IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1349 OF 2015

Konark Structural Engineering Pvt. Ltd. .. Appellant.
Vs.
Dy. Commissioner of Income Tax-9(2), & Anr. .. Respondents.

Mr.Jitendra Singh for the Appellant.

Mr.Arvind Pinto for the Respondent.

CORAM : A.S. OKA & A.K. MENON, JJ.

DATED : 5TH DECEMBER, 2017

P.C.

1. In this appeal under Section 260A of the Income Tax Act, 1961 (for short "the said Act"), the following questions questions of law have been pressed into service :

> *"(A) Whether the Appellate Tribunal is right in law in reversing the order of the Ld. CIT (A) and upholding the action of the Respondent No.1 in making addition of share application money under section 68 of the Act amounting to Rs.95,10,000/- ?*
>
> *(B) Whether the Appellate Tribunal is justified in law in upholding the action of Respondent No.1 in making the addition of Rs.95,10,000/- under section 68 of the Act without appreciating*

that the Appellant has proved the identity, capacity and genuineness of transaction ?

(C) Whether, in the facts and the circumstances of the case, and in law, the order of the Tribunal is perverse as it is based on irrelevant and erroneous considerations while ignoring material and relevant considerations and, as such, is liable to be quashed ?"

2. The appellant – assessee filed a return of income for the assessment year 2007-08 declaring total income at Rs.71,51,330/-. The appellant is a private limited company which is carrying on business as builders and developers. The case of the appellant was selected for scrutiny. The Assessing Officer noticed that the share capital of the appellant had increased by an amount of Rs.19,98,000/- and the general reserve had increased on addition of share capital by an amount of Rs.76,08,000/-. After being called upon, the appellant submitted that a list of 23 parties who had allegedly subscribed to its share capital and the numbers of shares allotted to them. The Assessing Officer while passing the order dated 22nd December, 2009 noted that after giving further opportunity, the assessee filed copies of the acknowledgments of the returns of income for the assessment year 2007-08 in the cases of 20 subscribers. The Assessing Officer in the assessment order recorded the finding that almost all parties were new assessees in the sense

that they had filed returns for the first time. Secondly, it was found that most of them had an income of Rs.1.25 lakhs and none of them had income above Rs.3 lakhs. It was also found that most of them were in early twenties. In paragraph 4.5 of the assessment order, it is noted that the notice/summons under Section 131 of the Act were issued to 23 parties. It is pointed out that the summons in case of 22 cases were unserved with the remark that the addressee was unavailable. Therefore, the Assessing Officer recorded a finding that there was a complete absence of the basic evidence to corroborate the case of the appellant - assessee. Therefore, the Assessing Officer treated the amount of Rs.95,10,000/- which was claimed by the appellant/assessee as amount in lieu of equity share subscription as unexplained cash credit and the same was added to the total income of the assessee.

3. Being aggrieved by the order of the Assessing Officer, an appeal was preferred by the appellant – assessee before the Commissioner of Income Tax (Appeals) [CIT (A)]. We may note here that the assessment order was passed on 22nd December, 2009. Along with a letter addressed to the CIT (A), the appellant purported to file the affidavits of 23 persons affirmed before a notary public.

4. The CIT (A) passed an order of remand and the remand report dated 9th September, 2010 was submitted by the Assessing Officer. The Assessing Officer observed that sufficient opportunity

was granted by him during the assessment proceedings to produce the evidence. The Assessing officer was, therefore, of a view that the application made by the appellant - assessee under Rule 46 of the Income Tax Rules, 1961 had no merit. Apart from this, the Assessing Officer observed that the franking made on all the twenty three affidavits is dated 8th April, 2010 and the affidavits have been affirmed before the same notary public between 8th to 13th April, 2010. It is also mentioned that there was no change in addresses of these persons and the addresses mentioned in the affidavits were the same as stated on the share applications. The Assessing Officer was of the view that the appellant has failed to establish identity of the persons who filed the affidavits and, therefore, even genuineness of the claim made by the same was not established.

5. The CIT (A) proceeded to allow the appeal for the appellant – assessee by deleting Rs.95,10,000/- as unexplained cash credit. Being aggrieved by the said judgment and order, an appeal was preferred by the respondent – revenue before the Income Tax Appellate Tribunal (for short "Tribunal"). By the impugned judgment and order dated 17th September, 2014, the appeal was allowed by setting aside the order of the first Appellate Authority and the order of the Assessing Officer was restored.

6. The learned counsel appearing for the appellant submitted that the appellant discharged the burden on him by producing the

affidavits of 23 persons and if there was any doubt about the genuineness of the contents of the said affidavits, the Assessing Officer could have always issued summons to the declarants. He submitted that the Assessing Officer did not give any opportunity to the appellant/assessee to procure presence of the said 23 persons. He submitted that if the Appellate Tribunal was inclined to hold that the identity, genuineness and capacity of the shareholders was not established by the appellant, then an order of remand ought to have been made to enable the appellant to lead evidence by producing the said persons for examination. He submitted that when the appeal was pending before the CIT (A), the appellant was willing to procure presence of the persons who had filed the affidavits. He submitted that the appeal may be admitted by this Court on substantial questions of law agitated by the assessee.

7. We have given careful consideration to the submissions. It is true that in the remand report dated 9th September, 2010 the Assessing Officer has come to a conclusion that no case is made out by the appellant for producing additional evidence. The Assessing Officer in the remand report observed that it was the case of the appellant that the said twenty three persons were his business partners. He noted that when the summonses under Section 131 of the Act were issued to the said persons, they were not available at the given addresses. He observed that from the declaration/

affidavits, it appears that the franking was done on all affidavits on 8th April, 2010 and were allegedly affirmed before a notary public from 8th to 13th April, 2010. The copies of the said affidavits are annexed to the memorandum of appeal and we find that the said two observations made by the Assessing Officer are correct on perusal of the said affidavits.

8. In the written response to the remand report, the appellant has not offered to procure presence of the persons whose affidavits were filed by it. We have also perused the findings of fact recorded by the Appellate Tribunal. The Appellate Tribunal observed that though an opportunity was granted by the Assessing Officer, the appellant could not procure presence of the said parties. It is observed that during pendency of appeal before the first Appellate Authority, the assessee filed the affidavits of said persons and pleaded that due of requirement of work, they kept on changing their addresses. However, the address mentioned in the affidavits were the same as the addresses filed before the Assessing Officer on which summonses under Section 131 were issued. Out of 23 persons, the summonses issued to 22 were returned on the ground that the addressees was not available. The Appellate Tribunal also noted that all said persons have their bank accounts only in the Borivali branch of Vijaya Bank and all the persons appear to have made cheque payments on 23rd August, 2006. It is specifically observed that all persons had made cheque payments by using

first leaf of cheque books issued to them. The numbers of the cheques are also mentioned by way of illustration. On the basis of the details of the cheques, another finding of fact was recorded that the said persons have been issued the cheque books from the same series and probably on same day. All those persons filed the Income Tax returns for the first time during the relevant year. It is reiterated that when summonses were issued to these 23 persons, 22 were returned unserved. All these factual aspects have been examined in the context of the case of the appellant that the said persons were his business partners. A specific finding of fact has been recorded that the appellant failed to produce even a single person before the Assessing Officer despite specifically asked by the Assessing Officer.

9. We may note here that even the order dated 22nd December, 2009 passed by the Assessing Officer records that repeated opportunities were granted to the appellant to substantiate its case. However, basic evidence was not produced by the appellant to corroborate its claim.

10. The issue before the authorities was of identity, genuineness and capacity of the alleged shareholders. In the facts of the case it was not sufficient for the appellant to have produced affidavits of the said persons. It was incumbent upon him to establish the identity of the persons signing affidavits/declarations and their

genuineness and capacity as they had allegedly subscribed to the shares.

11. There is one more aspect of the matter. We have perused the copies of the affidavits/declarations annexed to the memorandum of the appeal. The declarants are residing at various places in Mumbai Suburban District, Mira Bhayandar in Thane District and Vasai in Palghar District. However, all affidavits/declarations have been affirmed before the same notary public Shri Deepak Malkani having office at Malad (West), Mumbai. Almost all the declarants have been identified by the same Advocate Mr.Ashok M.Pandya. More importantly, the registration number of the said declarations in the notorial register maintained by the notary public has not been mentioned on the declarations/affidavits.

12. The cheque numbers have been mentioned in the said affidavits. The dates of cheques mentioned in all affidavits are 23rd August, 2006 and cheques had been drawn on Vijaya Bank, Borivali branch. The last digit of cheque numbers is 1 and that is how a finding has been recorded that cheque books issued to all the 23 persons were of the same series and first leaf was used by all of them for allegedly making payment of the subscription. The findings of fact of the Appellate Tribunal are completely borne out from the record. As stated earlier, neither before the CIT (A) nor before the Appellate Tribunal, the appellant offered to procure

presence of those 23 persons. Therefore, there is finding of fact recorded by the Appellate Tribunal confirming the observation of the Assessing Officer that the appellant -assessee had failed to establish the creditworthiness of the subscribers and even genuineness of the transactions.

13. Hence, we find absolutely no merit in the appeal and accordingly, the appeal is dismissed. There will be no order as to the costs.

(A.K. MENON, J.) **(A.S. OKA, J.)**