

ORDER

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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/165/2010

COMMISSIONER OF INCOME TAX, CENTRAL-I, KOLKATA
VERSUS
PRAMOD SHARMA

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 5th February 2024.

Appearance:

Mr. Om Narayan Rai, Advocate

Mr. Amit Sharma, Advocate

...for the appellant.

1. Heard Sri Om Narayan Rai, learned senior standing counsel for the appellant. None appears for the respondent assessee.
2. Affidavit of service filed today by learned counsel for the appellant, in compliance of the orders dated 17.02.2023 and 15.01.2024, is taken on record. Service of notice upon the respondent assessee is found to be sufficient.
3. This appeal was admitted by order of this Court dated 03.09.2010, on the following substantial questions of law:-

“i) *Whether the Learned Tribunal was justified on the facts and circumstances of this case to follow the ratio decided by the*

Learned Tribunal in case of Praveen Kumar Agarwal vide order dated 28.9.2007 in IT (SS) A No.74/Kol/2003, if not, then

- ii) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is correct in deleting the addition of Rs.3,33,18,027, made in accordance with the order of the Tribunal in case of Sri Praveen Kumar Agarwal, being commission earned @ 2% of the accommodation entries passed to the extent of Rs.166.59 crores?*
- iii) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is correct in deleting addition of Rs.166.59 crores made under section 68 of the Income-tax Act, 1961 being unexplained cash credits in the bank accounts of the assessee, the source whereof was not proved?*
- iv) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is correct in substituting the income of Rs.4,07,17,055 as peak credit, on the basis of its order in case of Sri Praveen Kumar Agarwal, in place of additions on account of commission and cash credits without appreciating the difference in the facts of the two cases?"*

Facts

4. Briefly stated facts of the present case are that search and seizure operation under Section 132 of the Income Tax Act, 1961 (hereafter referred to as the 'Act of 1961') was conducted in the business and residential premises of one Sri Praveen Kumar Agarwal on 27.7.2019. An order in the case of Praveen Kumar Agarwal was passed by the DCIT, Circle – 3, Kolkata under Section 158DC of the Act, 1961 for the block period 1.4.1990 to 27.7.1999 and

determining income by way of commission @2% for accommodation entries provided by him for Rs.166.59 crores. Additionally, the tribunal applied the peak balance and added the peak balance amount in the hands of Praveen Kumar Agarwal.

5. During investigation by the Directorate of Income Tax (Investigation) Kolkata it was found that the respondent/assessee is the sub-broker of the aforesaid Praveen Kumar Agarwal engaged in providing accommodation entries to various companies based at Mumbai who in turn used the said fund for payments to Madhepura Mercantile Co-operative Bank at Mumbai which is said to be controlled by one Ketan Parekh. The statement of the director of the company based in Kolkata was recorded by the DCIT under Section 131 of the Act, 1961 who stated on oath that the transactions with Mumbai based companies were only accommodation entries oriented transaction. The assessee was the director of six companies as mentioned in the assessment order. He had also formed eight proprietary concerns as mentioned in the assessment order. Separate bank accounts in UTI Bank, Dalhousie Branch, Kolkata in the name of eight proprietary concerns were opened, where the assessee deposited a sum of Rs.166.59 crores and issued cheques to parties to provide accommodation entries during the assessment year 2005-06 relevant to the previous year 2004-05. This cash deposit of Rs.166.59 crores in eight bank accounts of proprietary concerns of the respondent/assessee was sought to be added in income of the assessee by the assessing officer invoking Section 88 of the Act, 1961.

6. **The assessing officer passed the assessment order dated 31.12.2007 under Section 143(3) of the Act, 1961 determining the income of Rs.3,33,18,027/- being brokerage/commission @2% on the aforesaid cash deposits of Rs.166.59 crores. He also added the aforesaid amount of Rs.166.59 crores in the income of the assessee as unexplained cash credit under Section 68 of the Act, 1961.** Aggrieved, the respondent/assessee filed an appeal being Appeal No.107/CC-VII/CIT(A),C-I/07-08 before the Commissioner of Income Tax (Appeals), Central – 1, Kolkata which was dismissed by the CIT(A) by an order dated 30.12.2008. Aggrieved with the order of the CIT(A), the respondent/assessee filed ITA 515(Kol) of 2009 before the Income Tax Appellate Tribunal, A-Bench, Kolkata which was partly allowed by an order dated 14.10.2009. The tribunal determined the income of the assessee at Rs.4,07,17,055/- applying peak credit principle, which included brokerage. Aggrieved with the aforesaid order of the ITAT, the department has filed the present appeal.

Submission

7. The learned counsel for the appellant submits that the tribunal has erred in deleting the addition under Section 68 of the Act, 1961 and further committed manifest error of law to apply the principle of peak credit. He submits that the cash deposit of Rs.166.59 crores remained totally unexplained by the respondent/assessee's income and, as such, the entire amount was correctly added by the assessing officer and upheld by the

CIT(A) in the respondent/assessee invoking Section 68 of the Act, 1961. He referred to provisions of Section 68 of the Act, 1961 and relied upon the judgment of Hon'ble Supreme Court in Principal Commissioner of Income Tax (Central-1) Vs. NRA Iron And Steel Private Limited (2019) 15 SCC 529 (paragraphs 9.2 and 9.3) and Division Bench judgment of Allahabad High Court in Commissioner of Income Tax Vs. Vijay Agricultural Industries (2007) 294 ITR 610 (Alla).

Discussion and Finding

8. We have carefully considered the submissions of the learned counsel for the appellant and perused the paper book.
9. The entire submission of learned counsel for the appellant is with regard to the applicability of Section 68 of the Act 1961 on facts of the present case. Therefore, before proceeding to consider the submission, it would be appropriate to reproduce Section 68 of the Act 1961, as then existed, as under:-

*“68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the **assessee offers no explanation** about the nature and source thereof or the **explanation offered by him is not**, in the opinion of the [Assessing] Officer, **satisfactory**, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”*

10. We find that while passing the assessment order dated 31.12.2007 under Section 143(3) of the Act 1961, the assessing officer himself noted that the assessee on being enquired about the nature of transaction with the Mumbai companies submitted on oath on 15.12.2006 before the DDIT (I&B), Kolkata that he has got cash of equivalent amount from the companies and against the same, cheque has been issued. The assessing officer further noticed that the detailed list of cheques issued to various Mumbai based companies of the K. Parekh Group, the bank account numbers etc. submitted by the assessee, against which cash were received. The assessee had deposited cash of Rs.166.59 crore in the bank account of his eight proprietary concerns during the year in question. The assessing officer found that the original broker for providing accommodation entries is M/s. P.K. Agarwal and Company of which Sri Praveen Kumar Agarwal is the proprietor. The assessee was found to be sub-broker. On the facts as briefly noted above, the assessing officer has recorded, in the **assessment order**, the following finding:-

*“In view of above the assessee’s submission that his brokerage/ commission income of 0.15% is not accepted. **Considering the order of Hon’ble Tribunal in the case of assessee’s principal broker, Shri Praveen Kumar Agarwal an amount of 2% of the cash deposited amounting to Rs.166.59 Crore in the year under consideration i.e. Rs.3,33,18,027/- is taken as assessee’s income from business by way of commission.***

11. Thus, as per assessment order, one Sri Praveen Kumar Agarwal was the assessee's principal broker and the assessee has earned brokerage / commission @ 2% on the cash deposit of Rs.166.59 crore which comes to Rs.3,33,18,027/-. This commission/brokerage of Rs.3,33,18,027/- was assessed as income of the respondent assessee.
12. In appeal, the **CIT(A)** upheld the assessment order and dismissed the appeal of the assessee, holding as under:-

*“In order to avoid such speculation, it is held that **the commission income in the assessment order will be treated as the income accruing to the appellant from making the funds credited to the appellant's account available for accommodation entries.** Consequently, the appeal is dismissed.”*

13. Since the assessment of the respondent/assessee was based on materials found in the matter of aforesaid Sri Praveen Kumar Agarwal and addition made in the hands of said Sri Praveen Kumar Agarwal who and the Department contested the matter upto ITAT, therefore, the Tribunal followed its order in the case of Sri Praveen Kumar Agarwal, after due discussion of the fact of the respondent/assessee. The Tribunal noted that on being enquired about the nature of transaction with the Mumbai based companies, the assessee submitted on oath on 15.12.2008 before the DDIT (Inv), Kolkata that he has got cash amount from the companies and against the same cheques of equivalent amount were issued. The assessee also gave a detailed list of cheques issued to various Mumbai based companies of the Ketan

Parekh Group, the bank account numbers etc. against which cash was received by him. In the case of the principal broker i.e., Sri Praveen Kumar Agarwal, the ITAT has held that **the assessee was involved in the business of entry operation and has earned only commission on such transaction.** Applying the peak credit principle and brokerage @ 2% earned by the respondent/assessee on the total deposits, the Tribunal determined the income of the respondent/assessee at Rs.4,07,17,055/- .

14. Thus, **the assessing officer, the CIT and the ITAT all have recorded a concurrent finding of fact that (i) the respondent/assessee is a sub-broker of the principal broker Sri Praveen Kumar Agarwal and (ii) the respondent/assessee has earned brokerage @ 2% on cash deposit of Rs.166.59 crores.** All the aforesaid three fact finding authorities have determined/upheld the income of the respondent/assessee from brokerage/commission @ 2% on cash deposits of Rs.166.59 crores. All the three authorities have found that the respondent/assessee was engaged in providing accommodation entries and was earning brokerage/commission @ 2% in lieu of such accommodation entries. Thus, all the three authorities have found that the respondent/assessee was involved in providing accommodation entries and was earning brokerage/commission @ 2% on cash deposited Rs.166.59 crore. The respondent/assessee has disclosed before the authorities all the bank accounts and complete details of cheques issued and cash deposits.

15. In the case of *Commissioner of income Tax v. P. Mohannakala* reported in AIR 2007 SC 2116 (paragraphs 15, 16 and 23), the Hon'ble Supreme Court explained the nature and scope of Section 68 of the Act, 1961 and after referring to its earlier judgments in *Sumati Dayal v. Commissioner of Income Tax, Bangalore* reported in 1999 Supp (2) SCC 453 and several other judgements, held as follows:

15. *The question is what is the true nature and scope of Section 68 of the Act ? When and in what circumstances Section 68 of the Act would come into play ? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and **the assessee offer no explanation about the nature and source of such credit** found in the books; **or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory**, it is only then the sum so credited may be charged to income tax as the income of the assessee of that previous year. The expression "**the assessee offer no explanation**" means where the assessee offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. **The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion.***

16. In *Sumati Dayal vs. Commissioner of Income Tax, Bangalore* [1995 Supp. (2) SCC 453] this Court held:

“In all cases in which a receipt is sought to be taxed income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, “the burden of proving that it is not taxable because it falls within the exemption provided by the Act lies upon the assessee. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima face, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature.”

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23. It is true that **even after rejecting the explanation given by the assesseees** if found unacceptable, **the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assesseees constituted income of the previous year must receive the consideration of the authorities** provided the assesseees rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory. We are required to notice that Section 68 of the Act itself provides, where any sum is found credited in the books of the assesseees for any previous year the same may be charged to income tax as the income of the assesseees of the previous year if the explanation offered by the assesseees about the nature and source of

*such sums found credited in the books of the assessee is in the opinion of the Assessing Officer not satisfactory. Such opinion found itself constitutes a prima facie evidence against the assessee, viz., the receipt of money, and if the assessee fails to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of income nature. In the case in hand the authorities concurrently found the explanation offered by the assessee unacceptable. The authorities upheld the opinion formed by the Assessing Officer that the explanation offered was not satisfactory. **The assessee did not take the plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature.** The burden in this regard was on the assessee. No such attempt has been made before any authority. All the decisions cited and referred to hereinabove are required to be appreciated and understood in the light of the law declared by this Court in *Sumati Dayal (supra)*.” [emphasis supplied]*

16. Section 68 of the Act, 1961 provides 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. In the present set of facts, we find that the assessee has disclosed complete details of bank accounts, cheques issued and the cash received from those to whom accommodation entries were given, which fact has not been disputed by the

appellant/department and, instead, brokerage/commission on the aforesaid cash deposit of Rs.166.59 crores was determined as income of the assessee for giving accommodation entries.

17. Thus, once the source of cash deposit was disclosed and in respect of such cash deposit the respondent/assessee was treated as accommodation entry provider and accordingly brokerage/commission on aforesaid cash deposit was determined as income of the assessee for providing service in the form of accommodation entry, then Section 68 of the Act, 1961 becomes uninvokable on facts of the present case.
18. In the present set of facts we find that there being cash deposit of Rs.166.59 crores in the bank accounts, there was prima facie evidence against the assessee i.e. receipt of money. The assessee explained it that cash were given by those to whom cheques of equal amount were issued. He furnished complete details of cheques issued and the cash deposits. The assessee was held to be sub-broker of the principal broker Praveen Kumar Agarwal engaged in providing accommodation entries to Ketan Parekh Group. On these facts the assessing officer himself has treated the activity of the respondent/assessee as **accommodation entry provider on brokerage/commission basis** and, accordingly, determined the income of the respondent/assessee @ 2% as brokerage on entire cash deposits of Rs.166.59 crores. Further, **the Assessing Officer has not inferred that the sum credited in the books of the assessee constituted income of the**

previous year and instead held that the income of the respondent/assessee is 2% of the cash deposits, as brokerage. This leads to an irresistible conclusion that cash deposits of Rs.166.59 crore was not receipt of income of the assessee and instead his income was brokerage/commission @ 2% of cash deposits as accommodation entry provider. Under the circumstances, the addition of Rs.166.59 crores in the hands of the respondent/assessee under Section 68 of the Act, 1961 was correctly set aside by the ITAT.

19. Learned Counsel for the appellant has heavily relied upon paragraphs 9.2 and 9.3 of the judgment of NRA Iron And Steel Private Limited (supra).
20. We find that in paragraph 9.2 of the judgment in NRA Iron And Steel Private Limited (supra) the Hon'ble Supreme Court has only reproduced Section 68 of the Act, 1961. In paragraph 9.3 the Hon'ble Supreme Court has held that the initial onus is on the assessee to establish by cogent evidence; genuineness of the transaction and creditworthiness of the investors under Section 68 of the Act, 1961 by submitting proof of identity of the creditors; capacity of creditors to advance money and genuineness of the transaction. On facts of the present case, we find that the facts disclosed by the respondent/assessee before the authorities as briefly noted/discussed above, regarding cash deposits has not been disputed by the assessing officer in the assessment order and instead he held that the assessee is engaged in providing accommodation entries by receiving cash and issuing

cheques and accordingly he determined the income of the respondent/assessee from brokerage @ 2% on the cash deposits. Under the circumstances, the addition made by the assessing officer under Section 68 of the Act, 1961 was unsustainable.

21. In the case of Praveen Kumar Agarwal (principal broker), the ITAT held that either 2% of the commission or the peak credits during the block period, whichever is higher, has to be taken as income. Therefore, the assessee submitted daily summary of cash for the period from 01.03.2004 to 30.09.2005 for all the eight bank accounts before the ITAT which established the peak credit on 7th June 2004 to be Rs.4,07,17,055/-. Brokerage/commission @ 2% on cash deposits was Rs.3,33,18,027/-. Therefore, the ITAT applied the ratio of its decision of the case of the principal broker to the case of the respondent/assessee (sub-broker) and accordingly determined the aforesaid sum of Rs.4,07,17,055/- as income of the respondent/assessee as against the declared income of Rs.25,00,000/-. It has neither been argued nor shown to us that the decision of the ITAT in the case of Praveen Kumar Agarwal (principal broker) has been interfered with by the High Court. Therefore, the peak credit adopted by the ITAT to determine income of the assessee does not require interference.

22. For all the above reasons afore-stated, all the substantial questions of law are answered in favour of the assessee and against the revenue. **The appeal** being without merit, is hereby **dismissed**.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

S.Kumar / S.Das / As