

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

INCOME TAX APPEAL NO. 1502 OF 2016

Pr. Commissioner of Income Tax -14
426, Aaykar Bhavan,
Churchgate, Mumbai - 400 020.

.. Appellant

Versus

M/s. Aditya Birla Telecom Ltd
5th Floor, Windsor Off. CST Rd,
Kalina, Santacruz (E),
Mumbai.
PAN: AAACA5315A

.. Respondent

-
- Mr. Suresh Kumar a/w Ms. Sumandevi Yadav for the Appellant
 - Mr. Jehangir Mistri, Senior Counsel a/w Mr. Madhur Agrawal i/b Atul Jasani for the Respondent
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**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.**

DATE : MARCH 26, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short) raising following question for our consideration:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in deleting the addition of Rs. 2098.25 crores made under Section 68 of the I.T. Act, 1961?"

2. Brief facts are as under:-

3.1 Respondent assessee, M/s. Aditya Birla Telecom Ltd is a registered company and is engaged in providing telecommunication services. While assessing the company's return of income for the assessment year 2009-10, the Assessing Officer noticed that the assessee company had issued 19,25,000 preference shares, each of the face value of Rs. 10/- to one P5 Asia Holding Investment (Mauritius) Ltd (hereinafter referred to as "P5AHIML") at Rs. 10,890/- per share. Through allotment of these shares, thus, the company had received the share amount of Rs. 1,92,50,000/- and total premium of Rs. 2096.32 crores (rounded off). The company had thus received total sum of Rs. 2098.25 crores. The dividend would be paid at the rate of 0.00001% per annum on the face value of the preference shares. Upon completion of period of ten years of issuance of preference shares, the same would be converted into equity shares at a premium of Rs. 10,890/- per share. The Assessing Officer noticed that the assessee's holding company M/s. Idea Cellular Limited and its nominee owed 1,00,00,000 equity shares of Rs. 10/- each. He was of the opinion that the

assessee had received share capital towards preference shares from P5AHIML at terms which were so adverse to P5AHIML, that no prudent businessman would ever agree to subscribe to preference shares on such terms.

3.2 On such basis, the Assessing Officer initiated inquiry into the assessee receiving such sum of Rs. 2098.25 crores, whether the same would be covered by Section 68 of the Income Tax Act, 1961 ("the Act" for short). The Assessing Officer, therefore, called upon the assessee to prove the identity of the investor, its capacity to make such investment and the genuineness of the transaction. In furtherance of the same, the Assessing Officer asked the assessee to provide various details such as the proof of identity, financial capacity of P5AHIML, copy of the annual report, assessment orders and financial statements of P5AHIML for the last two years, justification for such huge premium charged etc.

3.3 The assessee supplied the desired documents and made submissions why according to the assessee, the transaction being genuine, Section 68 of the Act had no

applicability.

3.4 Rejecting the submissions of the assessee, the Assessing Officer passed the order of assessment holding that the assessee had failed to prove the genuineness of the transaction of the receipt of funds amounting to Rs. 2908.25 crores from P5AHIML. He, therefore, invoked Section 68 of the Act and made addition of the said sum in the hands of the assessee. In the process, he relied on following factors:-

- (i) The assessee had used only a sum of Rs. 7.31 crores received from P5AHIML for its own operation, the balance amount was transferred to Idea Cellular Ltd (holding company) or to Idea Cellular Infrastructure Services Ltd (another group company) for the purpose of other investment;
- (ii) In his opinion, there was no reason why P5AHIML should have transferred such huge amount without any apparent return;
- (iii) The assessee failed to produce the assessment order of P5AHIML;
- (iv) In the opinion of the Assessing Officer, P5AHIML representing Province groups and the assessee representing Idea group were front companies;

- (v) The assessee had opened the bank account in HSBC Bank only for receipt of funds from P5AHIML which was closed shortly after the transfer of funds;
- (vi) In the opinion of the Assessing Officer, culmination of these facts would be that the subscription of the preference shares by P5AHIML was colourbale device and not genuine transaction.

3.5 The assessee carried the matter in appeal. In appellate proceedings, the CIT(A) allowed the assessee to produce on record certain documents which did not form part of the assessment proceedings and called for remand report from the Assessing Officer. The CIT(A) dismissed the appeal. Perusal of this order would show that the assessee having approached the Bombay High Court in a Writ Petition seeking stay against the recoveries, the High Court, while disposing of the Writ Petition had desired that the Commissioner should dispose of the appeal within three months. The Commissioner in the order referred to the contentions of both sides as also the decisions cited before him. He also noted that after allowing the assessee to produce additional documents which could not be produced earlier, he had called for remand report. In his concluding remark in the appellate order, he stated as under:-

".... As the documents furnished by appellant are under investigation and verification which was stated in remand report of A.O. Under these circumstances, I uphold the order of the A.O. These grounds of appeal are dismissed. Appeal order was passed to comply with Hon'ble Bombay High Court direction."

The assessee thereupon approached the Tribunal. The Tribunal, by the impugned detailed judgment, allowed the assessee's appeal.

3. We will take note of the contents of the order of the Tribunal at a later stage. We may, however, record that the Tribunal in the said judgment concluded as under:-

"29. After analyzing the above documents we can safely conclude that P5 Asia is a company belonging to the Providence Equity Partners ("PEP"), a global private investment group specializing in media, entertainment, communication and information companies, managing funds of USD 22 billion and having investments in over 100 companies spread over 20 countries. P5 Asia has registered itself as a Foreign Venture Capital Investor ("FVCI") with Securities and Exchange Board of India ("SEBI"). Approvals were also taken from the Foreign Investment Promotion Board ("FIPB"). The investment in CCPS of the assessee was made after PS Asia registered as a FVCI with SEBI and the assessee obtained the necessary approvals from the FIPB. In connection with the issue of CCPS, the assessee submitted all the relevant details in the course of the assessment proceedings. Accordingly, all the three ingredients of section 68 of the Act i.e. identity, genuineness and creditworthiness of investor are duly established."

4. It is against this judgment of the Tribunal that the Revenue has filed this appeal.

5. Appearing for the Department, learned counsel Mr. Suresh Kumar submitted that the Assessing Officer had analyzed the facts on record and had cited proper reasons to come to the conclusion that the entire transaction was not genuine. The assessee had through complex web of corporate structures, merely routed its own money. The Assessing Officer was, therefore, justified in invoking Section 68 of the Act. Learned counsel relied on the decision of the Supreme Court in the case of **Pr. CIT Vs. NRA Iron & Steel (P) Ltd¹** to contend that even in the context of share application money, the genuineness to the transaction is always open to the inquiry by the Assessing Officer.

6. Learned counsel Mr. Mistri appearing for the assessee submitted that the Assessing Officer had proceeded on entirely erroneous basis. The respondent assessee was awarded cellular licence for providing telecommunication services in Bihar and Jharkhand blocks. The assessee

¹ [2019] 103 taxmann.com 48 (sc)

company, therefore, required sufficient funds. The investment was made by the leading US based company Providence Equity Partners through a specially constituted Mauritius based company i.e P5AHIML. The requirement of issuing shares at high premium was obvious namely in order to ensure that the holding company does not loose its majority stake in the assessee company. The Assessing Officer himself had examined the source of such investment. Further examination was conducted by the Commissioner (Appeals). The Assessing Officer in his remand report agreed that the investments were genuine. The Tribunal has given elaborate reasons for reversing the orders passed by the Revenue Authorities. Return of such investments in the form of dividend was not the only return for the investor as correctly recorded by the Tribunal. He stated that later on the investor company had exited with the sizable return on investments which itself would show the fallacy in the Assessing Officer's stand that the transaction was a colourable device.

7. As is well known in the context of Section 68 of the Act, the basic duty would be on the assessee to establish the genuineness of the transaction, credit worthiness of the investor and the source of funds. Equally well settled principle through series of judgments is that the Department cannot insist on the assessee establishing source of the source. With this background, we may peruse the impugned judgment of the Tribunal more minutely.

8. In its decision, the Tribunal noted that the investment made by P5AHIML was done registering itself with SEBI and after obtaining necessary approvals from Ministry of Finance. The application made to the Ministry of Finance contained full details of the investment, the background of the transaction, the terms of the agreement, identity of the investor and the investor group. The Tribunal noted that P5AHIML was an investment arm of Providence Equity Partners and the Tribunal had perused the financial statements which disclosed the flow of funds in the said P5AHIML. The Tribunal further recorded that while making such investment, the investor not only looks for dividend or

interest but also expects return on such investment as capital appreciation, when the investment finally gets converted into equity shares. The Tribunal found that this was the reason why P5AHIML had made the investment in assessee company. In the opinion of the Tribunal merely because there were multiple entities involved in such investment process, would not enable the Assessing Officer to draw an adverse inference on the financial capacity of P5AHIML. The Tribunal noted that during the assessment, the Assessing Officer had called for all necessary details which were supplied by the assessee. In view of such materials, it was not open for the Assessing Officer to invoke Section 68 of the Act. The Tribunal further noted that information was also sought from Foreign Tax Division with regard to the genuineness of the investment made by Providence Equity Partners in P5AHIML. Necessary information was also received. During the course of hearing of the appeal, the Commissioner had called for remand report from the Assessing Officer on the additional evidence produced on record. In the report, the Assessing Officer had made remark suggesting that the transactions were genuine.

The Tribunal also verified the necessary permissions for remittances of the funds and other relevant documents.

9. It can, thus be seen that at every stage, the full inquiry of source of funds and other relevant factors in relation to the investment in question was carried out. The Assessing Officer himself carried out a detailed inquiry. His initial suspicion or in other words starting point of inquiry on the basis that apparently the investor was investing huge amount which may prima facie appear to be without adequate possible returns, may be fully justified. However, when all the relevant factors are properly explained, including the fact that the payment of dividend was not the sole attraction for the investor and that the investor could expect a fair return on the investment, of course, subject to vagaries of the any business decision, the Assessing Officer had to advert to all such materials on record in proper perspective. As noted by the Tribunal, all necessary permissions and clearances were granted by the Government of India and other government authorities for such investment. The source of the funds in the hands of P5AHIML

was also verified. Merely because multiple corporate bodies may have been involved in the entire process of collecting funds in P5AHIML and then investing the same in the assessee company, by itself would not be sufficient to establish a sham transaction or colourable device.

10. We further notice that when the Commissioner (Appeals) had permitted additional evidence to be produced on record during the appellate proceedings, he had called for remand report from the Assessing Officer. Such report was made by him on 27.5.2013. In such report, his remarks were as under:-

7. On going through the documentary evidence, prima facie it appears that the identify of P5 Asia Holdings is established through residency certificate issued by the Mauritius Government. Assessee has filed documentary evidence of funds transfer vide letter dated 27th May 2013 by filing of copy of bank extracts. Copies of the said letter along with annexures are enclosed. Prima facie these prove the genuineness and the financial capacity of the persons making investment in preference shares. (Zerox Copy of the said reference enclsod as Annexure -E)."

11. Thus, the Assessing Officer himself was also prima facie of the belief that the materials on record prove genuineness

and financial capacity of the persons making investment. The Commissioner (Appeals) was under the directive of the High Court of Bombay to dispose of the appeal within a short time. It was for this reason that in his appellate order, he had recorded that further investigation into the additional documents was pending and therefore, in compliance with the order of the High Court, he was disposing of the appeal. Thus, the order of the Appellate Commissioner cannot be seen as the decision on merits of the matter for which he found inadequate time available with him. As noted, the Tribunal carried out the detailed inquiry into all aspects of the matter and noticed no suspicious movement of the funds. Merely because the investment was considerably large and as noted, several corporate structures were either created or came into play in routing the investment in the assessee through P5AHIML would not be sufficient to brand the transaction as colourable device.

12. In the result, the Income Tax Appeal is dismissed.

[SARANG V. KOTWAL, J.]

[AKIL KURESHI, J]