

OD-64

ITAT/294/2017
IA NO: GA/1/2017(Old No.GA/2698/2017)
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

NEELKANTHA COMMOSALES PVT. LTD. & ANR.
VERSUS
INCOME TAX OFFICER, WARD -1(2), KOLKATA & ORS.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 23rd November, 2021

Appearance :-

Mr. Debasish Chowdhury , Adv.
... For Appellant

The Court : This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 1st March, 2017 passed by the Income Tax Appellate Tribunal, "D" Bench, Kolkata in ITA No.644/Kol/2015 for assessment year 2009-10. The appellant has raised the following questions of law for consideration :-

- I. Whether on the facts and circumstances of the case the Learned Tribunal passed the orders under section 263 in the case of 5 out of six share applicants, wherein the learned Commissioner of Income Tax, Kolkata-1 initiated proceedings since in their

cases also the Commissioner felt that those persons failed to prove their identity, genuinity and credit worthiness. However in all the five cases the proceedings were dropped after making enquiry. In respect of the sixth share holder also the petitioner filed all the details and evidences on which there was no adverse comment by the Commissioner of Income Tax or by the Tribunal. The learned Tribunal however has confirmed the order of the Commissioner of Income Tax passed under section 263 ?

- II. Whether on the facts and circumstances of the case the Learned Tribunal is incorrect in law and in facts in confirming that the Commissioner of Income Tax, Kolkata-1 was justified in invoking the provision under section 263 when he himself examined the assessment records of the Investors and dropped proceedings under section 263 in their case ?
- III. Whether on the facts and circumstances of the case the Learned Tribunal has wrongly placed reliance on the lead order in the case of M/s. Subhalakshmi Vanijya Ltd. & Ors. Vs. Commissioner of Income Tax inasmuch as the factual findings of the Learned Tribunal in that case are not applicable to the case of your petitioners ?

None appears for the appellant.

We have heard Mr. Debasish Chowdhury, learned Standing Counsel appearing for the respondent revenue. We find that the questions raised before us is squarely covered by the decision of the

Hon'ble Division Bench of this Court in the case of M/s. Pragati Financial Management Pvt. Ltd. vs. The Commissioner of Income Tax – II & Ors. in ITAT 178 of 2016, dated 7th March, 2017. By the said judgment appeals were dismissed observing that there is no substantial questions of law arising for consideration. The operative portion of the judgement reads as follows :-

“9. Main thrust of the appellant's case is that the provisions of Section 68 of the Act as amended could not be given retrospective operation and if that position of law was accepted, then it was not open to the C.I.T. to direct an enquiry to ascertain the source and genuineness of the sums being projected by the appellants as capital receipts. Mr. Majumdar wants us to reject the finding of the Tribunal that Section 68 of the Act, as amended, has retrospective operation. In support of his submissions on this point, he has relied upon on a Constitution Bench judgement of Supreme Court delivered in the case of **Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd.** (2015) 1 SCC 1. Argument of the appellant is that in the event the amendment made to section 56(2) of the Act is given prospective effect along with provisos to Section 68, then sums received as share capital or share premium would not be taxable in the light of particulars already disclosed by each appellant, and the exercise directed by the C.I.T. would be a futile or redundant exercise. Mr. Majumdar wants the appeal to be admitted on formulating the following question, which, according to him, would involve substantial question of law:-

“Whether in the facts and circumstances of the case and in law, the learned Tribunal erred in holding that the proviso to Section 68 inserted by the Finance Act, 2012 with effect from April 1, 2013 would be applicable to Assessment Year 2008-09?”

10. A Coordinate Bench of this Court in dealing with an almost identically worded order of the C.I.T. in the case of ***Rajmandir Estates Private Limited Vs. Principal Commissioner of Income Tax, Kolkata – III, Kolkata***, [G.A. No. 509 of 2016 with I.T.A.T. No.113 of 2016] found such order to be sustainable in law. In the judgement, Their Lordships construed the provisions of section 68 as it was before the aforesaid amendment being the law which prevailed in the relevant previous year in that proceeding, and held, inter alia :-

“We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that “the use of the words “any sum found credited in the books” in Section 68 indicates that the said section is very widely worded and an Income-Tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of CIT – Vs – Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of CIT – Vs – Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the

Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that “the ITO may even be justified in trying to ascertain the source of depositor”. Therefor, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating state issues.”

12. The judgement was carried up in appeal by the assessee before the Hon’ble Supreme Court by filing a petition for special leave to appeal (Petition(s) for Special Leave to Appeal(c) . . . cc No (s) 22566-22567/2016). On 9th January, 2017, the Hon’ble Supreme Court was pleased to dismiss the special leave petition finding no reason to entertain the same. A copy of the order of the Hon’ble Supreme Court has been made available to us by Mr. Nizamuddin, learned counsel representing the Revenue.

13. In that judgement, the Coordinate Bench had referred to particulars of the assessee’s account in detail. Reference was made specially to its subsisting share capital, quantum rise in share capital and reserve and surplus on issue of share capital with high premium during the relevant previous year. In this judgement, we do not consider it necessary either to reproduce the particulars of accounts of individual assesseees or to refer to the manner in which the capital receipts were realised. The factual background of these cases are more or less similar to the facts involved in the case of **Rajmandir Estates Private Ltd.**

(supra), and the learned counsel for the parties have also confined their submissions to points of law only. The capital receipts in respect of which inquiries have been ordered by the C.I.T. have similar features, being fresh share capital issued at high premium. Mr. Majumdar, however, drew his strength to urge the point that it was only after the aforesaid amendments such inquiries would have relevance. He sought to take cue from the observation of the Coordinate Bench that the question as to whether proviso to Section 68 of Income Tax Act is retrospective in nature or not was being kept open. He also cited the judgement of the Hon'ble Supreme Court in the case of **Sneh Vs. Commissioner of Customs** (2006) 7 SCC 714] to contend that a judgement is the authority on the proposition which it decides and not what can logically be deduced from, and sought to distinguish the case of **Rajmandir Estates Private Ltd.** (supra), on that basis. Submission of the appellants is that the points of law urged in these appeals were not raised before the Coordinate Bench. Main argument of the appellants before us has been that the amendment to Section 68 does not have retrospective operation. According to the appellants, if it is found that the amended provisions of Section 68 of the Act do not have retrospective operation, then having regard to what has been held by the Tribunal in the case of **Subhalakshmi Vanija Pvt. Ltd.** (supra), the inquiry, as directed would be impermissible.

14. We have already observed that the judgement in the case of **Rajmandir Estates Private Ltd.** (supra) was delivered considering the unamended provision of Section 68 of the Act. In the case of the assessee before us, there is no differing feature so far as applicability of the said statutory provision is

concerned, even though the Tribunal in ***Subhalakshmi Vanija Pvt. Ltd.*** (supra) had held that the provisos to Section 68 of the Act are retrospective in their operation, and delivered the decision against the assessee in that case that reasoning. In the appeal of ***Rajmandir Estates Private Ltd.*** (supra), the Coordinate Bench did not consider it necessary to examine the question of retroactivity of the aforesaid provision. The Coordinate Bench found the order of the C.I.T. to be valid examining the order applying the unamended provision of Section 68 of the Act only. We do not find any other distinguishing element in these appeals which would require addressing the question s to whether the amendment to Section 68 of the Act was retrospective in operation or not. Neither do we need to address the issue that if the inquiries, as directed, revealed that share capital infused were actually unaccounted money, whether the same could be taxed in accordance with Section 56(2)(vii)(b) or not. The ratio of the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Vedika Township Private Ltd.*** (supra) does not apply in the legal context in which we are deciding these appeals. It is not necessary in these appeals to deal with the question of retroactivity of the aforesaid provisions, for which that authority was cited.

15. Arguments in all these appeals have been advanced in the same line, and for that reason we have not recorded in this judgement the submissions made individually in each appeal. Another decision of a ***Coordinate Bench in ITA No.723 of 2008 in the case of Commissioner of Income Tax, Central II, Kolkata Vs. Shyam Sel Ltd.*** Decided on 28th June 2016 was

referred to on behalf of the appellants. This decision was cited to contend that the assessee cannot be asked to discharge the onus or proving the genuineness of transaction relating to the source of its source of share application. But in the decision of ***Rajmandir Estates Private Ltd.*** (supra), the Coordinate Bench had directly addressed this issue and observed that source of source can be relevant inquiry.

16. The points sought to be raised before us in these appeals stand covered by the aforesaid judgement of the Coordinate Bench. The Special Leave Petition against that judgement has been dismissed. We accordingly dismiss these appeals, finding that there is no substantial question of law involved in them.”

Thus, following the above decision of the Hon’ble Division Bench, this appeal is dismissed and we hold there is no substantial questions of law arising for consideration.

With the dismissal of the appeal, the connected application is also dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)