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IN THE HIGH COURT OF DELHI AT NEW DELHI

R-182

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ITA 429/2003

COMMISSIONER OF INCOME TAX

... Appellant

Through: Mr. Raghvendra Singh,
Advocate.

versus

SHIV DHOOTI PEARLS & INVESTMENT
LTD.

..... Respondent

Through: Mr. C.S. Aggarwal, Senior
Advocate with Mr. Prakash Kumar,
Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

21.12.2015

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Dr. S. Muralidhar, J.:

1. This appeal by the Revenue under Section 260A(1) of the Income Tax Act, 1961 ('Act') is directed against the impugned order dated 30th April 2003 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 222/Del/2000 for the Assessment Year ('AY') 1994-95.

2. While admitting this appeal, the Court by its order dated 25th May 2004 framed the following questions of law for consideration:

1. Whether the ITAT has correctly interpreted and applied Section 68 of the Income Tax, 1961 while upholding deletion of Rs. 38 lakhs and Rs. 1,01,007 made by the Assessing Officer by applying the said section?

2. Whether the ITAT has erred in deleting addition of Rs. 38 lakhs and Rs.1,01,007 without going into and examining the credit worthiness of M/s. Tuq Credits Ltd. and genuineness of the transaction with reference to availability of funds with the said

company?

3. Whether the order of the ITAT is perverse as it ignores the reasons and grounds mentioned by the Assessing Officer for failure of the Assessee and M/s. Tom Investment Limited to furnish details and information with regard to Tuq Credits Limited source of funds available with Tuq Credits Limited genuineness of transaction and credit worthiness of Tuq Credits Ltd.

3. The facts leading to filing of the present appeals are that the Assessee, Shiv Dhooti Pearls & Investment Limited, filed its annual return of income on 29th November 1994 for the AY in question declaring Rs. 13,68,440. The return was accompanied by the tax audit report under Section 44AB of the Act and the audited final accounts. The return was picked up for scrutiny and notices were issued under Section 143 (2) of the Act on 22nd August 1995.

4. In the assessment order dated 28th February 1997 the Assessing Officer ('AO') noted that the Assessee continued to derive its business income, as in the earlier years, from trading in gold and diamond ornaments. It was noted by the AO, *inter alia* that the balance sheet of the Assessee showed the receipt of unsecured loans of Rs. 38 lakhs and a sum of Rs. 1,01,007 on account of interest accrued on the above amount. The Assessee was asked to furnish the evidence regarding identity, creditability and genuineness of the source of its income.

5. Pursuant thereto, the Assessee disclosed that the amount was borrowed from Tom Investment Limited ('TIL'), 9, Ezra Street, Calcutta. The acknowledgement of the return filed by TIL showed that it had returned an income of Rs. 2,904 in the AY in question and a loss of Rs. 18,677 in the AY 1996-97 which created doubts about TIL's creditworthiness.

Accordingly, TIL was asked to furnish the source of its lending.

6. The Authorised Representative ('AR') of TIL attended the proceedings and intimated that the amount lent to the Assessee had in turn been borrowed from M/s. Tuq Credits Limited ('TCL'), the address of which was the same as TIL, i.e., 9, Ezra Street, Calcutta. The AR of TIL was then requested to prove the genuineness and credibility of TCL. However, the AR of TCL expressed his difficulty in furnishing that information. Thereafter, summons were issued under Section 131 of the Act to TCL asking it to furnish, *inter alia*, certificate of incorporation, its PAN/GIR No and ward/circle/range, audited copies of the balance sheet, profit & loss account and auditor's report for the period ending 31st March 1994, 31st March 1995 and 31st March 1996, bank statement showing the lending of money to TIL, confirmation of the parties and their complete addresses, if any, from whom further loans have been obtained.

7. The letter containing the summons sent by registered post (speed post) to TCL was received back unserved with the remarks 'not available.' The AO then concluded that TCL was not a genuine party which could have lent the money to TIL, which in turn lent the said amount to the Assessee. It was, therefore, concluded that "the entire chain of lending and borrowing is bogus." From the chart of lending to the Assessee and from the confirmation given by TIL it was noted by the AO that the cheques issued by TCL were later than the dates on which the cheques were issued by TIL in favour of the Assessee. This, according to the AO, further corroborated the fact that the transactions were not genuine. Accordingly, a sum of Rs. 38 lakhs as unsecured loan was treated as unexplained income of the Assessee under Section 68 of the Act. A sum of Rs. 1,01,007 shown as interest payable on the said loan was also disallowed as an expenditure.

The income of the Assessee was computed as Rs. 52,84,439.

8. An appeal was filed by the Assessee before the Commissioner of Income Tax (Appeals) [‘CIT (A)’]. By an order dated 24th October 1997 the CIT (A) allowed the Assessee’s appeal and held that as long as TIL had confirmed the loan advanced by it to the Assessee, the Assessee had discharged the onus on it under Section 68 of the Act to prove the identity, genuineness and creditworthiness of the creditor. It was further found that repayments had also been made by the Assessee to TIL of the borrowed amount by cheques and tax at source of Rs. 30,171 had been deducted from the interest payment of Rs. 1,31,178. By its letter dated 27th and 31st January 1997 TIL had clarified the facts pertaining to the said loan. The CIT (A) found that the following documents were also placed before the AO:

- (a) confirmation of account of the Assessee in the books of TIL;
- (b) copy of the bank statement of the Assessee with Central Bank of India showing the receipt of loans raised from TIL;
- (c) copy of the bank statement of TIL showing both the receipt of monies and the encashment of cheques issued by it to the Assessee;
- (d) audited balance sheets of TIL as on 31st March 1994, 31st March 1995 and 31st March 1996;
- (e) certificate of incorporation of TCL including a photocopy of Form No. 18 filed with the Registrar of Companies, West Bengal.

9. The CIT (A) also noted that from the chart in regard to encashment of cheques issued in favour of the Assessee it was clear that the corresponding amounts had been received from TCL by TIL. Therefore, the finding of the AO that the entire chain of lending and borrowing was bogus, was unsubstantiated. The CIT (A), therefore, allowed the appeal

and deleted the additions made by the AO.

10. The Revenue then appealed to the ITAT. By the impugned order dated 30th April 2003 the ITAT dismissed the appeal. In addition to the factors already noticed by the CIT (A), the ITAT examined the details furnished by the Department Representative ('DR') on 11th February 2003 with regard to the return filed by the TIL (lender) for AYs 1997-98 and 1998-99. For AY 1997-98, a refund of Rs. 2,98,408 was obtained and the refund was issued to TIL which was on account of tax deducted at source by M/s. Mehra Sons, Jewellers and the Assessee. The letter of TIL issued to Assistant Commissioner of Income Tax ('ACIT'), Calcutta showing complete address of the Assessee, along with address of the AO of the Assessee was also furnished. It was clear that the amount was advanced to the Assessee by TIL and the interest was paid year after, on which the tax was deducted at source and the same was deposited in the government account. After verifying the genuineness of the tax deducted and paid, then the refund was issued to TIL. Apart from showing that the Department had accepted the genuineness of the AO of the Assessee who was regularly assessed to income tax, the Department has also accepted the return filed by TIL. It was therefore, held that all the three ingredients for proving the identity, genuineness and creditworthiness of the creditor were present in the case.

11. Mr. Raghvendra Singh, learned standing counsel for the Revenue, relied on the decision of the Gauhati High Court in **Nemi Chand Kothari v. Commissioner of Income Tax** (2003) 264 ITR 254 (Gau) and urged that it was incumbent on the Assessee to prove the creditworthiness of TIL which in turn hinged upon the genuineness, identity and credit worthiness of TCL. Mr. Singh submitted that TIL having failed to

establish the genuineness and creditworthiness of TCL, the burden shifted to the Assessee to do so.

12. The Court has examined the decision of the Gauhati High Court in ***Nemi Chand Kothari*** (supra). Therein the Gauhati High Court referred to Section 68 of the Act and observed that the onus of the Assessee “to the extent of his proving the source whom which he has received the cash credit.” The High Court held that the AO had ample ‘freedom’ to make inquiry “not only into the source(s) of the creditor, but also of his (creditor’s) sub-creditors and prove, as a result, of such inquiry, that the money received by the Assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself.” Thereafter, the High Court, on a harmonious construction of Section 106 of the Evidence Act and Section 68 of the Act, held as under:

“What, thus, transpires from the above discussion is that while Section 106 of the Evidence Act limits the onus of the Assessee to the extent of his proving the source from which he has received the cash credit, Section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor, but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the Assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the Assessee himself. In other words, while Section 68 gives the liberty to the Assessing Officer to enquire into the source/sources from where the creditor has received the money, Section 106 makes the Assessee liable to disclose only the source(s) from where he has himself received the credit and it is not the burden of the Assessee to show the source(s) of his creditor nor is it the burden of the Assessee to prove the creditworthiness of the source(s) of the sub-creditors. If Section 106 and Section 68 are to stand together, which they must, then, the interpretation of Section 68 has to be in such a way that it does not make Section 106 redundant.

Hence, the harmonious construction of Section 106 of the Evidence Act and Section 68 of the Income Tax Act will be that though apart from establishing the identity of the creditor, the Assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the Assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the Assessee and the creditor. What follows, as a corollary, is that **it is not the burden of the Assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the Assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been, eventually, received by the Assessee.** It, therefore, further logically follows that the creditor's creditworthiness has to be judged vis-a-vis the transactions, which have taken place between the Assessee and the creditor, and **it is not the business of the Assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the Assessee.**" (emphasis supplied)

13. The above observations, far from supporting the case of the Revenue, does the opposite. In the subsequent decision of this Court in ***Mod. Creations Pvt. Ltd. v. Income Tax Officer (2013) 354 ITR 282 (Del)***, the position was clarified by the Court and it was held:

"It will have to be kept in mind that Section 68 of the I.T. Act only sets up a presumption against the Assessee whenever unexplained credits are found in the books of accounts of the Assessee. It cannot but be gainsaid that the presumption is rebuttable. In refuting the presumption raised, the initial burden is on the Assessee. This burden, which is placed on the Assessee, shifts as soon as the Assessee establishes the authenticity of transactions as executed between the Assessee and its creditors. It is no part of the Assessee's burden to prove either the genuineness of the transactions executed between the creditors and the sub-creditors nor is it the burden of the Assessee to prove the credit worthiness

of the sub-creditors.”

14. In **Mod. Creations Pvt. Ltd.** (*supra*) this Court negated the case of the Revenue that the onus was on the Assessee to prove the source of the sub-creditor. It was observed as under:

“14. With this material on record in our view as far as the Assessee was concerned, it had discharged initial onus placed on it. In the event the revenue still had a doubt with regard to the genuineness of the transactions in issue, or as regards the credit worthiness of the creditors, it would have had to discharge the onus which had shifted on to it. A bald assertion by the A.O. that the credits were a circular route adopted by the Assessee to plough back its own undisclosed income into its accounts, can be of no avail. The revenue was required to prove this allegation. An allegation by itself which is based on assumption will not pass muster in law. The revenue would be required to bridge the gap between the suspicions and proof in order to bring home this allegation. The ITAT, in our view, without adverting to the aforementioned principle laid stress on the fact that despite opportunities, the Assessee and/or the creditors had not proved the genuineness of the transaction. Based on this the ITAT construed the intentions of the Assessee as being malafide. In our view the ITAT ought to have analyzed the material rather than be burdened by the fact that some of the creditors had chosen not to make a personal appearance before the A.O. If the A.O. had any doubt about the material placed on record, which was largely bank statements of the creditors and their income tax returns, it could gather the necessary information from the sources to which the said information was attributable to. No such exercise had been conducted by the A.O. In any event what both the A.O. and the ITAT lost track of was that it was dealing with the assessment of the company, i.e., the recipient of the loan and not that of its directors and shareholders or that of the sub-creditors. If it had any doubts with regard to their credit worthiness, the revenue could always bring it to tax in the hands of the creditors and/or sub-creditors. [See **CIT v. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi)** and **CIT v. Lovely Exports (P) Ltd. (2008) 216 CTR 195 (SC)**].”

15. In view of the legal position explained in the above decisions, the Court holds that as far as the present case is concerned, the Assessee has indeed discharged its onus of proving the creditworthiness and genuineness of the lender (TIL). There was no requirement in law for the Assessee to prove the genuineness and credit worthiness of the sub-creditor, which in this case was TCL.

16. Consequently, the question (i) framed by the Court is answered in the affirmative, and questions (ii) and (iii) in the negative i.e., in favour of the Assessee and against the Revenue.

17. The appeal is accordingly dismissed but, in the facts and circumstances of the case, with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

DECEMBER 21, 2015

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