

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 12.04.2024
DELIVERED ON: 23.04.2024

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/67/2024

(IA NO: GA/2/2024)

THE PRINCIPAL COMMISSIONER OF INCOME TAX, (CENTRAL) -2,

KOLKATA

VERSUS

M/S. BST INFRATECH LIMITED

Appearance:-

Mr. Om Narayan Rai, Sr. Adv.

Mr. Soumen Bhattacharjee, Adv.

.....For the Appellant.

Mr. J.P. Khaitan, Sr. Adv.

Ms. Swapna Das, Adv.

Mr. Siddharth Das, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 30.11.2022 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata (Tribunal) in ITA NO. 2655/Kol/2019 for the Assessment Year 2012-13. The revenue has raised following substantial questions of law for consideration:

A) Whether the Learned Tribunal has committed substantial error in law by deleting the addition of Rs. 14,63,00,000/- that had been made on account of unexplained cash credit under Section 68 of the Income Tax Act, 1961.

B) Whether the Learned Tribunal has committed substantial error in law in not considering the judicial Principles laid down in the matter of Pr. CIT 5, Kolkata Vs Swati Bajaj reported in 2022 SCC Online 1572 (Cal).

C) Whether the order of the Learned Tribunal is perverse inasmuch as the same has been passed without considering the facts of the case in its proper perspective.

D) Whether the learned Tribunal has committed substantial error in law by failing to appreciate that neither the identity and creditworthiness of the creditors nor the genuineness of the transactions has been established and that being no addition made by the AO and CIT(A) were perfectly justified.

2. We have heard Mr. Om Narayan Rai and Mr. Soumen Bhattacharjee, Learned Senior Standing Counsel for the appellant and Mr. JP Khaitan learned Senior Counsel assisted by Ms. Swapna Das and Mr. Siddharth Das learned Advocates for the respondent assessee.

3. The assessee filed its return of income for the Assessment Year 2012-13 declaring income of Rs. 20,555,090/-. The case was selected for scrutiny and notice under Section 143(2) was issued on 12.08.2013 and subsequently notice under Section 142(1) along with the questionnaire was issued on 24.02.2014. The assessee was represented by their authorized representative who appeared in person before the Assessing Officer and filed certain details and documents. The Assessing Officer while completing the assessment under Section 143(3) of the Act by order dated 12.03.2015 noted that the assessee issued shares to 5 companies, (i) Gainwell Textrade Pvt. Ltd., (ii) Lucky Tradelink Pvt. Ltd., (iii) Pawapuri Mercantile Pvt. Ltd. (iv) HIL Engineering Pvt. Ltd., (v) Mubarak Cosmetics Pvt. Ltd.

4. The Assessing Officer stated that there is rampant practice of introducing undisclosed income in the guise of share application/ share allotment to different companies/ individuals; the companies took the shelter of corporate veil to channelize the undisclosed income; to protect this practice the Income Tax Act was amended with effect from 01.04.2012. The Assessing Officer referred to a letter dated 23.01.2015 which was served on the assessee requesting them to produce the new share-holders as well as the Directors before the Assessing Officer within 15 days to prove the genuineness, credit-worthiness of their investment. The assessee was directed to produce the bank statements of share-holders for the Financial Year 2011-12; books of account of the share-holders for Financial Year 2011-12; Profit and loss, balance sheet, computation and return AD of the share-holders for Financial Years 2010-11, 2011-12, 2012-13 and profit and

loss, balance sheet, computation and return AD of the directors to the company for the Financial Years 2010-11, 2011-12 and 2012-13. The assessee was directed to be present at the time of recording their statement and for the purpose of cross-examination. It appears that the investor companies submitted a few documents but none of the directors appeared before the Assessing Officer. After considering all the materials the Assessing Officer held that the assessee company entered into a share transaction with the investor to introduce the unaccounted income in form of share application/allotment; they did not have any regular business transaction or regular acquaintance with the investors; the investors had no reason to invest such huge amount in the business of the assessee and the entire transaction was done to circumvent the provision of the Act. Under such circumstances the entire share application/ allotment money was added back under Section 68 of the Act as undisclosed cash credit. The assessee was informed that penalty proceedings under Section 271(1)(c) is being initiated separately. Aggrieved by such order, the assessee preferred appeal before the Commission of Income Tax (Appeal)- 11 Kolkata, [CIT(A)], contending that in the course of assessment proceeding the details/ documents in respect to the share applications were furnished before the Assessing Officer, all the share applicants are body corporate assessed to income tax and the share application money was received through proper banking channels. The details of source of fund was submitted to the Assessing Officer. However, the addition has been made on the ground of not responding to the notice issued under Section 131 of the Act. It was further contended that the Assessing Officer did not conduct any enquiry

with regard to the genuineness of the transaction and did not allow the adequate liberty to the assessee to produce the Directors of the shareholders and the addition is wholly unjustified and has to be deleted. The CIT(A) first noted the factual position, that the assessee had credited an amount of Rs. 14,63,00,000/- in its books towards share capital of face value of Rs. 10/- each issued along with the premium of Rs. 40/- each. The following 5 companies had invested in the assessee's shares at a premium during the year and the investment is as follows:

- (i) *GainwellTextrade Pvt. Ltd.*, - Rs. 8,10,00,000/-
- (ii) *Lucky TradelinkPvt. Ltd.*, - Rs. 50,00,000/-
- (iii) *Pawapuri Mercantile Pvt. Ltd.*, - Rs. 60,00,000/-
- (iv) *HIL Engineering Pvt. Ltd.* - Rs. 4,00,00,000/-
- (v) *Mubarak Cosmetics Pvt. Ltd.* - Rs. 1,43,00,000/-

5. The CIT(A) opined that since the Assessing Officer has not brought out certain relevant facts, he is constrained to undertake a fact finding exercise and the assessee was requested to furnish the bank statement of the investors, their return of income along with the financial statements along with copies of memorandum of association. The assessee appears to have furnished the details as called for by the CIT(A) and appears to have made elaborate submissions before the CIT(A) and also placed reliance on various decisions. After analyzing the financial statements of the above mentioned companies, the CIT(A) has culled out the details and has presented the same in a tabulated formant. Since the same would be of relevance, it is quote hereinbelow:

Name of the Assessee	AY	Share Capital	Reserve & Surplus	Non-Current Investments	Short Term Loans & Advances	Revenue from Operation	Other Income	Profit/loss
Baba Strips & Tubes Ltd.	2011-12	3,39,42,000	156559487.65	Nil	139736646.87	1398881745	55871727.14	12898909
	2012-13	63,20,2000	292003790.09	Nil	148285609.28	2418981534	63384021.87	18404302
Gainwell Textrade Pvt. Ltd.	2011-12	18967000	169693573	181900000	4229670	1892660	10430	3147
	2012-13	18967000	169738097	187400000	1194676	Nil	153704	2134
Lucky Tradelink Pvt. Ltd.	2011-12	1308000	52983439	54700000	570564	Nil	61030	9405
	2012-13	2308000	52963797	35000000	8612	Nil	80087	(-) 19642
Pawapuri Mercantile Pvt. Ltd.	2011-12	41577600	134707391.57	175265760	273368	Nil	Nil	(-) 76460
	2012-13	42777600	139646541.57	181265760	123709	455969	5849	139150
HIL Eng. Pvt. Ltd.	2011-12	18063500	188393639.25	400000	114982	353837.65	Nil	39224.90
	2012-13	18063500	188469637.60	400000	168916	493946	Nil	75998.35
Mubarak Cosmetic Pvt. Ltd.	2011-12	106407600	53937420.90	148991250	11412349	1003982	Nil	363404.30
	2012-13	109267600	65868034.90	163291250	11809307	1113508	Nil	491348

6. After setting out the above details the CIT(A) examined the bank accounts of the five companies as mentioned above and has recorded the findings that the account receives a certain amount from one entity and immediately remits to another entity. The entire bank account statement shows that the bank account is being used only for one activity i.e. receiving and transferring funds and all through the year in the said bank account

Gainwell Textrade Private Limited has received cheques from somewhere and has immediately issued in favour of another company and therefore came to the conclusion that the bank account is being used solely for the purpose of receiving and issuing cheques and there hardly remains any significant balance in the account.

7. The another bank account was also examined and the CIT(A) observed that the Gainwell Textrade Private Limited is being used only to receive funds from one entity and transfer the same to another and no other transaction worth noticing is recorded in the account and the account shows that it is being used to retain funds from one account to another till it reaches its “desired destination”. Similar exercise was done in respect of Mubarak Cosmetics Private Limited and the CIT(A) points out that the entire amount remitted to the assessee by Mubarak Cosmetics Private Limited has come from Gainwell Textrade Private Limited. It was concluded that the transactions recorded in the bank account show that the bank account is being used only to receive certain amounts from one party for transferring it to another. Similar exercise was done in respect of the other three companies as well and the CIT(A) holds that the only apparent purpose for which the bank accounts have been used is to receive money from one account and to transfer it to another. With regard to the amount remitted by Pawapuri Mercantile Private Limited to the assessee, the CIT(A) has found that the said amount was received from Gainwell Textrade Private Limited. Thus, the CIT(A) came to the conclusion that the basic nature and character of the transaction reveal a well planned and stage managed show of

genuineness behind which a clean and simple “round tripping” of funds is taking place. Further the bank accounts create a façade of documentary evidence “clean money” in the form of account payee cheques for any kind of accommodation entity. Further on examination of the return of income and bank statements of the investors, the CIT(A) holds that the investors who have purchased the shares of the assessee company at a premium for has neither NIL or negligible revenue from operations and the returns are either of loss or of insignificant incomes below taxable limits. They have all issued shares at a very high premium without having earned any revenue from business. They have also invested in shares at a very high premium in other companies who also have not earned any income worth noticing from business operation. Their balance sheet shows that even though they do not earn anything, they invite huge investments in their accounts and this money is then used to make further investments at a high premium in other companies, and they also extend unsecured loans to other companies, therefore money obtained from the route of share premium is re-routed for supplying sources of receipt of money to other companies. The circuit of investments remains within a group of companies and in this manner through a circular routing of funds, the capital of each of the companies is enhanced and this inflated capital is then used for providing loans etc. to desired entities.

8. The CIT(A) further points out that the bank accounts of the above companies show that huge sums are receive from one concern through cheques or through RTGS and are immediately diverted to another company

of the group. The bank balances remain negligible before and after such transfers. Further each of these companies invests in each other at very high premium even though there is no business being conducted. Further it is observed that there is no reason or logic provided by any of the companies as to on what basis and calculation they arrived at a value of premium on shares. Neither the assessee nor its investors has followed the guidelines of the Reserve Bank of India or Institute of Chartered Accountants of India for determining the rate of premiums on their shares and the rates so fixed appears to be arbitrary and devoid of any financial or accounting rationale. Further the CIT(A) points out that the investors company do not have any business operation, yet they have raised huge capital through issue of shares at a premium and also made investments in shares of other companies at a premium even though the other companies like them also do not have any promising business result each of the above companies have invested in each other and the investments have been made by rotating funds from one account to another and the pattern clearly shows that they are similar to shell companies.

9. The CIT(A) after assessing the facts has held that the investors of the assessee have no or nominal assets in real terms and the assets in the form of investments have been created through circular rotation of money as is evident from bank accounts, the assets consists of cash and cash equivalents there actually is no or insignificant business being conducted by the investors either they do not have any income or they have negligible income from business operations and the bank accounts are used only for

rotating money and for issuing account payee cheques to impart an appearance of genuineness to the transactions. After recording the above factual finding, the CIT(A) has taken note of various decisions of the High Courts as well as that of the tribunal.

10. The CIT(A) after taking note of the various decisions noted that the onus of establishing the identity, creditworthiness and genuineness of the share transaction was not discharged by the assessee. It was held that the return of income filed by the assessee's shareholders show that they did not have any real business activity and had never earned taxable income yet they were dealing in crores of money in the name of investing and receiving funds towards share capital at unreasonably high premium. Further the bank accounts show that they were being used only to rotate money and never had any substantial balance left either before or after transaction. The modus adopted was discussed by observing that once an amount through cheque or RTGS was received from one entity, it would immediately be diverted to another entity and the resultant cash balance was only a paltry sum of few thousands of rupees. Therefore, the CIT(A) came to the conclusion that the transactions were not genuine. Further it was pointed out that the thin cash balance left in the bank accounts pre and post the rotational transactions also established that the shareholders did not have creditworthiness to invest in shares at high premium in the assessee company. Further the assessee had not followed any of the guidelines issued by the Reserve Bank of India or the Institute of Chartered Accountants of India for ascertaining the value at which premium as high as Rs. 40/- on a

share of face value of Rs. 10/- could be charged. The CIT(A) held that there is no logic or rationale behind the decision of the assessee. In paragraph 31 of the order of CIT(A), the decision of the Delhi tribunal dated 23.08.2018 in the case of ***M/s. Pee Are Securities Limited Versus Deputy Commissioner of Income Tax, Circle 14(1)*** was referred to. The paragraph from the said decision was quoted which makes an interested reading. The tribunal held that the faith reposed in the tribunal by the Hon'ble Courts above makes the job of the tribunal even more onerous and demanding and does requires the tribunal to take a holistic view of the matter, in the light of the surrounding circumstances, preponderance of probabilities and ground realities, rather than being swayed away by the not so convincing, but apparently in order, documents and examining them, in a pedantic manner, with blinkers on. That the phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent, and that, till recently little was known, outside the underbelly of financial world, about modus operandi of shell entities. There were, therefore, not many questions raised about genuineness of transactions in respect of shell entities. That is not the case any longer. Just because the issues were not raised in the past does not mean that the issues cannot now be raised as well, and, to that extent, the earlier judicial, precedents cannot have blanket application in the current situation as well. Genuineness of transactions thus cannot be decided on the basis of inference drawn from judicial precedents in the cases in which genuineness did come up for examination in a very limited perspective and in the times when shell entities were virtually non-existent. As things stand now, genuineness of transactions is to be examined in the light of prevailing

ground realities. With the above observations and findings the appeal filed by the assessee was dismissed.

11. The assessee carried the matter on appeal to the tribunal contending that all the share applicants are assessed to income tax and the entire share application money was received through proper banking channels and thus the addition made by the assessing officer and confirmed by the CIT(A) is unjustified. The tribunal in the opening paragraphs of its order held that there is no discussion made by the assessing officer in respect of the details and evidence furnished by the assessee to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction and that the assessment order is a cryptic order. The tribunal took note of the various submissions made by the authorised representative of the assessee and the particulars of the five share applicants were also noted. After extracting the submissions made by the authorised representative of the assessee in paragraph five of the impugned order the tribunal holds that the assessee has proved the identity of the share subscribers. That the share applicants are group companies of the assessee companies, they are the body corporate registered with the Registrar of Companies and they were available in the given address. The tribunal states that the share applicants have furnished copy of PAN and are registered with ROC having CIM and all the data is available with the income tax department and ROC. The share applicants are assessed to income tax regularly, the share application money was received through banking channels, the shareholders had sufficient funds for the purpose of

investment and the investments are reflected in their bank accounts and the shareholders have confirmed the transactions. Further the tribunal held that the assessee is a steel industry and the future prospects of the assessee is great, that they were in needs of funds as they were expanding its operations and at the given point of time there was increase in fixed assets and the turnover of the assessee increased by 73% and the reason to invest also included strategic relation and are made by the associates/group companies having directors directly related to assessee's directors.

12. The tribunal faulted the assessing officer and the CIT(A) for having not brought on record any evidence to show that it was the assessee's own funds that was brought back in the form of share application money. Further the CIT(A) has not pointed any doubt or discrepancy with regard to the identity of the investor and the only finding rendered by the CIT(A) is that the investor companies have low income. Thus, the tribunal held that the findings rendered by the CIT(A) are not enough to prove that any unaccounted money of the assessee has been introduced in the assessee company warranting addition under Section 68 of the Act. The tribunal referred to a decision of this court in ***Principal Commissioner of Income Tax Versus Anmol Stainless Private Limited***¹ to hold that the share applicants had substantial creditworthiness and investments had been made by the sister concerns/group companies having common directors. Thus, creditworthiness and genuineness of the investment having been established the addition made under Section 68 of the Act has to be deleted. With the above reasoning the appeal filed by the assessee was allowed.

¹ (2022) 138 Taxmann.com 535 (Cal)

13. The revenue in this appeal has raised four substantial questions of law which include the question as to whether the order passed by the learned tribunal is perverse in as much as the same has been passed without considering the facts of the case in its proper perspective and whether the tribunal has committed substantial error in law when neither the identity and creditworthiness of the investor nor the genuineness of the transactions has been established.

14. Before we examine the correctness of the decision rendered by the learned tribunal it will be beneficial to take note of a few decisions which have elaborately dealt with Section 68 of the Act and what are the parameters which are required to be established to prove the creditworthiness or the genuineness of a transaction.

15. Mr. Om Narayan Rai, learned senior standing counsel appearing for the departments submits that though the assessee might have established the identity and creditworthiness of the share applicants at the relevant time but the third and the most important ingredient namely genuineness of the transaction has to be established and unless and until all the three factors are conjointly established, the revenue was fully justified in invoking Section 68 of the Act.

16. In ***Commissioner of Income Tax Versus N.R. Portfolio Private Limited***² the substantial question of law which was framed for consideration is whether the tribunal was right in deleting the additions

² (2014) 42 Taxmann.com 339 (Del)

under Section 68 of the Act and whether the decision of the tribunal is perverse.

17. With regard to the role of the assessing officer, the Hon'ble Court held that the assessing officer is both an investigator and an adjudicator; when a fact is alleged and stated before the assessing officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the assessing officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars, this may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The assessing officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. A universal procedure or method which should be adopted by the assessing officer when verification of facts is required cannot be laid down. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer and the same should be just, fair and should not cause harassment to the assessee or third person from whom the confirmation or verification is required.

18. It was further held that the provisions of the Evidence Act are not applicable but the assessing officer being a quasi-judicial authority must take care and caution to ensure that the decision is reasonable and satisfies

the cannons of equity, fairness and justice. The principle of Preponderance of Probability applies. On the question of creditworthiness and genuineness of the transaction in the said case, the Hon'ble Court recorded the following finding:-

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

19. The doctrine of "Source of Source" or "Origin of Origin" was explained in the following terms:-

24. We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of

each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of source of source' or „origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counter-productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which masquerade as pretence should be exposed and not accepted.

20. With regard to the identity, creditworthiness and genuineness of the transaction and the onus of prove the Hon'ble Court held as follows:-

30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that

third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.

31. Identity, creditworthiness or genuineness of the transaction is not established by merely showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object and purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably

visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large.

21. In ***Rajmandir Estates Private Limited Versus Principal Commissioner of Income Tax***³, one of the substantial questions of law which fell for consideration was whether the finding of the CIT(A) that unaccounted money was or could have been laundered as clean share capital by creating façade of paper work, routing the money through several bank accounts and getting the seal of statutory approval by getting the case re-opened under Section 147 suo motu and whether the same is perverse. The facts of the said case was noted wherein 19 out of the 13 applicants secured funds for the purpose of contributing to the share capital of the assessee therein, on account of share application money. In other words, those 19 applicants collected funds on account of share application money in their respective companies and that money was contributed to the share capital of the assessee. 15 out of the 39 applicants procured the requisite funds by selling the shares and the rest of the applicants of shares, in the share capital of the assessee company, did not disclose the nature of receipt at their end though the source of funds were identified. Further the shares were offered to and subscribed by closely held companies owned by the promoter/director or their close relatives and friends. After noting the facts, the Hon'ble Court held that the identity of the alleged shareholders is known but the transaction was not a genuine transaction. The transaction was nominal rather than real; creditworthiness of the alleged shareholders is also not established because they did not have money of their own, each one

³ 2016 SCC Online Cal 1237

of them received from somebody and that somebody received from a third person and therefore prima facie, shareholders are near namelenders.

22. In ***Principal Commissioner of Income Tax, (Central – 1) Versus NRA Iron and Steel Private Limited*** ⁴ the issue which fell for consideration is when share capital/premium is credited in the Books of Account of the assessee company, the onus of prove is on the assessee to establish by cogent and reliable evidence of the identity of the investor company, the creditworthiness of the investor and genuineness of the transaction, to the satisfaction of the assessing officer. The Hon'ble Supreme Court observed that 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 those transaction. The initial onus of proof lies on the assessee. The decision in ***Roshan Di Hatti Versus Commissioner of Income Tax*** ⁵ was referred to wherein it was held that if the assessee fails to discharge the onus by producing cogent evidence and explanation the assessing officer would be justified in making the addition back into the income of the assessee.

23. The decision in ***N.R. Portfolio Private Limited*** was quoted with approval wherein it has been held that creditworthiness or genuineness of a transaction regarding share application money depends on whether two parties are related or known to each other, or mode by which parties approached each other, whether a transaction is entered into through

⁴ (2019) 15 SCC 529

⁵ (1977) 2 SCC 378

written documentation to protect investment or whether the investor was an angel investor, the quantum of money invested, the creditworthiness of the receipt, object and purposes 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. The principles which emerge where sums of money are credited as share capital/premium was summarised as follows:-

13.1. The assessee is under a legal obligation 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 AO, so as to discharge the primary onus.

13.2. The assessing officer is duty-bound to investigate the creditworthiness 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.

13.3. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack creditworthiness, 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.

24. In ***Principal Commissioner of Income Tax, Kolkata Versus Swati Bajaj***⁶ this court considered as to in what manner the allegation against the assessee has to be proved. It was held that to prove the allegation against the assessee, it can be inferred by a logical process of reasoning

⁶ 2022 SCC Online Cal 1572

from the totality of the attending facts and circumstances surrounding the allegation/charges made and levelled and when direct evidence is not available it is the duty of the court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that are reasonable/prudent man would apply to arrive at a conclusion. It was further held that the proximity of time and prior meeting of minds is also very important factor especially when the income tax department has pointed out the unnatural rise in prices of the scripts of very little known companies.

25. While on this issue it would be beneficial to take note of the decision in ***Yadu Hari Dalmia Versus Commissioner of Income Tax, Delhi (Central)*** ⁷ wherein it was held that the whole catena of sections starting from Section 68 have been introduced in the taxing enactment step by step in order to pluck loopholes and in order to plug certain situation beyond doubts even though there were judicial decisions covering some of the aspects. It was pointed out that even prior to the introduction of Section 68 in the statute book, the courts have held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered, in the opinion of the ITO, not satisfactory, the sum so credited would be charged to income tax as income of the assessee during the relevant previous year. That Section 68 was inserted in the Act only to provide statutory recognition to a principle which had been clearly

⁷ (1980) 126 ITR 48

adumbrated in judicial decisions. Section 68 thus only codified the law as it existed before 01.04.1962 and did not introduce any new principle or rule.

26. We also take note of the Finance Bill, 2012 which brought about certain amendments to the Act with effect from the assessment year 2013-2014 wherein under the heading “Measures to Prevent Generation and Circulation of Unaccounted Money” it was pointed out that the onus of satisfactory explaining such credit remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is found to be satisfactory then the sum is added to the total income of the person. That certain judicial pronouncements have created doubts about the onus of proof and the requirements of Section 68, particularly in cases where sum is credited as share capital, share premium etc. That courts have drawn a distinction and emphasised that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large. In the case of closely held companies, investments are made by a known person; therefore, a higher onus is required to be placed on such companies besides the general onus to establish, identity and creditworthiness of the creditors and genuineness of the transaction. This additional onus needs to be placed on such companies to also prove the source of money in the hands of such shareholders or person making payments towards issue of shares before such sum is accepted as genuine credit. If the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income. Therefore, it

was proposed to amend Section 68 of the Act to provide the nature and onus of any sum credited, as share capital premium etc. in the books of a closely held company shall be treated as explained only if the source of fund is also explained by the assessee company in the hands of the resident shareholders. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, could not apply if the shareholder is a well regulated entity namely a Venture Capital Fund, a Venture Capital Company registered with SEBI.

27. It is no doubt true that this amendment which was made to Section 68 applies in relation to the assessment year 2013-2014 and the subsequent years and it has been argued that the said amendment will not apply to the assessee's case as the case concerns the assessment year 2012-2013. Though this may be true, as pointed out in **Yada Hari Dalmia** Section 68 as it stood prior to the earlier amendment only codified the law as it existed before 01.04.1962 and did not introduce any new principle or rule and when Section 68 was inserted in the 1961 Act it only provided a statutory recognition to a principle which had been clearly adumbrated in judicial decisions. Therefore, it was held that ratio laid down in the earlier judgments of the Hon'ble Supreme Court is equally applicable to the interpretation of Section 68 of the 1961 Act. Thus, we can very well refer to the objects behind amendment to Section 68 by Finance Bill, 2012 which has taken note of various decision of the court where the courts have drawn a distinction and emphasised that in case of private placement of shares the

legal regime should be different from that which is followed in the case of a company seeking share capital from the public at large.

28. Having taking note of the above referred decisions and the legal principles if we revert back to the factual position in this case, we find that the CIT(A) has analysed the three principles which are required to be fulfilled namely identity, creditworthiness and genuineness of the transaction. It is not in dispute that the investors whose details we have referred in the earlier part of this judgment are all either group companies or having a common set of directors. Further the assessee has not been able to dislodge the factual findings recorded by the CIT(A) that the share application money was received from independent legal entities. By way of illustration if we take the case of Gainwell Textrade Private Limited, they have invested Rs. 8,10,00,000/- in the assessee company. The said company receives a total of Rs. 1,65,00,000/- on 01.06.2011 and 02.06.2011 from eight private limited companies/entities. Out of the said amount, Rs. 1,50,00,000/- was remitted to the assessee's bank account on 02.06.2011 by three cheques of Rs. 50,00,000/- each. The balance remained at Rs. 15,09,039/-. On 02.06.2011, an amount of Rs. 38,00,000/- was remitted to the account by a private limited company and the balance rose to Rs. 53,09,039/- out of this an amount of Rs. 50,00,000/- was remitted to the assessee account on the same day. On 04.06.2011, Divine Suppliers Private Limited deposited another sum of Rs. 60,00,000/- of which Rs. 50,00,000/- was remitted to the assessee on 06.06.2011. On 06.06.2011 Highlight Goods Private Limited transferred a sum of Rs.

10,00,000/- to this account by taking a closing balance to Rs. 23,08,819/-.

On the same day an amount of Rs. 20,00,000/- was remitted to the assessee's account. On 06.06.2011 Divine Suppliers Private Limited RD Fashion transferred Rs. 25,00,000/-, Rs. 38,00,000/- and Rs. 37,00,000/- to this account and out of this amount Rs. 1,00,00,000/- was remitted to the assessee's account in two transactions on 07.06.2011. On 14.06.2011, Magnificent Distributors Private Limited remitted an amount of Rs. 35,00,000/- to the account which was immediately transferred to the assessee's account. On 18.07.2011, Superior Retail Private Limited credited an amount of Rs. 50,00,000/- to the account which was remitted to the assessee's account on 19.07.2011. On 20.07.2011 amount of Rs. 30,00,000/- was received through RTGS in the account and the amount was transferred to the account of the assessee on the same day. On 02.01.2012 an amount of Rs. 40,00,000/- was deposited into account by two companies and this was remitted to the assessee's account on 03.01.2012. On 03.01.2012 Salasar Garments Traders Private Limited credited to the account a sum of Rs. 20,00,000/- and out of the said amount Rs. 40,00,000/- was transferred to the assessee's account on 04.01.2012. The CIT(A) has in the above manner examined the factual position and has analysed the pattern of the transactions in the bank accounts of the five investor companies to that of the assessee's bank account. They have received cheques from somewhere and has immediately issued in favour of another company and the balance remaining in the account was very meagre the bank account has been operated solely for the purpose of rotating money.

29. With regard to the other investor namely Mubarak Cosmetics Private Limited on perusal of the bank statements, it was found that the said company had transactions with the assessee between 23.07.2011 to 28.07.2011 and the entire sum remitted to the assessee by Mubarak Cosmetics Private Limited had come from Gainwell Textrade Private Limited. The bank statements of HIL Engineering was also thoroughly examined more particularly the pattern of transaction and it was held that the only apparent purpose for which the bank accounts have been used is to receive money from one account and transfer it to another. With regard to the investor Pavapuri Mercantile Private Limited the bank statements revealed that the entire sums are remitted by Pawapuri Mercantile Private Limited to the assessee had come from Gainwell Textrade Private Limited. The analysis done by the CIT(A) would reveal the nature and character of the transaction and the CIT(A) cannot be faulted to have held that the transactions are well planned and stage managed to show genuineness behind which a clean and simple “round tripping” of funds is taking place. The CIT(A) on examination of the facts found that the bank accounts act as “highway” in the “journey of money” on a rotation and laundry trial from one entity to another and by this way these bank accounts create a façade of documentary evidence for clean money in the form of account payee cheques for any kind of accommodation entries.

30. The CIT(A) did not stop with the above findings but proceeded to analyse the data which was made available in the form of return of income, bank statements etc. and found that the investors have purchased the

shares of the assessee at a premium and all have shown similar characteristics, the revenue from operations are either nil or are negligible; the returns are either of loss or of insignificant income below taxable limit; they have been issued shares at very high premium without having earned any revenue from business operations; they have invested on shares at very high premium in companies who also have not earned anything from business operations; their balance sheet shows that even though they do not earn anything, they invite huge investments in their accounts and this money is used to make further investments at high premiums in other companies and they have also issued unsecured loans to other companies; money obtained from the route of share premium is rerouted for supplying sources of receipts of money to other companies; the circuit of investments remains within a group companies and in this manner through a circular routing of funds, the capital of each of the companies is enhanced and this inflated capital is then used for providing loans etc. to desired entities; the bank accounts show huge sums are received from one concern through cheques or RTGS and immediately diverted to other companies of the group and the bank balance remains negligible before and after such transfers; each of these companies invest in each other at very high premiums even though there is no business conducted; there is no reason or logic provided by any of the companies as to on what basis they arrived at the value of premium on shares to be issued as neither the assessee nor its investors had followed the guidelines of RBI or ICAI or any other guidelines for determining the rate of premium on their shares. Thus, the fixing of rate for premium is arbitrary and devoid of any financial or accounting rationale; the

investors have not bothered to ensure protection of their investments; the investor company do not have any business operations worth noticing yet they have raised huge capital through issue of shares at a premium and also made investments in shares of other companies at a premium even though the other companies like them, did not have any promising business activities. Thus, on analysing the data which was available it is seen that each of the companies have invested in each other and the investments have been made by rotating funds from one account to another. The assessee has not been able to explain why the investors companies had applied for shares in the assessee's company at a high premium even though the face value of the share was Rs. 10/- per share. The pattern of transaction clearly shows that these investors companies had raised capital by issue of shares at a very high premium and the transaction is repetitive. Therefore, the mere fact that the transactions were through banking channels or that the companies were income tax assesseees or registered with Registrar of Companies can in no manner be sufficient to discharge the onus under Section 68 of the Act. The learned tribunal did not examine the factual matrix in the depth and in the manner it ought to have done. Therefore, we would be well justified to hold that the findings rendered by the tribunal are perverse. It was argued by the learned Senior Advocate appearing for the respondent assessee that there is no material to show "round tripping" of funds; there is no finding that the money which has come to the assessee is ill gotten money and that the CIT(A) did not examine how the money came to the investors and failed to note that the company had requisite share capital resource. Various

documents which were placed before the tribunal in the form of a paper book was submitted to the court for its perusal.

31. In our view it is not required to show that the money which came to the assessee is ill gotten and what is required to be seen is whether the transaction was genuine. It may be true that the identity of the investor company has been established as they are registered with the Registrar of Companies and they are regularly assessed to income tax. Assuming without admitting that at the relevant point of time when the investor companies invested in the assessee company by purchasing shares at high premium, they had sufficient funds in the bank accounts, the question would be as to whether this by itself will establish the creditworthiness of the investor companies. This is a fit case where the doctrine of “source of source” or “origin of origin” should be made applicable. We say so because the CIT(A) has brought the evidence and the materials on record which manifestly show the involvement of the assessee as the Directors of the five investors companies and the Director of the assessee company Mr. Gopal Kumar Agarwala are all closely related.

32. One of the directors of the Gainwell Textrade Private Limited is brother-in-law of Gopal Kumar Agarwala. One of the directors of Lucky Trading Private Limited is the wife of the brother-in-law of Mr. Agarwala and the other director is the maternal uncle. Mr. Gopal Kumar Agarwala himself is one of the director in Pavapuri Mercantile Private Limited and another director is the sister of Mr; Agarwala. One of the directors of HIL Engineering Private Limited is the brother-in-law of Mr. Agarwala and one of the

Directors of Mubarak Cosmetics Private Limited is the wife of Mr. Agarwala. Thus, the facts clearly show that the doctrine of “origin of origin” has to be applied in the case on hand and this exercise has been rightly done by the CIT(A) by lifting the veil and enquiring into the real nature of the transaction. The pattern of remittances made to the five investor companies and immediately thereafter to the assessee company clearly shows that the shares subscriptions were collected as a part of pre-meditated plan which has been conceived by the assessee.

33. The tribunal fell in error in holding that the CIT(A) has not pointed out any doubt or discurbancy with regard to the identity of the investors. The learned tribunal has posed a wrong question which has led to a wrong answer. The question is not whether the identity of the investor has to be established but the question was whether the investor had requisite creditworthiness and whether such creditworthiness was a make belief situation by means of a circular transaction and if the same had been established. The learned tribunal has held that the findings rendered by the CIT(A) that the assets in the form of investments have been created through rotating of money in between the group companies and the assets mainly consists of cash and cash equivalents are not enough to prove that any unaccounted money of the assessee has been introduced in the assessee company warranting addition under Section 68 of the Act. This finding in our opinion upon consideration of the facts is perverse.

34. The CIT(A) has made an elaborate exercise to assess the creditworthiness of the investor companies as well as the genuineness. All

the investor companies are group companies and the directors are closely related to the director of the assessee company and the director Mr. Agarwala himself is one of the directors in one of the investor companies namely Pawapuri Mercantile Private Limited and the spouse of Mr. Agarwala is the director of Mubarak Cosmetics Private Limited, an investor company. Therefore, on a deeper scrutiny of the factual position would show that the investor company did not have a genuine creditworthiness and consequently the transaction has to be held to be not genuine. As held in **N.R. Portfolio Private Limited** (supra) whether or not the onus is discharged depends on facts of each case as well as it depends on whether the two parties are related or known to each other; the manner or mode by which the parties approach each other, the quantum of money, the object and purpose for which payment/investment was made. As held earlier certificate of incorporation of the companies, payment by banking channel etc. cannot tantamount to satisfactory discharge of onus and the facts of the case on hand speaks for itself as it is obvious. Thus, the principle of Preponderance of Probabilities applies with full force to the case on hand which leads to the irresistible conclusion that the finding rendered by the CIT(A) is legal and valid.

35. We have noted that the tribunal has made certain observations as regards the future prospects of the assessee company as they are a steel industry and that their fixed assets and also the turnover had increased substantially. However, this appears to have not been the submission when the assessee filed an appeal before the CIT(A) challenging the addition made

by the assessing officer. This is evident from the grounds of appeal which have been set out in the order passed by the CIT(A) in paragraph 2.1 of the order dated 28.11.2019. The finding rendered by the tribunal is probably taken from the written submissions made by the assessee before the tribunal giving certain facts and figures regarding the expanding of business activities of the assessee. The assessee in their submission contended that their business activity has increased considerably and for the purpose of expansion funds were required and therefore the assessee raised funds from various means, increment in share capital from associates being one of them. The fact clearly demonstrates that the source of the funds which have flown into the account of the assessee have substantially come from one company namely Gainwell Textrade Private Limited and the said company had contributed to the other companies and the funds transferred to those companies were transferred to the assessee company invariably on the same day leaving a bank balance which was almost negligible and the bank statements reveal that the prior to the inflow of the funds into those investing companies, the bank balance was negligible and after the transfer it was also negligible. The assessee had contended before the tribunal that the amount was credited through proper banking channels and the investing companies are body corporate registered with the Registrar of Companies and individually assessed to income tax and therefore the genuineness of the parties is beyond doubt. However, this is not the litmus test to discharge the burden on the assessee to establish creditworthiness of the investing companies as well as the genuineness of the transaction. Thus,

we have no hesitation to hold that the explanation offered by the assessee is neither proper, reasonable or acceptable.

36. In **Swati Bajaj**, the court held that based on the foundational facts the department has adopted the concept of “working backward” leading to the assessee. The department would be well justified in considering the surrounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over and then arrive at a decision.

37. Thus the CIT(A) was right in adopting a logical process of reasoning considering the totality of the facts and circumstances surrounding the allegations made against the assessee taking note of the minimum and proximate facts and circumstances surrounding the events on which charges are founded so as to reach a reasonable conclusion and rightly applied the test that a reasonable/prudent man would apply to arrive at a conclusion. On facts we are convinced to hold that the assessee has not established the capacity of the investors to advance moneys for purchase of above shares at a high premium. The credit worthiness of those investors companies is questionable and the explanation offered by the assessee, at any stretch of imagination cannot be construed to be a satisfactory explanation of the nature of the source. The assessee has miserably failed to establish genuineness of the transaction by cogent and credible evidence and that the investments made in its share capital were genuine. As noted above merely proving the identity of the investors does not discharge the onus on the assessee if the capacity or the credit worthiness has not been established.

38. In the light of the above discussion, we hold that the assessee has failed to discharge legal obligation to prove the genuineness of the transaction and the credit worthiness of the investor which has shown to be so by a “round tripping” of funds. For all the above reasons, the revenue succeeds.

39. In the result the appeal is allowed, the order passed by the learned Tribunal is set aside and the order passed by the CIT(A) dated 28.11.2019 is restored and the substantial questions of law are answered in favour of the revenue.

(T.S. SIVAGNANAM, CJ.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.- PRAMITA/SACHIN)