



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

Reserved on: 4th, November, 2009

Date of Decision: 23rd December, 2009

+ **ITA 783/2007**

COMMISSIONER OF INCOME TAX, DELHI-II Appellant

Through: Mr. N.P. Sahni with Mr. P.C.
Yadav, Adv.

versus

KISHORI LAL CONSTRUCTION LTD. Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha
and Mr. Sriram Krishna, Adv.

with

ITA 633/2008

COMMISSIONER OF INCOME TAX - V Appellant

Through: Ms. Rashmi Chopra, Adv.

versus

RAIL TRACK INDIA LTD. Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha
and Mr. Sriram Krishna, Adv.

and

ITA 467/2008

COMMISSIONER OF INCOME TAX, DELHI -IV Appellant

Through: Ms. Prem L. Bansal with Ms. Ansul
Sharma, Adv.

versus

DÉCOR INVESTMENT & FINANCE LTD. Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha
and Mr. Sriram Krishna, Adv.



% **CORAM:**

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

J U D G M E N T

A.K. SIKRI, J.

1. By the impugned order, learned Income Tax Appellate Tribunal (ITAT) has affirmed the order of the Commissioner of Income Tax(Appeals) [CIT(A)] deleting the addition of Rs.49,41,030/- made by the Assessing Officer under Section 68 of the Income Tax Act (hereinafter referred to as 'Act') on account of unexplained cash credit. This amount was received by the assessee from one M/s Yadav and Company and according to the Tribunal the basis for making this addition was clearly erroneous.

2. The assessee is a company engaged in the business of purchase and sale of iron and steel as well as that of purchase and sale of shares. It filed return of income for the assessment year 2000-01, which was accepted under Section 143(1) of the Act. Thereafter, however, a notice under Section 148 of the Act was issued to the respondent-assessee on 24th March, 2003. It was stated that the assessee had sold certain shares to M/s Yadav and Company during the financial year ending on 31st March, 1999. A sum of Rs.49,41,030/- was payable by M/s Yadav and Company as on 31st March, 1999, on this account. This amount was paid in the year in question by cheques



drawn on Union Bank of India. The search and seizure operation was conducted in the premises of M/s Yadav and Company in March, 2002. On 7th March, 2002 statement of Sh. Mohinder Singh Yadav and Sh. O.P. Yadav of M/s Yadav and Company was recorded under Section 132(4) of the Act. In this statement Sh. Mohinder Singh Yadav denied having any account in Union Bank of India, Moti Bagh Branch. This was the reason for opening the assessment by issuing notice under Section 148 of the Act. The Assessing Officer treated the receipt of aforesaid consideration as sham and bogus in view of the statement of Mr. Mohinder Singh Yadav that M/s Yadav and Company had no such account with Union Bank of India, Moti Bagh Branch. According to the Assessing Officer the assessee had introduced his own unaccounted cash through the above transactions. The Assessing Officer, therefore, concluded that this receipt was to be treated as unexplained cash credit and made the addition under Section 68 of the Act.

3. We may also mention, at this stage, that the assessee had filed a copy of the account of M/s Yadav and Company and their confirmation in respect of transactions and assessment particulars of M/s Yadav and Company. The Assessing Officer called upon the assessee to produce the proprietor of M/s Yadav and Company for examination. The assessee submitted that he was not aware of the present whereabouts of the said person. The assessee also contended that it had no connection with the bank accounts of M/s Yadav and Company either directly or indirectly. Because of non-production of the proprietor of M/s Yadav and Company, the Assessing Officer was of



the view that the assessee had failed to discharge its onus to prove the genuineness of the transaction.

4. The assessee preferred appeal against this assessment order of the Assessing Officer repeating its contentions which were advanced before the Assessing Officer. The CIT(A), after hearing the parties, came to the conclusion that the sum received by cheques represented sales proceedings of shares sold in earlier year which was not found out to be false by the Assessing Officer. The Assessee had filed confirmation of M/s Yadav and Company which even contained the income tax assessment particulars of M/s Yadav and Company. The amounts were received by account payee cheques. On the basis of these factors the CIT(A) held that assessee could not be held responsible for non-production of the proprietor of M/s Yadav and Company for examination. According to him it was for the Assessing Officer to make efforts to ascertain the whereabouts of M/s Yadav and Company to find assessment particulars. More so, when premises of M/s Yadav and Company were searched by the Department in the year 2002 and the assessment in the case of assessee is also completed in December, 2003. Furthermore, there was no evidence to establish that the account from where the cheques were issued was opened or controlled by the assessee and mere statement of Sh. Mohinder Singh Yadav that he does not own the account was not sufficient to draw any adverse inference against the assessee. Even opportunity to cross-examine Sh. Mohinder Singh Yadav and Sh. O.P. Yadav was not afforded to the assessee. On this basis the aforesaid addition was deleted.



5. The ITAT found that these are the findings of facts recorded by the CIT(A) with which it concord and thus dismissed the appeal of the Revenue.

6. The main emphasis of learned counsel for the Revenue is to demonstrate that the findings of CIT(A) and ITAT are perverse on account of non application of mind to the specific observations made by the Assessing Officer. The appeal was accordingly admitted on the following questions of law:

- “1. Whether the learned ITAT was correct in law in deleting the addition of Rs.49,41,030/- made by the AO under Section 68 of the Act on account of unexplained cash credit?
2. Whether the order passed by the learned ITAT is vitiated by perversity on account of non application of mind to the specific observations made by the Assessing Officer in the order of assessment with regard to the evidence/material furnished by the assessee?”

7. It was contended by Mr. Sahni, learned counsel for the Revenue that assessee failed to comply with the notice of the Assessing Officer as per order sheet entry dated 26th August, 2003, wherein the Assessing Officer in order to examine the genuineness of confirmation had asked the assessee to furnish (i) PAN number, (ii) particulars of his ward or circle where Yadav and Company is assessed to tax, and (iii) complete present address of the creditor. The assessee was also asked to produce the owner of Yadav and Company as Sh. Mohinder Yadav and Sh. O.P. Yadav of Yadav and Company searched by the



Department denied any connection with the account from where cheques were received by the assessee as also the transactions. He submitted that as per the provision of Section 68, the assessee is duty bound to provide the identity, creditworthiness and genuineness of the transaction and if any of the ingredients is not been established, then the Assessing Officer has justified to treat the impugned credit as income of the assessee. It is argued that there are plenty of decisions supporting this stand of the Revenue and some of these are as under:

- a. Govindrajuly\ Murlidhar vs. CIT, 34 ITR 807 (SC)
- b. Lakhmichand vs. CIT, 35 ITR 416 (SC)
- c. Kalekhan vs. CIT, 50 ITR 1 (SC)
- d. CIT vs. Visvanath Parsad, 72 ITR 194 (SC)

The learned counsel also contended that the plea of the assessee that, since the transactions were through cheque, the same are genuine, does not hold good and tenable. He referred to the decision of Calcutta High Court in the case of *CIT vs. Precession Finance Ltd., 208 ITR 465 (CAL)*. His further submission was that the onus on the assessee does not get discharged merely by filing of confirmatory copy of account as held by the Calcutta High court in the case of *CIT vs. United Commercial* reported in *187 ITR 596 (CAL)*. His further endeavour was to demonstrate that the decision of the tribunal is contradictory in view of the fact that on one hand the ITAT has held that the AO has not granted opportunity to the assessee for cross examining the owners of Yadav and Compnay and on the other hand the ITAT has recorded that the signatures of Sh. O.P. Yadav and Sh. Mohinder Yadav constituted intrinsic evidence in favour of assessee.



This finding has been recorded without there being any basis and material on record or produced before it. It is argued that the analogy/reasoning of not allowing cross-examination as applied by the ITAT in favor of assessee is also available to the AO since the ITAT has relied on a confirmation, the contents of which remained unverified as the assessee did not reduce the creditor. Challenging the plea of denial of natural justice, he submitted that law is well-settled by the Hon'ble Apex Court in the case of ***Gundhur Brothers*** reported in ***40 ITR 298(SC)*** where in it has been held that denial of natural is only a irregularity and the proceedings would start from the stage at which the irregularity intervened. Further, in the proceedings before the ITAT, DR had even suggested remanding the case to the Assessing Officer to meet natural justice but this suggestion was opposed by the assessee. The ITAT being the final fact finding authority could have remanded the matter back to the Assessing Officer if it was of the view that proper opportunity was not afforded to the assessee.

8. Mr. Vohra, learned counsel for the assessee refuted the aforesaid arguments. He highlighted the facts recorded by the CIT(A) as well as ITAT on the basis on which the addition was deleted. His submission was that the mischief of Section 68 is attracted where any sum is found credited in the books of accounts maintained by the assessee for the relevant previous year. In ***CIT v. Prameshwar Bohra, 301 ITR 404 (Raj.)***, it has been held that the rigors of Section 68 of the Act are not attracted to the opening balance at the beginning of the year. In the instant case, the amount of Rs.49,41,030/- was received by the respondent-assessee on account of payment for sale of shares in earlier years, i.e., in satisfaction of



amounts due by Yadav and Company to the respondent-assessee, which were carried forward as opening balance in the debtor's account as at 1st Aril, 1999. The payment received during the year was to square off the debt due from Yadav and Company. There is no amount credited in the books of accounts for the previous year relevant to the assessment year 2000-01. He thus argued that there being no credit in the books of account for the relevant previous year, the provisions of Section 68 of the Act have no application at the threshold. His submission, without prejudice, on merits, was that Section 68 of the Act is, even otherwise, not applicable to treat the amount of Rs.49,41,030/- received during the year from Yadav and Company as undisclosed income of the assessee, for the following reasons:

In terms of the said section, the initial burden is placed on the assessee to substantiate-

- (a) the identity of the creditor,
- (b) the genuineness of the transaction, and
- (c) credit worthiness of the creditor

Once the initial burden is discharged by the assessee, the onus shifts to the Department to prove that the amount credited in the books of accounts represents undisclosed income of the assessee.

The assessee is not required to prove the source of source and the onus cast on the assessee stands discharged where the assessee is able to establish the aforesaid three ingredients.

He referred to the judgment of this Court in the case of *CIT vs. Value Capital Services*: 307 ITR 334 @ 336 wherein it is held:



“.....the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee this has not been done in so far as the present case is concerned and that has been noted by the Tribunal also.”

His plea was that in this case the respondent-assessee had discharged the initial burden cast upon the respondent-assessee.

9. After considering the arguments of both the sides, we find ourselves in favour of the submission made by learned counsel for the respondent. As mentioned above the assessee had produced the following which would clearly demonstrate it has discharged its initial burden:

- (a) The identity of Yadav and Company, by filing their confirmation and their assessment particulars;
- (b) genuineness of the transaction by pointing out that the assessee had sold shares to Yadav and Company in the immediately preceding year (which has been accepted by the Department) and that the payment received during the relevant previous year was against the debt due from Yadav and Company.
- (c) creditworthiness of the creditor by pointing out that the amount was received by way of cheques drawn on the bank account of Yadav and Company maintained with Union Bank of India, Moti Bagh Branch, New Delhi, which, despite denial by the Yadavs, was, as per bank records, found to be opened and operated by Sh. O.P.



Yadav/Mohinder Singh Yadav.

10. The initial burden thus discharged, it was for the Revenue to establish that the transaction in question was bogus. This would be so even if there is a denial by the creditors that the credits were not genuine as held by the Supreme Court in ***Commissioner of Income Tax, Orissa vs. Orissa Corporation (P) Ltd, 159 ITR 78***. Mere denial by Yadavs that account in question was not operated by them would not automatically lead to the inference that assessee deposited in the said account and, therefore, it became its unaccounted income. The CIT (A) as well as the ITAT have rightly pointed out that the necessary exercise which was to be undertaken by the Assessing Officer was not carried out. It was for the Assessing Officer to probe the matter further. He could not simply pass on the buck to the assessee asking him to produce Sh. O.P. Yadav or Sh. Mohinder Singh Yadav. It is the Department which had reopened the assessment on the basis of the statements of the Yadavs. The Department was relying upon the said statements. When the premises of M/s Yadav and Company were search by the Department in 2002 and the statements of aforesaid two persons were recorded, it is clear that Yadav and Company was very much in existence. More interestingly, M/s Yadav and Company even assessed to income tax. In the case of assessee the assessment was completed in December, 2003. In such a scenario, it would not have been difficult for the Assessing Officer to find the whereabouts of Yadavs particularly having regard to the statement of the assessee that it had no dealing with M/s Yadav and Company after assessment year 2000-01 and was thus unaware of its present whereabouts. Live link between the bank account of M/s Yadav and



Company and the assessee has not been established.

11. In view of all these facts, it cannot be said that the findings are perverse. The two questions posed are thus answered against the Revenue and in favour of the assessee.

12. The alternative plea which still needs to be considered is as to whether the ITAT should have remitted the matter back to the Assessing Officer, if it was of the view that proper opportunity was not afforded to the assessee. We feel that there was a *bona fide* confusion in the mind of the Assessing Officer regarding the onus viz. whether it was obligation of the assessee or the Assessing Officer to produce Sh. O.P. Yadav and Sh. Mohinder Singh Yadav. Therefore, in the interest of justice matter needs to be remitted back to the Assessing Officer to enable him to produce the Yadavs for cross-examination by the assessee. The Assessing Officer shall undertake fresh exercise as per the observations contained in the order of ITAT and this order and addition would be made only if those conditions are satisfied.

13. Thus, the matter is remitted back to the Assessing Officer for the aforesaid purpose.

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14. In this case also addition of Rs.35,00,000/- was made in the income of the assessee for the assessment year 2000-01 on the basis of statement of Sh. Mohinder Singh Yadav of M/s Yadav and Company. Following the order passed by the Tribunal in the case of assessee-Kishori Lal Construction Ltd., the Tribunal deleted the said addition. Against the judgment of the Tribunal in *Kishori Lal Construction Ltd.*, ITA 783/2007 has been filed by the Revenue which is dismissed above.



15. Learned counsel for the appellant, however, argues that the case of *Kishori Lal Construction Ltd.* is distinguishable on facts.

16. It is not in dispute that payments were received from M/s Yadav and Company by the assessee on account of sale and purchase of shares. Copies of the bills and contract notes were also filed in support thereof. In fact, M/s Yadav and Company was dealing in shares. The only distinguishing factor which is tried to be shown is that no payments were made at the time of purchase of shares and only netting of amount was shown to have been received in subsequent year. This is hardly a ground of distinction between the two cases. When there are dealings in purchase and sale of shares, after adjusting the amount payable against the amount receivable if only net amount is received, that would not make the transaction different. In all other respects the case is similar to *Kishori Lal Construction Ltd.* case. However, here also matter stands remitted to the Assessing Officer to undertake fresh exercise as ordered in *Kishori Lal* case.

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17. Here also addition was made by the Assessing Officer under Section 68 of the Act in similar circumstances namely on the basis of statement of Sh. O.P. Yadav and Sh. Mohinder Singh Yadav of M/s Yadav and Company. Again an attempt was made to show that this case is distinguishable from *Kishori Lal Constructions Ltd.* However, we do not find it to be so. Similar kind of evidence was produced by the assessee discharging the initial onus. It is the



Department which could not establish connection between the bank account with Union Bank of India and the assessee. In all other respects this case is also similar to ITA 783/2007. Here again matter is remitted to the Assessing Officer for passing fresh order after undertaking the exercise as ordered in *Kishori Lal* case.

18. Appeals are disposed of in the aforesaid terms.

A.K. SIKRI, J.

SIDDHARTH MRIDUL, J.

DECEMBER 23, 2009

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