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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.8.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

TAX CASE APPEAL NO.97 OF 2015

The Commissioner of Income
Tax, Central II, Chennai

...Appellant

Vs

Midas Golden Distilleries P.
Ltd., Kancheepuram District

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 30.6.2009 passed in ITA.No.1801/Mds/2008 on the file of the Income Tax Appellate Tribunal, Chennai 'C' Bench for the assessment year 2003-04.

Appeal against the order passed by the Commissioner of Income Tax (Appeals)-I, Chennai-600 034, dated.21.07.2008 made in ITA No.7/08-09 for the Assessment Year 2003-04. Against the Assessment order passed by Assistant Commissioner of Income Tax, Central Circle II (2), Chennai-34, dated.27.12.2007 made in PA/GIR No.AADCM9073D for the Assessment Year 2003-04.

For Appellant : Mr.T.R.Senthilkumar, SSC
assisted by Ms.K.G.Usharani, JSC

For Respondent : Served and No appearance

Judgment was delivered by T.S.SIVAGNANAM, J

We have elaborately heard Mr.T.R.Senthilkumar, learned Senior Standing Counsel appearing for the appellant - Revenue. None appears for the respondent though the respondent is served and their name is printed in the cause list.

2. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 30.6.2009 passed in ITA.No.1801/Mds/2008 on the



through cheques or demand drafts and that the list of persons, from whom, the share application money was received, was furnished to the Assessing Officer. It was also contended that that the assessee allotted shares to the applicants and filed necessary documents with the Registrar of Companies in proof of such allotment. Further, the allotment had been made on the basis of a valuation made by independent and reputed professional.

11. Placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Stellar Investments Ltd. [reported in (1991) 192 ITR 287], it was contended by the assessee that on account of the factual situation, the amount of share application money could not be regarded as undisclosed income in the hands of the assessee.

12. This argument of the assessee was considered by the Assessing Officer and it was pointed out that merely filing the identity of the shareholders or the share applicants and the mode of receipt of amounts would not amount to discharging onus cast upon the assessee. It was further pointed out that when a doubt arose as to the genuineness of the share capital introduced by the assessee, it would be necessary to examine the facts and circumstances of the entire issue to find out as to whether the amounts shown as representing the share application were genuine and also to ascertain the capacity of the share applicants.

13. Thus, the Assessing Officer held that if, on the facts and circumstances, the Assessing Officer came to the conclusion that the share capital of a company was in question, the Assessing Officer was at liberty to make an enquiry and if the enquiry proved that the transactions were not genuine, he could treat the amount as income of the assessee.

14. With regard the argument of the assessee that the share application money had been received by cheque/demand draft, the Assessing Officer relied upon the decision of the Gauhati High Court in the case of Nemi Chand Kothari Vs. CIT [reported in (2003) 264 ITR 254] and held that merely because the amounts were received by cheques, it could not make the transaction sacrosanct and that the assessee was bound to prove the identity of the creditors, the genuineness of the transactions, which they had with the creditors and the creditworthiness of their creditors vis-a-vis the transactions, which they had with the creditors and only then, the burden stood discharged.

15. With regard to the decision of the Hon'ble Supreme Court relied upon by the assessee in the case of Stellar Investments Ltd., the Assessing Officer held that no ratio



decidendi was laid down in that decision and it could not be applied to the facts of the assessee's case.

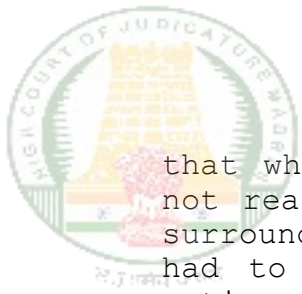
16. With regard to the power of the Assessing Officer to make enquiry about the nature and source of amounts credited under share application money, the Assessing Officer relied upon the decision of the Delhi High Court in the case of CIT Vs. Sophia Finance Ltd. [reported in (1994) 205 ITR 98] and observed that the Assessing Officer was not precluded from making any enquiry with regard to the share capital. To the same effect, reliance was placed on the decisions of the Calcutta High Court in the case of Hindustan Tea Trading Co. Ltd. Vs. CIT [reported in (2003) 263 ITR 289] and in the case of CIT Vs. Ruby Traders and Exporters Ltd. [reported in (2003) 263 ITR 300].

17. Further, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Juggilal Kamalpet Vs. CIT [reported in (1969) 73 ITR 702], the Assessing Officer held that he was entitled to pierce the veil of a corporated entity and look at the reality of the transaction. To the same effect, reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Sri Meenakshi Mills Ltd. [reported in (1967) 63 ITR 609] and the decision of the Kerala High Court in the case of CIT Vs. Paulose and Mathen Pvt. Ltd [reported in (1999) 236 ITR 416].

18. Further, the Assessing Officer held that a tax payer could not be allowed to get away with any colourable device or artificial sham transaction and to that effect, placed reliance on the decision of the Hon'ble Supreme Court in the case of McDowell & Co. Vs. CTO [reported in (1985) 154 ITR 148].

19. Reverting to the facts, the Assessing Officer observed that the share capital had been routed through two companies, the existence and operation of which remained only on paper and that the enquiries, which were conducted, were not only to lift the corporate veil of the assessee company, but also that of the intermediary companies, which acted as conduits. Further, based on the enquiry, the Assessing Officer recorded that it revealed that huge amounts were brought in the assessee's books as share application money through the intermediary companies by the shareholders, who could not properly explain their source.

20. Therefore, the Assessing Officer held that the provisions of Section 68 of the Act got attracted and that the share application money, which was not explained, had to be assessed in the hands of the assessee company. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT [reported in (1995) 214 ITR 801] wherein it was held that apparent could not be considered as real and



that when there was no reason to believe that the apparent was not real, the Taxing Authorities were entitled to look into the surrounding circumstances to find out the reality and the matter had to be considered as per such a finding. Accordingly, the entire share application money amounting to Rs.13,94,15,000/- was brought to tax by the assessment order dated 27.12.2007.

21. Aggrieved by such an order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-I, Chennai-34 [for brevity, the CIT(A)], who, by a very detailed and reasoned order dated 21.7.2008, dismissed the appeal by confirming the assessment order.

22. As against the same, the assessee preferred further appeal to the Tribunal, which was allowed by the impugned order dated 30.6.2009. Thus, the Revenue is before us by way of this appeal.

23. Though the impugned order passed by the Tribunal, at the first blush, appears to be a very elaborate and detailed order, we find that the discussion is only in paragraph 30. From paragraphs 31 to 40, the Tribunal referred to various decisions of the Hon'ble Supreme Court not on the subject issue, but on the issue as to when an order passed by the Hon'ble Supreme Court is a law declared by the Court under Article 141 of The Constitution of India. To say the least, we find that the order passed by the Tribunal to be utterly perverse and devoid of reasons and there was no discussion as to how the Assessing Officer was factually incorrect and as to how the CIT(A) was not right in confirming the order passed by the Assessing Officer.

24. The CIT(A), while confirming the order passed by the Assessing Officer, reexamined the entire facts and the discussions commenced from paragraph 4.1.3 in the order dated 21.7.2008. After noting the submissions, which were recorded by the Assessing Officer during the course of assessment proceedings, the CIT(A) held that the so-called directors basically discharged their functions in the honorary capacity during their tenure and they used to look after the routine matters pertaining to the assessee and that they categorically denied having ever actively participated in the crucial decision making process of the assessee company. As former managing director of the assessee company, he was stated to be in charge of civil work, erection of plant and machinery, purchases, etc., and expressed ignorance about the shareholding pattern of the assessee company and other financial transaction entered into by the initial promoter - directors and the present directors. All of them appeared to have stated that the important decisions used to be taken by only one person, who was the main person behind the promotion of the assessee company and



its business operations. But, the main person pleaded that he and his family members had no role to play in the assessee's business activities apart from holding shares therein.

25. After noting the statements recorded by the Assessing Officer, the CIT(A) observed that the Assessing Officer was within his right to probe the genuineness and source of the share application money received by the assessee during the year. The statements recorded from the persons had clearly established that the needle of suspicion inevitably and inexorably pointed to one particular person and since the suspicion was so overwhelming, the Assessing Officer had no other option except to trace the origin of funds, which got channelized into the assessee company through the corporate entities. Further, the CIT(A) pointed out that the Assessing Officer, while embarking upon such an enquiry, found that the share application money was primarily contributed by two companies and an aggregate sum of Rs.3 Crores was found to be contributed by three Mumbai based companies.

26. During the course of enquiry, the Assessing Officer was able to establish that two persons, who were common directors in the two companies and who were alleged to have contributed, had no social standing or any financial capacity to bring in such amount of monies as share application monies. The statements revealed that those two persons acted as puppets under the instructions of a single person. It was also found that the two companies had, in turn, collected funds from other parties and the family members of the said single person and they were subsequently transferred to the assessee company by way of share application money.

27. Thus, the CIT(A) agreed with the conclusion arrived at by the Assessing Officer and held that there was no other option left except to treat the source of the aggregate funds brought in by the companies as unexplained. Likewise, the genuineness of other transactions were also examined and the CIT(A) agreed with the Assessing Officer that the alleged investments remained unexplained and the creditworthiness of two ladies, who were stated to have invested a sum of Rs.30 lakhs was not established. Therefore, the CIT(A) agreed with the findings rendered by the Assessing Officer that the source of entire share application money remained unexplained thereby attracting the provisions of Section 68 of the Act.

28. Before the CIT(A), the assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of Stellar Investments Ltd., and distinguished that decision on facts and contended that the special leave petition filed before the Hon'ble Supreme Court was summarily dismissed and it was not by



a speaking order. Thereafter, the CIT(A) proceeded to refer to several decisions including the decision of the Delhi High Court in the case of CIT Vs. M/s.Lovely Exports Pvt. Ltd. [reported in (2008) 299 ITR 268], which was referred to by the Tribunal and which, according to the Tribunal, stood confirmed before the special leave petition was dismissed. After noting the decisions, the CIT(A) held that the Assessing Officer was entitled to conduct a full-fledged enquiry for ascertaining the true nature and source of any credit appearing in the books of accounts of the assessee and also brought out on facts as to how the creditworthiness of the persons, who were said have brought in the share application money was not established and accordingly confirmed the assessment order.

29. As mentioned above, the Tribunal reversed the order passed by the Assessing Officer as confirmed by the CIT(A) by observing that despite all material being available with the Assessing Officer and discreet enquiries were made as within the scope of his powers, the Assessing Officer has not brought in positive material or evidence to indicate that the share application money as such represented assessee's own undisclosed money brought back in the garb of share capital.

30. Unfortunately, the Tribunal did not take note of the elaborate exercise done by the Assessing Officer and the various statements, which have been recorded in a well reasoned order running to 44 pages. The Tribunal, in a single line, held that the Assessing Officer had not brought in any positive material or evidence. This finding is wholly erroneous and contrary to the facts, as the Assessing Officer clearly brought out as to how the so-called investors were either shell companies or without any financial capacity to bring in such monies for the purpose of investment and all fingers pointed to one individual. These facts were re-appreciated by the CIT(A), who had concurred with the Assessing Officer.

31. Section 68 of the Act states that 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.

32. In terms of Section 68 of the Act, the assessee is bound to explain as to how the nature and source of the amounts found credited in their books. If the assessee offers an explanation, which, in the opinion of the Assessing Officer, is not satisfactory, the said sums found credited in the books of accounts of the assessee may be charged to income tax as the



income of the assessee.

33. Therefore, the onus is on the assessee to establish the creditworthiness of various persons and as to how the share application money was brought in. Therefore, furnishing the list of names or stating that the monies were paid by cheques will not, by itself, establish the creditworthiness and genuineness of the transaction. The initial onus is on the assessee to discharge the burden cast upon them to prove the creditworthiness and genuineness of the transaction.

34. On going through the factual position as recorded by the Assessing Officer and re-appreciated by the CIT(A), we have no hesitation to hold that the assessee has not established the creditworthiness and genuineness of the transaction to the satisfaction of the Assessing Officer. In fact, the Tribunal agreed that the Assessing Officer made an in-depth enquiry, which was well within his powers. Yet, by a cryptic order, the Tribunal reversed the well considered order passed by both the Assessing Officer as well as the CIT(A).

35. The decision in the case of M/s.Lovely Exports Pvt. Ltd., can hardly help the case of the assessee because, on facts, in the said case, it was found that the assessee furnished full information thereby discharging the onus cast upon them and once the onus is discharged, it was for the Assessing Officer, who has to prove the contrary.

36. In the case on hand, the assessee miserably failed to discharge the primary onus cast upon them. In fact, the Assessing Officer conducted a detailed enquiry, issued summons, recorded statements, permitted the authorized representative of the assessee to peruse the seized records and in fact, came to a provisional conclusion as to how he intends to proceed and gave further opportunity to the authorized representative of the assessee, who had filed a written submission on 03.12.2007 raising certain factual issues and relying upon certain decisions. Those factual issues were considered and held to be not sustainable and the decisions, which were relied upon by the assessee, were also distinguished and in our considered view, are rightly so.

37. The case of the Revenue stands substantiated and supported by the decision of the Delhi High Court in the case of PCIT Vs. NDR Promoters P. Ltd. [reported in (2019) 102 Taxmann.com 182] wherein it has been held that when the Assessing Officer made additions to the assessee's income under Section 68 of the Act in respect of the amounts received as share capital from several companies, which was, in fact,



maintained by one person, the additions were held to be justified. The special leave petition filed against this decision was dismissed by the Hon'ble Supreme Court in the decision reported in NDR Promoters P. Ltd. Vs. PCIT [reported in (2019) 109 Taxmann.com 53].

38. In the decision of this Court in the case of B.R.Petrochem P. Ltd. Vs. ITO, Ward I(1), Chennai [reported in (2017) 81 Taxmann.com 424], it was held that where assessee received share capital from various contributors, in view of fact that those contributors were persons of insignificant means and their creditworthiness to have made contributions had not been established, impugned addition made by authorities below in respect of amount in question under Section 68 was to be confirmed.

39. In the decision of a Division Bench of this Court, to which, one of us (TSSJ) was a party, in the case of PCIT Vs. M/s.SRM Systems and Software P. Ltd. [TCA.No.875 of 2018 dated 17.2.2021], more or less an identical issue was considered and after taking note of the provisions of Section 68 of the Act, it was held as follows :

"8. In terms of the above provision, if the assessee offers no explanation about the nature and source of the amounts found credited in their books or the explanation offered by the assessee is not in the opinion of the Assessing Officer, satisfactory, the same so credited, may be charged to income tax, as the income of the assessee of that previous year. Therefore, to establish, the assessee was required to produce the creditworthiness of various persons, who are said to have made the share capital advance. Therefore, what is required to be established is the identity of the person, who has made the share capital advance, his creditworthiness and genuineness of the transaction. The onus is on the assessee to establish these factors and mere furnishing of the list of persons, who have claimed to have advanced towards share capital, will not constitute sufficient compliance of the onus placed on the assessee.

9.The CIT(A) has brushed aside the remand report submitted by the Assessing



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Officer, which would clearly indicate that the assessee failed to establish the genuineness of the amounts received as advance towards share capital. The CIT(A) has made an observation that the assessee has produced Form No.2, which is under the provisions of the Companies Act and as rightly submitted by the learned Senior Standing Counsel, the same will not contain the PAN numbers of the persons, who are said to have advanced monies.

10. In Principal Commissioner of Income Tax, Central I vs. NRA Iron & Steel Pvt. Ltd., [(2019) 103 taxmann.com 48 (SC)], the issue, which fell for consideration, was whether the share capital/premium credited in the books of accounts of the assessee-company, the onus of proof is on the assessee to establish by cogent and reliable evidence of the identity of the investor companies, the creditworthiness of the investors and genuineness of the transaction to the satisfaction of the Assessing Officer. While answering the said issue, the Hon'ble Supreme Court held that 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. After referring to several decisions, the principles, which emerged there from, were summed up in paragraph 11 of the judgment on the following terms:-

"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.



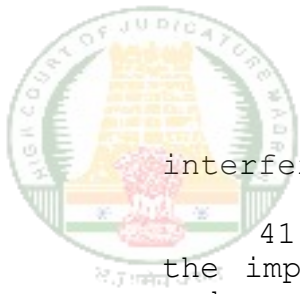
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ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

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.

11. The Review application filed against the above decision was dismissed by a speaking order as reported in (2020) 117 taxmann.com 752 (SC). 12. From the facts of the case, which we have set out in the preceding paragraphs, it is clear that the assessee has not discharged the legal obligation cast upon them to prove the genuineness of the transaction, the identity of the creditors and creditworthiness of the investors, who should have the financial capacity to make the investment in question to the satisfaction of the Assessing Officer so as to discharge the primary onus. Since the assessee did not discharge the primary onus cast upon them, the question of the Assessing Officer to investigate the creditworthiness of the creditors/ subscribers would not arise in the case on hand. Therefore, the above decision is a clear answer to the assessee's case, which would necessitate us to decide the same in favour of the Revenue.

13. We may also refer to the decision of the High Court of Calcutta in J.J. Development Private Ltd., vs. CIT, Calcutta IV [(2018) 100 taxmann.com 101 (Cal.)] wherein, it was held that when there was no plausible explanation that was furnished by the assessee to discharge the onus cast upon them and the identities of the alleged share applicants having not been established and the documents of the alleged



interference.

41. In the result, the above tax case appeal is allowed, the impugned order passed by the Tribunal is set aside and the order passed by the Assessing Officer dated 27.12.2007 as confirmed by the CIT(A) is restored. The substantial questions of law framed are answered in favour of the Revenue.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

RS
To

1. The Income Tax Appellate Tribunal,
Chennai 'C' Bench
2. The Commissioner of Income Tax,
Central-II, Chennai-600 034
3. The Commissioner of Income Tax Appeals-I,
Chennai-600 034
4. The Assistant Commissioner of Income Tax,
Central Circle II(2),
Chennai - 600 034

+1CC to Mr.T.R.Senthilkumar, Advocate, Sr.No.42833

TCA.No.97 of 2015

LN (CO)
K.RK. (27.09.2021)