

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

INCOME TAX APPEAL NO.1613 OF 2014

Commissioner of Income Tax-1

..Appellant

Versus

M/s. Gagandeep Infrastructure Pvt.Ltd.

..Respondent

Mr. Suresh Kumar for the Appellant.

Mr. Percy Pardiwala, Senior Counsel, a/w Atul Jasani for the Respondent.

**CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.**

DATE : 20th MARCH, 2017

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 23rd April, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. Mr. Suresh Kumar, the learned counsel appearing for the Revenue urges the following re-framed questions of law for our consideration:-

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.7,53,50,000/- under Section 68 of the Act

being share capital/share premium received during the year when the Assessing Officer held the same as unexplained cash credit?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restricting the disallowance under Section 14A of the Act only to the amount of expenditure claimed by the assessee in the absence of any such restriction under Section 14A and/or Rule 8D?”

3. Regarding question no.(i):-

(a) During the previous relevant to the subject Assessment Year the respondent-assessee had increased its share capital from Rs.2,50,000/- to Rs.83.75 lakhs. During the assessment proceedings, the Assessing Officer noticed that the respondent had collected share premium to the extent of Rs.6.69 crores. Consequently he called upon the respondent to justify the charging of share premium at Rs.190/- per share. The respondent furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form no.2 filed with the Registrar of Companies. The justification for charging share premium was on the basis of the future prospects of the business of the respondent-assessee. The Assessing Officer did not accept the explanation/justification of the respondent and invoked Section 68 of

the Act to treat the amount of Rs.7.53 crores i.e. the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of Section 68 of the Act.

(b) Being aggrieved, the respondent carried the issue in appeal. By an order dated 24th May, 2011 the Commissioner of Income Tax (Appeals) (CIT(A)) deleted the addition of Rs.7.53 crores made by the Assessing Officer by holding that the Assessing Officer had given no reason to conclude that the investment made (inclusive of premium) was not genuine. This inspite of evidence being furnished by the respondent in support of the genuineness of the transactions. Further he held that the appropriate valuation of the shares is for the subscriber/investor to decide and not a subject of enquiry by the Revenue. Finally he relied upon the decision of the Apex Court in *CIT v/s. Lovely Exports (P)Ltd.* 317 ITR 218 to hold that if the amounts have been subscribed by bogus shareholders it is for the Revenue to proceed against such shareholders. Therefore it held the Assessing Officer was not justified in adding the amount of share capital subscription including the share premium as unexplained credit under Section 68 of the Act.

(c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent-assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers, bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be on capital receipt and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in *Lovely Exports (P) Ltd.* (supra) to uphold the finding of the CIT(A) and dismissing the Revenue's appeal.

(d) Mr. Suresh Kumar, the learned counsel appearing for the Revenue contends that proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of

the present case even for A.Y. 2008-09. The basis of the above submission is that the *de hors* the proviso also the requirements as set out therein would have to be satisfied.

(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced “for removal of doubts” or that it is “declaratory”. Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the

capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in *Lovely Exports (P) Ltd.* (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.

4. (a) Admit the substantial question of law at (ii) above.

(b) The issue arising in question no. (ii) is essentially whether application of Rule 8D(2)(iii) of the Income Tax Act Rules would permit

the Revenue to disallow expenditure not claimed i.e. much larger than the expenditure / debited in earning its total income. The Counsel inform us that there is no decision on this issue of any Court available and it would affect a large number of cases where similar issues arise. Therefore, this issue would require an early determination. In the above view, at the request of the Counsel, the appeal is kept for hearing on 17th April, 2017 at 3.00 p.m., subject to overnight part-heard.

5. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

6. Stand over to 17th April, 2017.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)