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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 14th January, 2015

+ **ITA 659/2014**

COMMISSIONER OF INCOME TAX-II Appellant
Through Mr. Rohit Madan, Mr. Ruchir Bhatia
and Mr. Akash Vajpai, Advs.
versus

LALIT KUMAR PODDAR Respondent
Through Ms. Prem Lata Bansal with Mr. Ram
Avtar Bansal, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The revenue is aggrieved by the order dated 17.1.2014 of the ITAT in ITA 5400/Del/2011. It urges two questions of law :

(i) Whether the assessee's loss on account of intraday trading in shares, is truly speculative in nature and liable to be treated as such?

(ii) Whether the interest-free loans secured by the assessee to the tune of ₹1.55 crores were in the circumstances of the case liable to be added under Section 68 of the Act?

2. The assessee engages itself in trading in stocks and shares and acts as a sub-broker. It had claimed a sum of ₹66,35,210/- on account of clearing difference. In the assessment year 2007-08 it also reflected an amount of ₹1.55 crores as loans/advance obtained from various parties and entities.

The assessing officer proceeded to treat the first amount i.e. ₹66.35 lakhs as a speculative loss and disallowed it on account of Section 73(1). As far as the sum of ₹1.55 crores was concerned the assessing officer added it back under Section 68, doubting the genuineness of the transaction.

3. So far as the addition of ₹66,35,210/- is concerned the CIT and the ITAT upset the findings of the assessing officer. Both the appellate bodies were of the opinion that the nature and character of the transaction was such that it did not fall within the description of speculative transaction and that given the material produced by the assessee, all the shares and scripts purchased from the broker were on firm basis.

4. This Court has considered the submissions of the parties. The relevant findings of the CIT(Appeal) in this regard are as follows :

“I have carefully considered the submissions made on behalf of the appellant and the findings recorded by the Id. AO. on consideration. I find that the clearing difference of Rs.6635210/-has been determined by the appellant on the basis of statement of purchase and sales of shares and securities made on his behalf by M/s. Indus Portfolio (P) Ltd. a perusal of the ledger account of Indus Portfolio (P) Ltd. maintained in the books of the appellant and the contract notes issued by the said company clearly reveals that the broker has actually purchased and sold shares and securities on behalf of the assessee and necessary charges on account of STT, stamp duty and other statutory levies have been debited to the assessee’s account. The Id. Counsels for the appellant have rightly pointed out that with the introduction of ‘online computerized’ trading of securities, the transactions are automatically recorded by the stock exchanges and there is no requirement of physical delivery of said certificates etc. The purchase and sale is routed through demat accounts and the only way to find out the profit

and loss on the purchase and sales of securities made through a broker is the account statement submitted by such broker from time to time. In the present case, the appellant has maintained all the regular books of accounts and all necessary details have been filed before the AO in the course of assessment proceedings. Therefore, in my view, the AO was not justified in holding the loss of Rs. 66.35 lacs as speculative in nature. Accordingly, he is directed to treat the loss of Rs. 66.35 lacs as normal business loss as has been done by his predecessors and successor in the Ays 2005-06, 2006-07 and 2008-09.”

5. Both the CIT (Appeal) and the ITAT took into consideration the assessee's explanation that certain intraday transactions – broadly described as “clearing differences”, were held over in the sense that the delivery had to be obtained. The assessee had also apparently argued before the concerned authorities and placed a chart reflecting the transactions to support the submission that even in respect of intraday sales, consideration had passed. A look at the order of the CIT (Appeal) as well as ITAT nowhere reflect this position. Even the discussion of the assessing officer while including a sum of ₹66,35,210/- would show that the no rationale has been given as to whether in fact consideration flowed for the intraday purchases and sales effected by the assessee so as to take it out of the mischief. Having regard to these facts this Court is of the opinion that the matter should be considered afresh and express findings recorded as to whether in fact intraday purchases and sales made by the assessee were jobbing transactions and whether consideration has passed. The CIT (Appeal) shall call for a remand report in this regard and after hearing the submissions of the parties, return the findings in this regard. It is open to the parties to make all submissions in accordance with law. All other rights of the parties in this regard are

reserved.

6. So far as the second question i.e. addition under Section 68 is concerned this Court notices and both the CIT and ITAT examined the question in detail. All the seven creditors of the assessee had confirmed the transactions. Their creditworthiness was established in the sense that relevant documents in support of their possessing and requisite funds to advance loans to the assessee were examined. It was also noticed that this amount was represented by the assessee to the said creditors. In the circumstances, the appropriate course – if the assessing officer felt that being interest-free, certain amounts were deemed to be included as income – was to do so in accordance with law rather than proceeding under Section 68 as he did. The mandate of the law as explained in *CIT V. Lovely Exports (P) Ltd.* 216 CTR 195 is that onus is upon the assessee to disclose the true identity of the creditor and the creditworthiness of the said party. In this case since the identity and creditworthiness had been established, genuineness was a matter of inference. This Court is satisfied that both the CIT and ITAT acted in consonance with law. No substantial question of law arises in this count.

7. The appeal is partly allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 14, 2015/vld