

OD - 6

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

ITAT/10/2025
IA NO: GA/1/2025
PRINCIPAL COMMISSIONER OF INCOME TAX 2 KOLKATA
VS
M/S MUNDHRA CONSTRUCTION PRIVATE LIMITED

Mr. Aryak Dutt, Advocate
Mr. Soumen Bhattacharjee, Advocate

....for the Appellant.

Mr. S. M. Suraja, Advocate
Mr. Bhaskar Sengupta, Advocate

. . .for the Respondent.

HEARD ON : 07.3.2025

JUDGMENT ON : 07.3.2025

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 13.8.2024 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata in ITA No.807/Kol/2024 for the assessment year 2012-13.
2. The revenue has raised the following substantial questions of law for consideration.

“1. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in ignoring the settled position of law in respect of provisions of Section 68 of the Income Tax Act, 1961 that the onus of proving the identity & creditworthiness of the parties from whom the assessee received money and the genuineness of such transaction is on the assessee and the assessee miserably failed to prove so in the instant case ?

2. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in deleting the total addition of Rs.2,82,00,000/- made under section 68 of the Act ignoring the judicial principles laid down in the matter of Pr. CIT vs. Swati Bajaj reported in 2022 SCC Online 1572 [Cal] wherein the Hon’ble High Court at Calcutta laid down guidelines on the manner in which the allegation against the assessee has to be considered ?

3. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in appreciating the principle which has been laid down by the Hon’ble Supreme Court in the case of Pr. CIT [Central]-1, Kolkata vs. NRA Iron & Steel Private Ltd. [412 ITR 161] [2020] 117 taxmann.com 752 [SC] ?

4. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in not following the judicial principles laid down in the matter of Pr. CIT 2, Kolkata [C]-2, Kolkata vs. M/s. BST Infratech Ltd. in ITAT/67/2024 dated 23.4.2024, which is an earlier decision of Hon’ble High Court having a precedence value ?

5. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in ignoring the judicial principles laid down in the matter of Sumati Dayal v. CIT [1995] 214 ITR 801 [SC] ?

6. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in not taking cognizance of the judicial principles laid down in CIT vs. Durga Prasad More 1973 CTR [SC] 500 : [1971] 82 ITR 540 [SC] ?

7. Whether the learned Income Tax Appellate Tribunal has committed substantial error in law in giving the verdict in favour of the assessee where the case is covered by clause [h] of Exceptions laid down under para

3.1 of the CBDT Circular No.5/2024 vide F.No.279/Misc-142/2007-ITJ[Pt], Dated 15th of March, 2024 ?

8. Whether the order of the Learned Tribunal is perverse in not considering the issue of the present case ?

3. We have heard learned advocates on either side.
4. The issue which falls for consideration is whether the tribunal was justified in setting aside the order passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre dated 27.3.2024 by which the appellate authority confirmed the order passed by the Assessing Officer dated 23.3.2015 by holding that there is an unexplained cash credit as contemplated under section 68 of the Act to the tune of Rs.2,84,15,960/-. The learned tribunal has referred to the details of the share subscribers/companies in paragraph 11 of the impugned order which contains a tabulated format giving the names of the shareholders, number of equity shares, share capital, share premium, share application money and net worth. In the said tabulated format, the names of the directors of the respondent/assessee also find place in serial nos. 22 and 23 and surprisingly those two directors have not paid any share premium. Furthermore, on a perusal of the said tabulated statement it is seen that the share premium paid by all the share subscribing companies/entities are substantial in nature. Therefore, we need to consider as to whether the three factors which have to be established namely, creditworthiness of the investors, the genuineness of the transaction and the identity has been established. It is true that the identity of the share subscriber companies have been established, inasmuch as, it has been shown that they are registered companies, yet to escape from the rigor of section 68 of the Act, the assessee is also bound to prove the creditworthiness of the parties and also genuineness of the

transaction. Thus, we are required to see as to whether this exercise has been done by the assessee. The Assessing Officer issued notices under section 133(6) for which reply has been stated to have been received. Summons was issued under section 131 on the directors of the assessee/company to appear personally and to produce various documents. However, the assessee filed written statement in response to the summons with photo identity of the directors of the invested companies but no reason was assigned as to why the directors did not appear in response to the summons. The Assessing Officer took up the case for discussion, took note of section 68 of the Act and held that there was no compliance from the assessee. The identity, the genuineness and creditworthiness of the share applicant companies have not been established against the primary issues regarding the due diligence permission, steps taken for protection of the fund and most importantly the reason for investment in the company with no track record and that too with such huge premium was not clarified. Furthermore, the Assessing Officer has noted that due to non-compliance on the part of the assessee the details of the shareholders were not available and, hence, identity of the shareholders is questionable. If the identity of the creditors are not established, consequently, question of establishment of genuineness of the transaction or creditworthiness of the creditors did not and could not arise. Furthermore, the Assessing Officer observed that the case has to be judged in the light of preponderance of probability and non human behaviour from which it will be easily inferred that the entire transaction lacks substance. Furthermore, on facts the Assessing Officer noted that a company that has been recently incorporated without any proven track record does not in any way justify the hefty premium. Thus, on facts the Assessing Officer came to the conclusion that the receipt of share application money is only façade for

conversion of unaccounted money and the non-appearance of the directors only strengthen on this point. Reference was made to the decision of *CIT vs. Precision Finance Pvt. Ltd.* [208 ITR 465] and another decision of the learned tribunal in the case of *Agarwal Coal Corpn. [Pvt.] Ltd. vs. Asstt. CIT* 63 DTR 20, and, ultimately, assessment was completed holding that the share application money received along with premium amounting to Rs.2,82,10,798/- remained unexplained and was, accordingly, added back under section 68 of the Act. The assessee was informed that penalty proceeding under section 271(1)(c) will be initiated separately. The assessee carried the matter on appeal before the appellate authority namely, National Faceless Appellate Centre (NFAC). The assessee contended that the addition made by the Assessing Officer is bad in law, unwarranted and unlawful and the interest charged is also unlawful and not acceptable. The appellate authority took note of the observations of the Assessing Officer, noted the submissions made by the authorised representative of the assessee and the grounds canvassed in the written statement and thereafter proceeded to take a decision in the matter.

5. The first issue which was considered by the appellate authority was whether the tax recovery officer was an Assessing Officer after referring to various statutory provisions which was held that the assessee was covered under clause (a) of sub-section (3) of section 143 of the Act. Apart from that it was held that not only the tax recovery officer-10/tax recovery officer-4, Kolkata was fully empowered to pass the order under section 143 of the Act and the question of the assessee raising the issue of jurisdiction beyond the prescribed time limit does not arise.
6. The next issue which was taken up for consideration is with regard to the correctness of the addition made under section 68 of the Act. The assessee

among other things contended that the notices under section 133(6) of the Act was issued only out of 9 out of 30 shareholders and the details having been furnished, the assessee submitted that they have discharged burden cast upon them. Furthermore, the assessee submitted that the profit and loss account and the balance-sheet containing substantial income was before the Assessing Officer and, hence, creditworthiness was proved. Certain decisions were also referred to in support of such contention. The appellate authority, in our considered opinion, rightly noted the legal position that the onus is on the assessee to prove not only the identity of the share applicant but also the creditworthiness of the share applicants and last but not the least the bona fide or genuineness of the share application money credited in the books of account. It was held that merely providing proof of identity and other relevant documents is not sufficient as creditworthiness of the share applicant and the genuineness of the transaction is also important. After noting the decision of the Hon'ble Supreme Court in *PCIT vs. NRA Iron and Steel Pvt. Ltd.* (2019) 412 ITR 161 (SC), *CIT vs. Durga Prasad More*, (1971) 82 ITR 540 (SC) and *Sumati Dayal vs. CIT*, (1995) 214 ITR 801 (SC) the appellate authority proceeded to examine the documents in the case of the share subscriber companies which are 21 in number. The appellate authority has discussed the factual aspect in respect of each such share subscribers. By way of an illustration, if we take up the case of *Lucky Prime Financial Consultants Pvt.Ltd.*, the company was shown to be an existence from June, 2011 with an authorised share capital of Rs.500000/- and paid up capital of Rs.4,59,600/-, the subscriber company has collected share premium of Rs.1.76 crores on the share capital of Rs.4,59,600/- which was found to be abnormal as the subscriber company had no track record of any identity whatsoever or there were any projection of any activity and it had a

surplus of only Rs.53,230/-. Furthermore, the subscriber companies had received Rs.5,22,174/- on which profit of Rs.44,330/- was earned. Furthermore, on facts it was found that the funds collected are entirely invested in land and advances of Rs.1.06 crores and there is a bank balance of Rs.88.69 lakhs. Further, the subscribers claimed to have invested Rs.2,50,000/- as share application money and premium in the financial year 2011-12. However, there are no investments shown in the balance-sheet of *Lucky Prime Financial Consultants Pvt.Ltd.* as on 31.3.2012. Therefore, the appellate authority came to the conclusion that the creditworthiness of the share subscriber remains unproved and the genuineness of the transaction is also not proved from the documents produced. Similar discussion has been made in respect of all the 21 share subscribers. In paragraph 6.5 of the order passed by the appellate authority the common features of all the subscriber companies were noted namely that the registered address of some of the companies are common and the directors of the company were also found to be a group of persons. The accounts of the companies were audited by the same group of auditors. There are no activities apparent from the profit and loss provided except for receipt of interest and all companies have only furniture and computers as assets and there are no vehicles or office premises in the schedule of assets. Thus, noting all the facts the appellate authority held that the assessee has not discharged the onus under section 68 of the Act. More importantly the appellate authority noted that the first two entities are individuals and they are promoters of the assessee company and the shares issued to them are not added as premium. This peculiar aspect was noted and it was pointed out that the promoters do not share the view of the other companies who have subscribed to the shares at premium, about the prospects of the assessee company. Moreover, the assessee

has not provided any documentary evidence for the creditworthiness of the promoters, i.e., Aditya Mumdhra & Sonali Mumdhra. It was found that the remaining 28 companies have contributed Rs. 2.77 crores towards the share capital at par along with share premium and the creditworthiness and the genuineness of the transactions were not proved. Accordingly, the addition of Rs.2,82,00,000/- was confirmed and the addition of Rs.10,798/- was deleted.

7. The assessee carried the matter on appeal to the tribunal which was allowed the assessee's appeal by the impugned order when surprisingly the learned tribunal has not discussed or dealt with the correctness of the findings recorded by the appellate authority, which, in our view, was done after a detailed factual exercise. The learned tribunal has stated in paragraph 17 of the impugned order that on perusal of the paper book and document three factors have been proved by the assessee. This, in our view, is wholly inadequate and insufficient for the tribunal to set aside the order passed by the appellate authority. In other words, the tribunal was required to examine the correctness of the factual findings recorded by the appellate authority and then recorded its views as to why it is not in agreement with the findings of the appellate authority. On reading of the impugned order it is seen that this aspect of the matter is conspicuously absent. At this juncture, it will be relevant to take note of the decision of this court in *Balgopal Merchants [P] Ltd. vs. Principal Commissioner of Income Tax*, [2024] 162 taxmann.com 465 [Cal]. The said decision also arose under section 68 of the Act and the facts and circumstances of the case were more or less identical. In the said case also the appellate authority on examining the facts found that the assessee company therein had no track record or asset base for demanding astronomical high premium per share which defied all commercial and financial prudence and logic. Furthermore, the

test of human probability was also applied and when done so it was held that high premium share defying logic. Thus, if the test of human probability is applied in the facts of the case on hand, it should have been established by the assessee as to why and for what reason the share subscription invested in shares of the assessee company at such huge premium despite the factual position being that the assessee company had no track record.

8. Thus, we are of the view that the learned tribunal did not go into all these aspects and proceeded to accept the case of the assessee solely by making certain observations with regard to the paper book which was filed by the assessee. The tribunal over-turning the order passed by the appellate authority was required to examine the correctness of the findings recorded by the appellate authority and then come to the conclusion why such findings are not acceptable and while doing so reasons have to be recorded in writing. In the absence of all these essential requirements, we have no hesitation to hold that the impugned order is not sustainable in law and the learned tribunal committed an error of law in allowing the assessee's appeal.
9. For the above reasons, the appeal filed by the revenue is allowed and the substantial questions of law are answered in favour of the revenue.
10. The application being GA/1/2024 stands closed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(CHAITALI CHATTERJEE (DAS), J.)