limited from which the assessee had purchased the shares of M/s.Dhanlab Merchandise Limited was returned unserved with remark 'not known'.

Moreover, the assessee did not bring any other material on record to establish the genuineness of the purchase of shares.

M/s.Bakra Pratisthan Limited did not pay dividend or did not issue bonus shares during the period of holding of these shares by the assessee corresponding to the increase in the price of the share of M/s.Bakra Pratisthan Limited. During this period, there has been no corporate announcement by M/s.Bakra Pratisthan Limited which suggests that the company is undertaking any substantial development activity.

The above facts were not disputed by the appellant.

These facts clearly establish that the share prices of M/s.Bakra Pratisthan Limited were artificially hiked.

.....
7.6. In the present case also, the shares were purchased through off market and not through Stock Exchange and selling rates were artificially hiked later on."

26. The above findings will clearly show that not only the Assessing Officer, but also the CIT(A) examined the modus operandi of the assessee and held that the shares were purchased through off market and not through Stock Exchange and that the selling rates were artificially hiked later on. The above

findings have not been set aside by the Tribunal and there is no reason for the Tribunal to remand the matter to the Assessing Officer for a fresh consideration.

27. As pointed out in the decision of this Court in the case of Cholamandalam MS General Insurance Co., we find in the instant case that there was no material, which necessitated the remand of the case to the Assessing Officer and it is a clear case where the Tribunal had failed to exercise its jurisdiction in the manner known to law. The Tribunal, being a last fact finding Authority, is under the legal obligation to record a correct finding of fact. It has been held in the cases of

(i) M.R.M.Periyannan Chettiar Vs. CIT
[reported in (1960) 39 ITR 159 (Madras)]

(ii) V.Ramaswamy Iyengar Vs. CIT
[reported in (1960) 40 ITR 377 (Madras)]

(iii) Hindustan Sanitary Ware and Industries Ltd. Vs. CIT [reported in (1978) 114 ITR 85 (Calcutta)]

(iv) CIT Vs. Ishwardass [reported in (1986) 158 ITR 168 (Delhi)] and

(v) CIT Vs. Harikishan Jethalal Patel
[reported in (1987) 168 ITR 472 (Gujarat)]

that the power to remand the case should be exercised on judicial principles.

28. Further, in the decisions in the cases of

(i) United Commercial Bank Vs. CIT
[reported in (1982) 137 ITR 434 (Calcutta)]

(ii) Darjeeling Dooars Plantations Vs. CIT [reported in (1988) 174 ITR 37 (Calcutta)] and

(iii) Siemens India Ltd. Vs. CIT
[reported in (1997) 226 ITR 801 (Bombay)],

it was held that where all the evidence had been produced and the CIT(A), after full investigation of the evidence and examination of the accounts, had given a definite finding on the question in issue, the Tribunal's order of remand was held to be invalid.

29. Further, in the recent decision of the Hon'ble Division Bench of this Court in the case of Tharakumari Vs. ITO [TCA.No.128 of 2019 dated 11.2.2019], the appeal filed by the assessee in a case relating to penny stock was dismissed after noting the factual findings rendered by the Assessing Officer, the CIT(A) and the Tribunal. Thus, for all the above reasons, we hold that the order passed by the Tribunal calls for interference.

30. In the result, the above tax case appeal is allowed,

the impugned order passed by the Tribunal is set aside and the substantial questions of law framed are answered in favour of the Revenue and against the assessee. Consequently, the order passed by the CIT(A) stands restored.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Income Tax Appellate Tribunal,
Madras 'C' Bench.

2.The Commissioner of Income Tax (Appeals) - V,
Chennai 34.

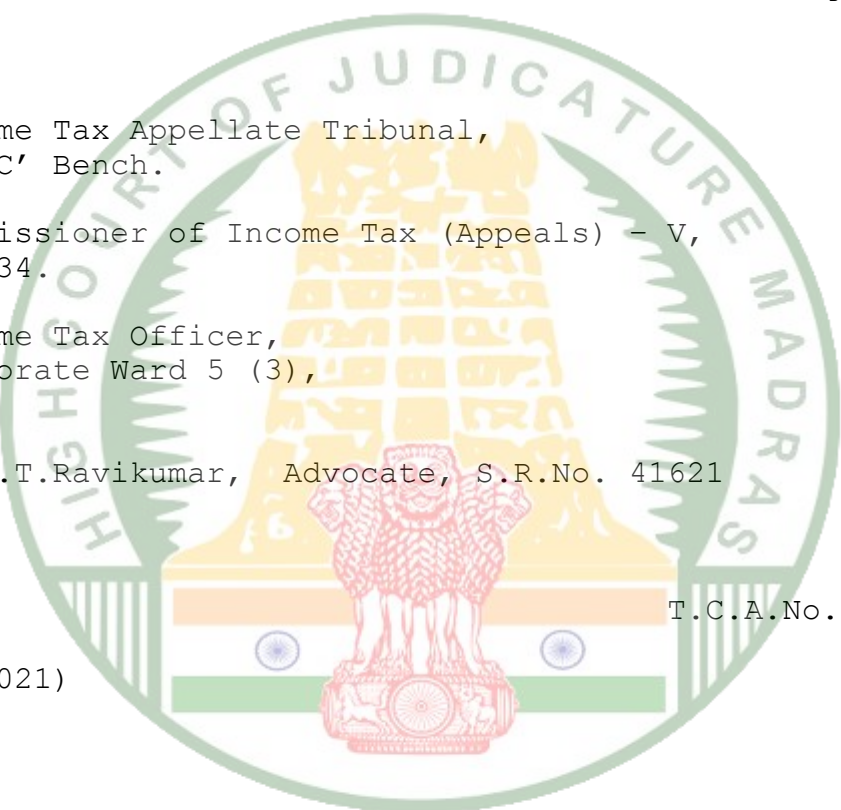
3.The Income Tax Officer,
Non Corporate Ward 5 (3),
Chennai.

+1cc to Mr.T.Ravikumar, Advocate, S.R.No. 41621

RS

AJS (CO)
GN(06/01/2021)

T.C.A.No.223 of 2020



सत्यमेव जयते

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