IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL No. 1242 of 2007

FOR APPROVAL AND SIGNATURE:
HONOURABLE Mr. JUSTICE AKIL KURESHI
and
HONOURABLE Mr. JUSTICE B.N. KARIA
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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE COMMISSIONER OF INCOME TAX, AHMEDABAD - II
Versus
LABH LEASE & FINANCE LTD.
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Appearance :
Mr. M.R BHATT, Sr Advocate with Mrs MAUNA BHATT, Advocate for PETITIONER
Mr JP SHAH, Sr Advocate with Mr MANISH J SHAH, Advocate for RESPONDENT
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CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI
and
HONOURABLE Mr. JUSTICE B.N. KARIA
10th May 2018

ORAL JUDGMENT (PER : HONOURABLE Mr. JUSTICE AKIL KURESHI)

This Tax Appeal was admitted for consideration of the following substantial question of law :

[A] **“Whether the Appellate Tribunal was right in law and on facts in deleting the addition of Rs. 1,30,42,400=00 made under Section 68 of the Act on account of receipt of discounted value of advance lease rental** ?”

[B] **“Whether the Appellate Tribunal was right in law and on facts in deleting the addition of Rs. 3,93,944/= made on account of discounting charges** ?”

2. Brief facts are as under :

2.1 The respondent-assessee M/s. Labh Lease & Finance Limited is a company registered under the Companies Act, 1956 and is a part of group concerns where M/s. Labh Construction Limited is a lead company. M/s. Labh Construction Limited is engaged in construction related activities. During the course of assessment of the returns of the respondent-assessee for AY 1996-97, the Assessing Officer noticed deposit of a sum of Rs. 1.30 Crores [rounded off] shown by way of unsecured loan from one M/s. Miga Gas Private Limited, Bangalore [“**MGPL**” for short] and assessee had claimed an amount of Rs. 3.90 lakhs [rounded off] as discounting charges towards the said transaction. When the Assessing Officer questioned the assessee about such deposit in its accounts, the assessee pointed out that Labh Construction Limited had purchased 2500 Gas Cylinders from one M/s. M.M Industries, Tamil Nadu. These industrial gas cylinders were leased by Labh Construction to one M/s. Miga Gas Private Limited, Bangalore [for short "**MGPL**"]. As per the terms of the lease, MGPL had to pay monthly lease rent of Rs. 2.83 lakhs [rounded off] to Labh Construction over a span of five years of lease agreement. MGPL thus had to pay total Rs. 1.70 Crores [rounded off] to M/s. Labh Construction by way of lease rent. MGPL and assessee entered into an agreement under which MGPL paid a sum of Rs. 1.30 Crores [rounded off] to the assessee in lieu of the assessee taking over the liability of MGPL to pay the monthly lease rent to M/s. Labh Construction. According to the assessee, such amount was paid by MGPL through different drafts drawn on different dates.

2.2 The Assessing Officer doubted genuineness of the transaction and probed the issue further. From the material produced by the assessee, he noticed that the gas cylinders were purchased by M/s. Labh Construction Limited from M.M Industries of Madras for which, the bill of Rs. 1.53 Crores [rounded off] for 2500 gas cylinders was raised. The delivery was shown at Madras, where no sufficient storage facility was not shown to be existing. The goods were shown to have been delivered at a godown situated at Hosur, which is altogether a different place. The delivery challan did not contain necessary details such as truck number, address at which delivery was to be made, etc. The Assessing Officer therefore did not accept this element of delivery of goods at the declared address. He, therefore, inquired the issue further with the assessee, doubting this transaction with MGPL. He also made inquiries regarding assessment of MGPL from the Assessing Officer of MGPL and also from the company itself. He noted that MGPL had not furnished copies of bank account to verify issuance of draft payments to the assessee. MGPL had also not provided audited statement of P&L Account and balance-sheet. Even the query regarding delivery and use of the goods was not replied to. He, therefore, wrote in a FAX letter to MGPL on 24th March 1999 asking for certain further specific details which was not replied by MGPL. On the basis of such inquiries, he held that the entire transaction of leasing of gas cylinders to MGPL was not genuine. He, therefore, discarded assessee's version that the sum of Rs. 1.30 Crore credited in the account was received from MGPL by way of unsecured loan. He treated such sum as the income of the assessee from undisclosed sources. Consequently, he also disallowed the claim of assessee of discounting charges of Rs. 3,98,944/=.

3. The assessee carried the matter in appeal. Before CIT [A], assessee produced further documents in form of paper-book. Such documents were sent to Assessing Officer for his comment. The response of the Assessing Officer was shared with the assessee. On the basis of additional documents, the assessee contended before the CIT [A] that the entire transaction was legitimate. The payment was received from MGPL for discounting the lease charges. Agreement between assessee and MGPL was also produced. It was argued that the assessee had established necessary ingredients to dispel the Revenue's objection to the cash credit. The genuineness of the transaction, source of the receipt and credit-worthiness were all duly established. It was pointed out that necessary confirmation from MGPL was also produced.

4. CIT [A] noted that the AO in response to the additional documents produced by the assessee, had sent a copy of the assessment order in the case of MGPL for AY 1996-97 alongwith copy of accounts, annexures for AY 1996-97 and 1997-98 filed by MGPL with the tax authorities at Bangalore. It was noted that the accounts of MGPL for AY 1996-97 disclosed loans and advances during the year amounting to Rs.17.45 lakhs which obviously would not include the sum indicated by the assessee, which being much larger. The CIT [A] on the basis of such materials considered the question whether the credit of Rs. 1.30 Crore appearing in the books of account of the assessee was a genuine credit. He examined this question in the context of Section 68 of the Income-tax Act, 1961. He noted that though the assessee had produced documents of MGPL confirming the transaction, when the Assessing Officer had sought for corroborating evidence from MGPL, only skeleton information was supplied. The Assessing Officer had asked MGPL to provide details such as when the goods purchased by Labh Construction Limited were put to use by the assessee, copy of delivery challan and other details showing how the cylinders were transferred from Tamil Nadu

to Bangalore. Whether the amount of RS. 1.30 Crore was paid by MGPL to assessee with supporting accounts and the details of bank cheques or drafts and a copy of the bank account statement. MGPL was also called upon to supply copy of audited accounts and balance sheet and to clarify whether the said sum of Rs. 1.30 Crore paid by MGPL to the assessee was claimed as expenditure. In response to such queries, the MGPL had given a short confirmation of having taken the gas cylinders on lease and also having paid a sum of Rs. 1.30 Crore to the assessee towards discounted value of all future lease rentals payable in relation to the transaction. CIT [A] confirmed the view of the Assessing Officer observing that the reply of MGPL did not reveal necessary details. In his opinion, MGPL, except for confirmation of having paid a sum of Rs. 1.30 Crore to the assessee, provided no further details. The details of bank cheques or draft through which such payment was made were not supplied. He noted that MGPL, a corporate body claimed that three years after the end of financial year, as late as on 20th March 1999, the accounts were under completion. In the subsequent year *ie.*, year ending 31st March 1997, which was relevant to AY 1997-98, the accounts were audited as far back as on 1st September 1997. He was, therefore, of the opinion that MGPL had purposedly withheld furnishing copy of accounts in relation to the assessee in its books as also bank statement. In totality of the facts and circumstances, he concluded that the purported cash credit transaction was not *bona fide*. By way of supporting material, he also referred to the audited accounts of MGPL for AY 1997-98 in which there was no mention of a sum of Rs. 1.30 Crores having been given to the assessee - the factor which the counsel for the assessee was unable to explain. It was observed that merely establishing the identity of the creditor was not enough. The genuineness of the transaction was also important. He concluded the discussion on the issue with the following remarks :

> "12. To conclude, therefore, in view of these discussion, I hold that in the instant case while the identity of the creditor may be taken as proved, their credit worthiness to advance a sum of Rs. 1,30,42,400/= is not established by the appellant. Similarly, in the absence of any entry in this regard in the books of the creditor, and also in the absence of any documentary evidence furnished by the creditor as called for by the assessing officer, ie., the copy of appellant's account as appearing in their books and

copy of bank statement to confirm the transaction, once again, the appellant has not proved the genuineness of this transaction. Therefore, the addition made by the assessing officer of this amount as the appellant's income from undisclosed sources is confirmed. Following from this, the disallowance is discounting charges amounting to Rs. 3,98,944/= is also confirmed."

5. The assessee carried matter in further appeal before the Tribunal. The Tribunal, by *impugned* judgment, reversed the decisions of revenue authorities. The Tribunal was of the opinion that in the present case, the validity of lease transaction between Labh Construction Limited and MGPL was not of much importance. What was vital was the question of genuineness of the transaction relating to receipt of Rs. 1.30 Crore by the assessee from MGPL. In the opinion of the Tribunal, the assessee had to establish only two things, namely, that it had stood as a guarantor of the amount in question so received from MGPL. The Tribunal proceeded on the basis that the Revenue had not disputed the correctness of the *tripartite* agreement dated 25th May 1995 executed between Labh Construction Limited, MGPL and the present assessee. This document records that the assessee would stand as a guarantor

for MGPL in view of payment of discounted amount of Rs. 1.30 Crores. The Tribunal also noted that the payment of the said sum was confirmed by MGPL. In that view of the matter, in the opinion of Tribunal, the assessee had discharged its onus. Reflection of such amount in the accounts of MGPL in the opinion of the Tribunal was irrelevant because on such basis, the transaction cannot be held to be non-genuine. Tribunal observed that the AO's failure to proceed with further inquiry from MGPL cannot be a ground to penalize the assessee.

6. Appearing for the Revenue, learned counsel Shri Bhatt highlighted certain salient features of the evidence on record. His contention was that the assessee failed to establish the very first ingredient of the transaction being genuine. Once we come to such a conclusion, the question of applicability of Section 68 of the Act would immediately arise. He took us through the orders on record and the documents produced during the assessment proceedings and in appeal to highlight that the totality of facts and circumstances would lead to an irresistible conclusion that the entire transaction was non genuine. The sum of Rs. 1.30 Crore was nothing but the assessee's cash credit from undisclosed source.

7. On the other hand, learned counsel Shri JP Shah for the assessee- company pain shockingly took us through the documents on record to contend that the Tribunal committed no error, as the entire transaction was a *bona fide* transaction duly documented between the three corporate entities in the form of *tripartite* agreement. The assessee had entered into a business transaction. It had received *lump sum* amount from MGPL for discharging the periodical rental liabilities of MGPL for the entire span of the lease period. Counsel contended that even if there was some flaw or laxity on the part of MGPL to maintain its account, the same would not in any manner demonstrate that the transaction was not genuine. The assessee cannot be penalized for laxity of the MGPL in maintaining its accounts. This would virtually amount to putting burden on the assessee to establish source of the source. He pointed out that MGPL had confirmed the transaction, as also receipt of the goods. MGPL had also placed on record, certificate of Chartered Accountant and Chartered Engineer establishing that the goods were actually received and put to use. In support of his contentions, counsel relied on the following judgments :

7.1 In case of **Commissioner of Income-tax-I v. Chanakya Developers**, reported in [2014] 43 taxmann.com 91 [Gujarat] to contend that once the primary burden was discharged by the assessee, the Revenue would not be justified in making addition under Section 68 of the Act.

7.2 In case of **Commissioner of Income-tax, Orissa v. Orissa Corporation Private Limited**, reported in [1986] 159 ITR 78 [SC] in which, the extent of assessee's obligation to discharge burden of proving the transaction leading to the cash credit being genuine was discussed by the Supreme Court.

7.3 In the case of **Deputy Commissioner of Income-tax v. Rohini Builders**, reported in [2002] 256 ITR 360 [Guj] in which the Division Bench of this Court held that the identity of the creditors was proved. The amounts were received through account payee cheques and thus initial burden was discharged by the assessee. It was held that the assessee did not have the responsibility to establish source of the credit.

8. The summary of opinion of Assessing Officer, CIT [A] and the Tribunal would be that on one hand, the Revenue authorities were of the opinion that the entire transaction was

non genuine. Their conclusions were based on several factors to which we would refer to at the latter stage. Tribunal, however, deferred from such view and held that the Revenue was penalizing assessee for MGPL not maintaining its account properly. If so, the Assessing Officer should have questioned MGPL further, but at no rate, could have taxed the assessee.

9. In order to decide the correctness of the said views, we may refer to some of the documents and materials on record. According to the assessee, M/s. Lab Construction Limited had purchased 2500 industrial gas cylinders from one M/s. M.M Industries, Tamil Nadu for a sum of Rs. 1.53 Crores. These gas cylinders were leased out to MGPL, Bangalore on monthly lease rent which was fixed at Rs. 2.83 lakhs. The lease period was of five years. A copy of the said lease agreement dated 25th September 1995 is on record, as per which, the equipment in question, namely, 2500 numbers., 45 kilograms Co2 Seamless Industrial Gas Cylinders were leased by Labh Construction Limited for a period of sixty months commencing from 25th September 1995 and ending on 24th September 2000 on a lease rent of Rs. 2,83,864/= per month for each completed month.

9.1 On the very same day, another tripartite agreement was executed between M/s. Labh Construction Limited [Lessor]; M/s. Miga Gas Private Limited, Bangalore [Lessee] and Labh Lease & Finance Limited [Guarantor] *ie.*, the present assessee. Under such agreement, MGPL – the lessee requested the assessee to accept and take over its entire financial obligations under the lease agreement, in lieu of payment of Rs. 1.30 Crore by MGPL to the assessee. In other words, as against the total payment of Rs. 1.70 Crore; spread over sixty months of duration of the lease period, MGPL had upfront paid a sum of Rs. 1.30 Crores to the assessee. The assessee in turn would discharge the liability of MGPL to M/s. Labh Construction of monthly rental of Rs. 2.83 lakhs.

9.2 We also have on record, the details of demand drafts through which such payment of Rs. 1.30 Crore was made. All the demand drafts were drawn on different banks, all situated at Ahmedabad and drawn on 25th September 1995 or 26th September 1995.

10. We may recall that the Assessing Officer of the present assessee called upon MGPL to confirm the payment and give necessary details with documents. Principally, what MGPL did

was to issue confirmation of payment without providing any further details such as bank accounts from which such payments were made and the reflection of such amount in ts books of account, citing the reason of non completion of the audited accounts.

10.1 We may also recall that for the immediate succeeding financial year, the accounts of MGPL were completed well in advance duly audited and which did not contain any reflection of the unsecured loan of Rs. 1.30 Crore.

11. It is undoubtedly true that in the context of cash credit in the books of accounts, it is primarily liability of the assessee to establish the identity, genuineness of the transaction and the credit worthiness of the donor. Such liability does not extend any further. In particular, the Courts have emphasized that the assessee is not required to establish source of the source. Nevertheless, in the present case, we are concerned with the very genuineness of the transaction which needs to be tested from various facts and circumstances duly established on the record. The glaring facts which we have noticed are as follow :

[i] Almost by way of simultaneous transaction, M/s. Labh

Construction Limited, a lead company of a group to which assessee is a part, claimed to have purchased 2500 industrial gas cylinders from an entity at Tamil Nadu and having given it on lease for a period of five years to MGPL at Bangalore. On the same date, a separate tripartite agreement is executed under which, the lessee transfers its liability to the assessee and the assessee undertakes to discharge such liability in lieu of *lumpsum* payment of Rs. 1.30 Crores. The purchase cost of the gas cylinders is shown to be Rs. 1.53 Crores. Over a span of five years, the lessee would have to pay rental charges of Rs. 1.70 Crores. As against this, the lessee paid upfront *lumpsum* payment of Rs. 1.30 Crore to the assessee who would then discharge the rental liabilities.

[ii] Entire payment of Rs. 1.30 Crore was made through bank drafts drawn from local banks at Ahmedabad without any further details of the payments being provided; either by the assessee or by MGPL, though called by the Assessing Officer. The accounts of the MGPL of the relevant period were not produced citing reason of the accounts being incomplete. Thus, it was not possible for the Assessing Officer to verify the same or the payment of the said sum of Rs. 1.30 Crore.

[iii] MGPL even on persistent queries by the Assessing Officer failed to show that such payment was reflected in the books of account of the relevant year. CIT [A] correctly noted that the corporate tax payer had claimed that three years after the end of the relevant assessment year, its accounts were not compiled. Thus, giving an evasive reply to the Assessing Officer's question on the reflection of the payments in its books of account.

11.1 CIT [A] also noted that the accounts of the very next year were compiled well in advance, in which there was no reflection of the unsecured loan of Rs. 1.30 Crores.

12. The cumulative effect of these factors in our opinion would show that the Tribunal committed serious error in up-turning the findings and conclusions of the revenue authorities. No single factor could be seen in isolation as to establish or destroy the genuineness of the transaction. In a case like this, the combined effect of several factors must be taken into consideration.

13. As noted, for the equipments which cost Rs. 1.53 Crore to M/s. Labh Construction Limited, MGPL had agreed to pay

lease rent which over five years of lease period would come to Rs. 1.70 Crore. In absence of any suggestion that the equipment in question was perishable, immediately a question would arise why would a business entity agree to pay a total sum by way of rental for a period of five years which is higher than the cost of equipment itself. Even going by the advance *lumpsum* payment of Rs. 1.30 Crore, it could be seen that MGPL paid virtually 80% of the cost of the equipment for taking it on rent. Under normal circumstances, we are not concerned with the fairness of the terms and conditions of the agreement between two parties. In business dealings and such transactions, various considerations apply with which the Revenue would have no concern. Nevertheless, these facts only raise further questions.

14. Primarily, we are concerned with the fact that neither the assessee nor MGPL provided full details of payments to the assessee. MGPL also avoided producing its books of account for the relevant assessment year citing reason of their incompletion, and last but not the least, the completed accounts of later year had no reflection of outstanding unsecured loan of Rs. 1.30 Crore. The Tribunal, therefore, was

not correct in interfering with orders of the revenue authorities.

15. The questions are, therefore, answered in favour of the revenue. The judgment of the Tribunal is quashed. The orders of the Assessing Officer and CIT [A] are restored.

Tax Appeal is disposed of accordingly.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash