

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

Judgment Reserved on September 03 , 2014

Judgment Delivered on September 16, 2014

+ **ITA No. 1270/2011**

COMMISSIONER OF INCOME TAX-VIAppellant

Through: Mr.Sanjeev Sabharwal,
Sr.Standing Counsel/Sr.Advocate
with Mr.Ruchir Bhatia, Ms.Swati
Thapa, Advocates

versus

M/S. T.S.KISHAN & CO. LTD. Respondent

Through: Mr.Ved Jain, Advocate with
Ms.Pranjal Srivastava, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) pertains to assessment year 2005-06 and emanates from order dated June 14, 2011 passed by the Income Tax Appellate Tribunal, Delhi ('Tribunal', for short) in ITA No. 4938/DEL/2010, whereby the Tribunal while dismissing the appeal filed by the Revenue, confirmed the order of the CIT(A), wherein, it concluded as under:-

“6. We have heard the rival contentions in
light of the material produced and precedent

relied upon. We find that assessee has duly submitted that the loans were received by cheque and were paid in subsequent assessment years and necessary, evidence in this regard has also been submitted in the shape of the affidavit, bank statement. In these circumstances, we find that the Ld. Commissioner of Income Tax (Appeals)'s action in deleting the addition is justified. Hence, we do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals) and hence, we uphold the same”.

2. The following substantial question of law was framed by this Court on 26.03.2012:

“Whether the Income Tax Appellate Tribunal was right in dismissing the appeal of the Revenue upholding deletion of addition of Rs. 28,00,000/- under Section 68 of the Income Tax Act, 1961”.

3. The relevant facts, as emerged from the Assessment order dated December 28, 2007, are that the respondent assessee, i.e., M/s. T.S. Kishan & Co. Ltd., (hereinafter referred to as ‘respondent assessee), filed its return of income declaring a loss of Rs. 44,70,307/-. The return was processed under Section 143(1) of the Act and thereafter, a notice was issued under Section 143(2) of the Act, initiating scrutiny assessment proceedings.

4. The Assessment officer vide its order dated December 28, 2007, assessed the total loss of Rs. 16,70,307/-, while reducing the returned loss by making an addition of Rs. 28,00,000/- pertaining to unsecured loans credited in the books of account of the assessee being income from undisclosed sources under Section 68 of the Act. Relevant portion of the Assessment order is reproduced hereunder:

“4. Keeping in view the above position, the assessee was required vide order sheet entry dated 20.12.2007 to prove identification, genuineness and creditworthiness as per the provisions of Sec. 68 of the IT Act, 1961 in respect of both the aforesaid firms i.e. M/s. Shila Textile and M/s. Rajesh Upadhyay & Co. Case was adjourned to 24/12/2007.

5. On 24/12/2007, Shri Dinesh Aggarwal, CA attended the office. But, he could not provide PAN, Address or confirmation of loan taken from M/s. Shila Textile and M/s. Rajesh Upadhyay & Co. The assessee submitted that the subject loans were taken by cheque and the amount of loan was repaid by cheque in the next year i.e. FY 2005-06. The assessee sought time to try again in contacting the aforesaid firms. Proceedings were adjourned to 28.12.2007.

6. On 28/12/2007, the assessee filed an affidavit in which he provided the particulars of loan obtained by cheque and also returned by cheques. I have considered the affidavit as well as other submissions made by the assessee in this regard. But, the fact remains that the assessee has not discharged the onus cast upon it to identify the persons and prove their creditworthiness of having advanced the loan to the assessee. This is the requirement of law as per the provisions contained in Sec. 68 of the IT Act,

1961.

7. Hence, reference is invited to the recent decision of Hon'ble Delhi High Court in the case of CIT Vs Himalaya International Ltd., in which Hon'ble Court has held vide its order dated 30.07.2007 that if the Assessing Officer harbours doubts of the legitimacy of any subscription, he is empowered, nay duty-bound to carry out thorough investigation u/s 68 of the IT Act, 1961. The assessee has to prima facie prove (1) the identity of the credit/subscriber (2) the genuineness` of the transaction (3) the credit worthiness. Further, reference is also invited to the decision of Hon'ble Calcutta High Court in the case of CIT Vs M/s. Precision Finance Pvt. Ltd. (208 ITR 465) & CIT Vs M/s. Korloy Trading Co. Ltd. (232 ITR 820) on the issue in hand.

8. Keeping in view the above discussion, sum of Rs. 28,00,000/- pertaining to unsecured loans credited in the books of account of the assessee during the FY 2004-05 is treated as undisclosed income u/s 68 of the IT Act, 1961.”

5. On appeal filed by the assessee, CIT(A) has framed two issues, first being whether the Assessing Officer has erred in law and on facts and was justified in treating unsecured loans of Rs. 28,00,000/- as income of the assessee, and the second being the initiation of penalty proceedings u/s 271(1)(c).

6. CIT(A) vide its order dated September 01, 2010, allowed the above appeal. The findings of the CIT(A) are reproduced hereunder:

“10. In view of the above, the identity of both the parties i.e. M/s Sheela Textile and Rajesh Upadhyaya & Co stands proved.

11. The Ld. AO has obtained the bank statements of both the parties. From the bank statement it is clear evident that the loan amount is flowing from the above bank accounts of the parties to the account of the assessee by account payees cheque only. Similarly, the repayments by the assessee from its bank account with the Indian Overseas bank are flowing back to both the parties account with Bank of Baroda by account payee cheques only. While issuing the cheques to the assessee, both the parties have the bank account balance with them out of which the money was received by the assessee. In view of this credit worthiness and genuineness also stand proves.

12. Further from the close scrutiny of the above bank statement, it would be observed that there are the frequent transaction in the bank account whereby regular amounts are being deposited and withdrawals made, both by cheque and cash. This shows that both the firms are having some regular business and the money tended to the assessee is out of this business only. The assessee has submitted a detailed affidavit before the learned AO a copy of which is enclosed herewith as Annexure I. This affidavit contains the factual position, copy of ledger accounts of the parties appearing in the books of the assessee, bank statement of the assessee showing receipt and repayment of loans, confirmation from the assessee's bank for the repayment of loans and other supporting documents.

13. In a recent Judgment, Honorable Delhi High Court in the case of CIT v/s Dwarkadish Investment Pvt. Ltd. ITA 9011/2010 dated August 2, 2010 (2010) 6 Taxmann.com 84 (delhi) (A Copy of the order is attached herewith as Annexure IV) held that though in Section 68 proceedings, the initial burden of proof lies on the assessee yet he once proves the identity of the creditors/share applicants by either furnishing their PAN or Income Tax

assessment no. and shows the genuineness of transaction by showing money in his books either by way of account payee cheque or by draft or by any other mode than the onus of proof would shift to the revenue. It was also held that just because creditor/share applicant could not be found at address given, and it would not give Revenue right to invoke section 68. Moreover, it was held that it is a settled law that the assessee need not to prove the "source of source".

14. In this case of the assessee though it is not able to provide the PAN of the Parties who have lent the money but had been able to provide all the other material to prove the identity of the party by furnishing the account opening form mentioning the address, photo of one of the lender and the PAN of the introducer of the account. Today when the bank are supposed to follow the KYC norms as stipulated by the Reserve Bank of India, the existence of bogus parties does not arise and that too for an account running since 2001 that is almost for 10 years now. The address as given by the assessee is same as has been mentioned in the bank account opening form and all the parties do exist even today at these address though it has been denied to the inspectors who had gone for the inspection.

15. The genuineness of the transaction is proved by the fact that the money has been received by the assessee from the bank account of the lenders by account payee cheque only as evident from the bank statement of both the parties and assessee. A certificate from the bank has also been submitted before the AO which is forming a part of the affidavit submitted by the assessee.

In view of above it is prayed that the appeal of the assessee may kindly be allowed by deleting the addition of Rs. 28 lacs on account of unexplained credits u/s 68 of Income Tax Act."

8. *I have gone through the assessment order and the detailed written submissions filed by the AR in this regard.*

9.1 *The assessee has shown receipt of Rs. 28,00,000/- as loans from the following two parties:*

1. *Sheela Textiles Rs. 5,00,000/-*
2. *Rajesh Kumar Upadhaya & Co. Rs. 23,00,000/-*

9.2 *The AO disbelieved the credits on the grounds that identity and creditworthiness of the transactions are not proved. The contentions of the AR are that the amounts were received by way of cheques and the amounts were repaid in the subsequent assessment years apart from stating that necessary evidence was furnished before the AO by way of Affidavit and Bank Statements.*

9.3 *The AO has not disputed the repayment of loans in subsequent assessment year/s. in the case of ITO vs. Shyam Sunder Jajodia (2008) 26 SOT 541 (Delhi), the Hon'ble Tribunal has held that repayment of loan confirms the earlier acceptance of loan.*

9.4 *After careful consideration of the facts brought on record, the identity, creditworthiness 86 genuineness of the transactions as envisaged u/s 68 are adequately proved. In the light of the above discussion, the action of the AO is not upheld."*

7. Aggrieved by the order dated September 01, 2010 passed by the CIT(A), the Revenue filed ITA No. 4938/Del/2010 before the Tribunal i.e. Income-Tax Appellate Tribunal, New Delhi, wherein the issue raised by the Revenue was that whether the Ld. CIT(A) erred in deleting the

addition of Rs. 28,00,000/- on account of unexplained receipts of unsecured loans.

8. The Tribunal vide its order dated June 14, 2011, dismissed the appeal of the Revenue while justifying the findings found by the CIT(A) in its order. The relevant finding of the order passed by the Tribunal are hereunder:

“6. We have heard the rival contentions in light of the material produced and precedent relied upon. We find that assessee has duly submitted that the loans were received by the cheque and were paid in subsequent assessment years and necessary, evidence in this regard has also been submitted in the shape of the affidavit, bank statement. In these circumstances, we find that Ld. Commissioner of Income Tax (Appeals)’s action in deleting is justified. Hence, we do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals) and hence, we uphold the same.”

9. Aggrieved by the order passed by the Tribunal, revenue filed the present appeal inter alia on the following grounds:

- a. Order of CIT(A) as well as the Tribunal is a non speaking order.
- b. The Tribunal as well as CIT(A) erred in coming to the conclusion that the assessee had discharged the initial onus which lay upon him in terms of Section 68 of the Act.

- c. The Tribunal as well as the CIT(A) completely failed to take note of the fact that no credible evidence in respect of these firms was brought on record to establish their identity, genuineness of the transaction and credit worthiness of such firms.
- d. The Tribunal as well as CIT(A) erred in relying upon the affidavit filed by the assessee which was a self serving evidence and placing too much reliance on the bank statement produced of the firms to prove identity and genuineness.

10. Mr.Sanjeev Sabharwal, learned counsel for the appellant-Revenue would submit that the assessee has failed to discharge the onus in proving the identity, genuineness of the transactions and creditworthiness of the parties. According to him, the Assessing Officer has rightly treated the income from other sources and made an addition. He would further state that the CIT(A) and the Tribunal have not appreciated the facts in proper prospective while concluding in favour of the assessee. According to him, the finding of the CIT(A) and the Tribunal that the assessee has repaid the loan in subsequent year was without ascertaining whether interest was paid by the assessee for the loans; the reliance placed by the CIT(A) on the affidavit of the assessee which is a self-serving evidence, was untenable. The reliance on the bank statements of the parties by the CIT(A) could not prove the

identity, genuineness on the transactions; the parties were found to be non-existent at the given address. According to him, the tests laid down by this Court in the case of ***CIT Vs. Oasis Hospitalities (Pvt.) Ltd., ITA No. 2093/2010***, decided on 31.01.2011 have not been satisfied.

11. On the other hand, Mr. Ved Jain, learned counsel for the respondent-assessee supports the conclusion of the CIT(A) and the Tribunal. He would state that the assessee could able to prove the identify and genuineness of the transactions through the account details of the parties from where the loan was advanced. He relied upon affidavit filed by the assessee with regard to the transactions. He would further state that the genuineness of the loan of Rs. 42,05,000/- which was also arranged by Mr. Bharat Kaushik has been accepted by the Assessing Officer and there was no reason for the Assessing Officer to reject loans for Rs. 28 lakhs.

12. Having heard the learned counsel for the parties, before we deal with the rival submissions, the position of law is as under:

13. Section 68 of the Income Tax Act, 1961 ('Act' in short), empowers the Assessing Officer to treat the income credited in the books of accounts of the assessee for any previous year if there is no plausible explanation by the assessee about the nature and source of such income or if the explanation given is not satisfactory. Once it is explained, it is

for the Assessing Officer to consider the same and form an opinion about the genuineness of the whole transactions. Such an opinion must be based on cogent evidence i.e. material produced by the assessee. In ***A.Govinda Rajulu Mudaliar Vs. CIT, [1958] 34 ITR 807 (SC)***, it was held that it is not necessary for the department to adduce evidence to show from which sources the income was derived and as to why it should be treated as undisclosed income. If the assessee fails to prove satisfactory the source and nature of certain amount of cash received through the accounting year, the ITO is entitled to draw an inference that the receipts are of an assessable nature. Therefore, the burden of proving the source of such income is on the assessee.

14. In ***CIT Vs. Durga Prasad More, [1971] 82 ITR 540 (SC)***, it was held that the discharge of onus is dependent on the facts and circumstances of each case. Whether the initial onus is discharged or not that has to be ascertained from the materials on record. Once the initial onus is discharged, the onus shifts on the Revenue. Then, it is for the Revenue to act on it and until it comes to a finding that the explanation is insufficient and unsatisfactory, it could either ask for further explanation or could come to a decision on the basis of such material, but it is also a necessity or incumbent on the taxing authority to discharge their duty before fastening liability on the assessee. Therefore, when the materials

are placed before it, the Revenue is duty bound to look into the same.

15. In the present case, it is seen insofar as the identity is concerned, the assessee could not produce the PAN Number of both the parties. The Assessing Officer, using his power under Section 131 of the Act, had called upon the bankers of the parties to produce the necessary particulars. The banks could only produce the account opening forms and bank statements of the parties. We do not think that the efforts made by the Assessing Officer and the fact that he was able to procure the bank statement would justify the finding and conclusion that identity, creditworthiness and genuineness of the transactions stands established. The findings recorded by the Assessing Officer and which remained unnoticed are telling and unequivocal. Attempts made by the Assessing Officer to serve the parties at 17/4, Mathura Road, New Delhi proved futile. This position is admitted and it is accepted by the counsel for the respondent that the address mentioned was correct. Mr. Bharat Kaushik, who acted as an introducer while opening the accounts and who is said to be the son of an old friend and was instrumental for arranging funds, was not produced on the pretext that the assessee was not in best relations with him. This appears to be a ploy for not producing him. His presence definitely would have thrown light on the identity of the parties. We also note, at the same time, the Assessing Officer should

have invoked Section 131 of the Act to ensure his presence. The parties who had given loans of Rs.28 lacs namely Sheela Textile and Rajesh Upadhyaya & Co. were not produced. That apart, we note the Account Numbers being 51706, 51921 are in close proximity and have been opened around the same time. It is surprising that the bank had not even cared to seek the complete details of the parties at the time of the opening of the account like their PAN Number. It is also not disputed by the learned counsel for the assessee that the assessee had not paid any interest to the parties for advancing such huge loans. It has also come on record that the parties were not known to the assessee so as to oblige the assessee by advancing interest free loan of substantial amounts. The purpose for which the loans were taken, have not been spelt out by the assessee in his affidavit or otherwise. The Paying back of the so called loans by way of an Account payee cheque is not conclusive, moreso, if the aspects narrated above, are considered cumulatively. The facts have to be seen in the context of Section 68 of the Act. Suffice to state, the identity of the parties have not been proved, their creditworthiness not established and genuineness of transactions not demonstrated. In this context the respondent assessee was unable to file/give PAN number, details of income tax returns etc.

16. The Calcutta High Court in the case of ***CIT Vs. Precision Finance***

(P) Ltd., [1994] 208 ITR 465 (Cal) has held that it is for the assessee to prove the identity of the creditors, their creditworthiness and genuineness of the transactions. Mere furnishing of particulars is not enough. It was found, in that case, on enquiry by the ITO that the assessee was not traceable and there was no such file. The first ingredient as to the identity was not established. Similar view was taken by the same High Court in the case of **CIT Vs. Korley Trading Co. Ltd., [1998] 232 ITR 820 (Cal)** wherein, the High Court held the creditors should be identified; there should be creditworthiness, genuineness of the transactions. The furnishing of income tax file number is not enough to prove the genuineness of cash credit.

17. We also note in agreement the judgment of this Court as relied upon by Mr. Sanjeev Sabharwal in support of his case in **CIT Vs. Oasis Hospitalities (Pvt.) Ltd (supra)**, wherein, this Court has held as under:

“11. It is clear from the above that the initial burden is upon the Assessee to explain the nature and source of the share application money received by the Assessee. In order to discharge this burden, the Assessee is required to prove:

- (a) Identity of shareholder;*
- (b) Genuineness of transaction; and*
- (c) Credit worthiness of shareholders.*

12. In case the investor/shareholder is an individual, some documents will have to be filed or

the said shareholder will have to be produced before the AO to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.

13. Genuineness of the transaction is to be demonstrated by showing that the Assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the credit/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the Assessee would have satisfactorily discharge the onus cast upon him. Thereafter, it is for the AO to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the Assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the AO and he cannot go into the realm of suspicion.”

18. The CIT(A) and the Tribunal, in our view, have committed an error in not properly approaching the issue which fell for their consideration out of the findings rendered by the Assessing Officer. In

such a situation, it has to be held that they have committed substantial error of law in interfering with the order of the Assessing Authority without any proper basis.

19. In view of the aforesaid, we are therefore convinced that interference is required by this Court in this appeal. We accordingly set aside the order of the Tribunal and restore the order of the Assessing Officer. The question of law is accordingly decided in favour of the appellant-Revenue and against the respondent-assessee.

20. The appeal is disposed of.

21. No costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

SEPTEMBER 16, 2014

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