ITA 619 OF 2008

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

COMMISSIONER OF INCOME TAX, KOLKATA-II, KOLKATA

VERSUS

M/S.TRINETRA COMMERCE & TRADE PVT.LTD.

Present:

THE HON'BLE ACTING CHIEF JUSTICE GIRISH CHANDRA GUPTA
And
THE HON'BLE JUSTICE ARIJIT BANERJEE
15th SEPTEMBER, 2016.

For the Appellant: MR.M.P.AGARWAL,ADVOCATE

For the assessee: MR.J.P.KHAITAN,SR.ADVOCATE
MR. M. S. TIWARI, ADVOCATE
MR. P. BAG, ADVOCATE
MR. A. K. SHUKLA, ADVOCATE

THE COURT : The subject matter of challenge is a judgement and order dated 11th January, 2008 passed by the learned Income Tax Appellate Tribunal, “E” Bench, Kolkata in ITA 1403/Kol/2007 pertaining to the assessment year 1995-96, by which the learned Tribunal allowed the appeal preferred by the assessee.

The appeal was admitted on the following question of law :

"Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is correct in deleting addition of Rs.1,06,94,471/- under section 68 of the Income Tax Act, 1961, in the light of the decision of the Hon'ble Calcutta High Court in case of Hindustan Tea Trading Co. Ltd. vs. CIT 263 ITR 289, as the assessee could not prove the identity and creditworthiness of the alleged share subscribers and the genuineness of the share subscriptions ?"

The facts and circumstances of the case, briefly stated, are as follows.

The original assessment was made on 23rd March, 2000 adding a sum of Rs.1,06,90,000/-. In an appeal, the learned Tribunal by its order dated 24th January, 2003 remanded the matter to the assessing officer with the following directions :

"However for proper adjudication of the matter and for ends of justice and fair play, we are of the considered view that the A.O. should have made further enquiry and should have ascertained the details of the shareholders in whose name the assessee company had shown the share capital. Be it mentioned here that the assessee company in the instant case is a Private Limited Co. wherein no public issue has been floated to raise the share capital. It was, therefore, viable and proper and duty on the part of the assessee company to give identity and the details of the shareholders who have deposited the share application money on invitation only. A similar issue had some up for consideration before this Tribunal in the case of M/s.Appar Barter (P) Ltd. wherein this issue was restored back to the file of the A.O. to redecide the issue after giving the opportunity of hearing to the assessee and after considering the evidences and material that may be furnished

by the assessee. We therefore, restore the issue to the file of the AO. With a direction to redecide the same after giving adequate opportunity of hearing to the assessee and after considering the evidences and material that may be furnished by the assessee. The assessee shall under obligation furnish or adduce or produce reliable and cogent evidences or materials in support of the credit of amount by way of share application money. We order accordingly."

In pursuance thereto, the assessing officer undertook the exercise once again and disposed of the matter by his order dated 27th February, 2004. The Assessing Officer noticed the following pieces of evidence :

(a) There were 40 share applicants. All of them were issued summons under section 131 of the I.T.Act. Except for Mahabir Prasad Surulia and Gobardhan Das Surulia, the rest of the share applicants were not found at the address provided by the assessee.

(b) The assessee was informed that the share applicants were not found. The assessee was also requested to produce the share applicants to establish the genuineness of the transaction. The assessee failed to do so.

(c) Mahabir Prasad Surulia and Gobardhan Das Surulia, in response to the summons filed written statements stating that they did not know the company nor did they have any relation with the company. Mahabir Prasad Surulia stated that he was a driver by occupation. He had no income-tax file. Gobardhan Das Surulia is the father of the said Mahabir Prasad Surulia. He also stated that he was a driver by occupation. He did not know the company nor did he have any relation with the company.

(d) The written statements of the aforesaid Surulias were duly forwarded to the assessee seeking its reply thereto. The assessee, except for raising some technical defects did not answer the questions on merits.

(e) Upon comparison of the hand-writings appearing in the share application forms, the assessing officer was of the opinion that all the share applications were filled up by two persons.

(f) Cheques were all drawn on the Punjab National Bank, Jakaria Street Branch. The cheques appeared to have been issued from one cheque book which would be evident from the following table:

Date	Name of the applicant	Cheque No.	Drawn on
06.04.1994	Mahendra Kumar Roy	306038	Punjab National Bank, Jakaria Street Branch
11.4.1994	Sombhu Dayal Sharma	306062	-Do-
28.1.1995	Mahendra Kumar Roy	306040	-Do-
28.1.1995	Shambhu Dayal Sharma	306069	-Do-
20.02.1995	Anjana Roy	306015	-Do-
09.03.1995	Mahendra Kumar Roy	306041	-Do-

Neither of the share application forms contain any Permanent Account Number. On the basis of the aforesaid evidence, the assessing officer concluded that "*there is no existence of these share applicants who jointly provided the entire share application money of Rs.1,06,90,000/-*."

The assessing officer, therefore, made an addition of a sum of Rs.1,06,90,000/- under section 68 of the I.T.Act. In an appeal by the assessee, the CIT(Appeal) upheld the order passed by the assessing officer.

In a further appeal, the learned Tribunal tried to justify the order dated 28th January, 2003 which was not required because that would appear from the order remanding the matter. The justification was offered only for the purpose of establishing a nexus between the assessee/company and Sri K.P.Kedia. Submissions were made on behalf of the assessee, as would appear from paragraph-8 of the impugned judgement, that *"from the block assessment order of Sri K.P.Kedia placed in the Paper Book, it can be seen that the names of both the appellant companies are figuring in the Annexure – I list – the list of the so-called intermediary companies. He then drew the attention of the Bench to the order of the settlement Commission passed in the case of Sri K.P.Kedia and submitted that the Settlement Commission had rejected the application filed by Sri K.P.Kedia. The issue reached finality inasmuch as the additions were confirmed substantively in the hands of Sri K.P.Kedia. He submitted that the same income cannot be taxed twice – once in the hands of Sri K.P.Kedia and again in the hands of the assessee companies.*"

The learned Tribunal held that -

“The Settlement Commission vide its order dated 16.03.2006 (copy placed in the Paper Book) has rejected the application filed by Sri K.P.Kedia. This fact has not been disputed by the ld.D.R. appearing before us. Thus, the identity and the genuineness of the share capital of the assesssee companies have been proved beyond doubt. Now, it has been established that the funds belonging to Sri K.P.Kedia have gone to the so-called beneficiary companies through the medium of the Annexure – I companies including the assessee-companies. In these facts and circumstances, in our considered opinion, the sustenance of the additions in the hands of the assessee companies would amount to double additions. Reliance on the decision in the case of Hindustan Tea Trading Co. Ltd.’s case (supra) by the A.O. and the ld.D.R. does not help the case of the department. In the said case before the Hon’ble Calcutta High Court, the issue was whether where the creditworthiness of the shareholders and the genuineness of investment is not established, can the share capital be added back ? Here, the issue is quite different. In the instant case, the department has added back the total share capital of 117 companies floated by Sri K.P.Kedia including the share capital of the assessee companies, in the hands of Sri K.P.Kedia which has reached finality by way of rejection of petition filed before the Settlement Commission. The issue hare is whether in such a situation, the addition of the share capital in the hands of the assessee companies can once again be sustained. We have already held that sustenance of such additions would amount to double additions.”

Even assuming that the funds belonging to Sri K.P.Kedia had gone to the so called beneficiary companies, including the assessee before us, that would not prove the identity of the shareholders or their creditworthiness or the genuineness of the transaction. The assessee/company is obliged to prove :

a) The identity of the alleged shareholders;

b) The creditworthiness of the shareholders;

c) The genuineness of the transactions.

In the case before us, there were 40 shareholders. 38 of them could not be found. Two of them stated that they had no connection with the company. They never applied for any share. They were drivers by profession. They did not give any money.

Can the transaction resulting in contribution of a sum of Rs.1,06,90,000/-, allegedly contributed by 40 applicants be said to have been proved genuine just because K.P.Kedia is said to have provided the funds ? The answer is no. That would on the contrary lead to a negative answer to all the three questions indicated above. As a result, addition under section 68 of the I.T.Act shall be perfectly justified. If K.P.Kedia has, in fact, provided any fund which is not accounted for in his Books of Accounts then it would attract addition to his income under section 69 of the I.T.Act. The addition to the income of Sri K.P.Kedia does not, in the least, diminish the liability of the assessee company under section 68. These are two different causes of action leading to addition against the income of two different persons. There is as such no question of any double taxation.

It may also be pointed out that the learned Tribunal failed to notice that the Settlement Commission in its order dated 16th March, 2006 has recorded that the case of K. P. Kedia was that he filed return on 21st August, 2000 of income reflecting undisclosed income of Rs.7.10 crores under compulsion. We are sorry to say that the learned Tribunal has mixed up the matters. The addition in this case under Section 68 has nothing to do with any investment claimed or admitted to have been made by K. P. Kedia outside his books of accounts. In case that is found to have been done, that would attract addition under Section 69 against Shri K. P. Kedia. The addition in the case of the assessee is on account of the sum found credited in its books of accounts maintained for the previous year in respect whereof the assessee failed to offer any explanation and the Assessing Officer for justified reasons added the amount of Rs.1,06,90,000/- to the income of the assessee.

Mr. Khaitan, learned senior advocate appearing for the assessee/respondent, submitted that by an order dated 28th March, 2001 passed under Section 143(3)/158BC(c) of the I.T. Act, the Assessing Officer assessed the income of Sri K. P. Kedia for the block period 1st April, 1988 to 12th March, 1999 at a sum of Rs.100,47,45,780/-. In doing so, the paid up capital of 117 companies including the assessee, before us, was taken into account. In an appeal preferred by said Sri K. P. Kedia, the CIT(A) by an order dated 16th May, 2008 deleted the additions made on account of the paid up share capital of 117 companies including the assessee, before us.

He submitted that the revenue has preferred an appeal challenging the order of the CIT(A) before the learned Tribunal and the ground taken by the revenue is, inter alia, *that* *the Ld. CIT(A)-VI, Kol had erred in deleting the addition of Rs.73,04,75,000/- under the head of paid up capital of 117 companies.*

Mr. Khaitan submitted that the same share capital, which is the subject matter of addition under Section 68 in this appeal, is also sought to be added to the income of Sri K. P. Kedia in the appeal pending before the Tribunal.

We have not been impressed by this submission for the reasons already discussed. We may add that the right to offer explanation under Section 68 is that of the assessee. No third party has any right to offer such explanation.

Mr. Agarwal, learned advocate appearing for the appellant/revenue, relied upon a judgement in the case of Jagmohan Ram Ram Chandra vs. C.I.T., reported in [2005] 274 ITR 405 and submitted that an identical view was taken by the Allahabad High Court in the aforesaid matter as we have done in this case.

In the present appeal, we are only concerned with the question whether the addition, under Section 68 made by the Assessing Officer and upheld by the CIT(A), was deleted for justifiable reasons. The question is answered in the negative.

The appeal is, thus, allowed.

Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, ACJ.)

(ARIJIT BANERJEE, J.)

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