2009:DHC:9326-DB

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 401 of 2008

% *Decided on: 23rd November, 2009*

Toby Consultants (P) Ltd. . . . Appellant

through : Mr K. Sampath, Advocate with Mr. Satyen Sethi, Advocate

VERSUS

Commissioner of Income Tax . . . Respondent

through : Ms. Suruchi Aggarwal with Ms. Payal Jain, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J. (ORAL)

1. This appeal relates to assessment year 2001-02. The appellant company which carries on business of investments in securities had filed return for the previous year relevant to the assessment year 2001-02 on 30.10.2001 declaring loans of Rs.26,50,670/-. In this return, the appellant had shown unsecured loans of Rs.2,67,83,100/- from its director Shri P.N. Jain and Rs.2,45,04,100/- from Ms. Urvashi Jain. Though confirmation of these loans, aggregating to Rs.5,12,87,200/-, were filed, they were not accompanied by income

(AO) treated this as income of the appellant from undisclosed and made additions under Section 68 of the Income Tax Act, 1961 (for short, the 'Act'). Assessment order was passed on 1.3.2004 making the assessment at Rs.5,12,72,884/-. The assessee preferred appeal against this assessment order before the CIT(A). The CIT(A) recorded the statement of Mr. P.N. Jain under Section 131 of the Act, who *inter alia* stated that –

a) The amounts advanced to the appellant did not belong to him and/or his daughter and that the same were routed to their accounts from M/s. Associated Techno Plastics Pvt. Ltd. (for short, 'ATP')

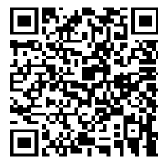
b) Since the money did not belong to him, therefore, the same was not shown in the return of income filed by him and that Ms. Urvashi Jain is not assessed to tax.

c) Neither any interest has been paid by them to ATP not have they received any interest from the appellant.

d) Bank accounts with IDBI in his name and in the name of his daughter were exclusively operated for the appellant and that singed cheque books of these accounts were handed over to the staff of ATP.

e) Though shares of the value of Rs.49,900/- each were allotted to him and his daughter but physical delivery of the same were not given to them.

2. On this, remand report of the AO was sought. In this remand report



(i) ATP had advanced a sum of Rs.1,86,44,000/- and th of advance was the sale proceeds of shares held by ATP. Statement of Mr. M.C. Vaidya, director of ATP was recorded, wherein he affirmed these facts.

(ii) It was affirmed in the remand report that ATP is owned by Vaidya family and that Mr. P.N. Jain and Ms. Urvashi Jain are neither the directors not shareholders of ATP.

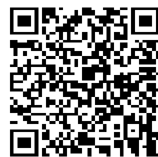
(iii) Balance amount was advanced by Mr. Y.C. Vaidya, another director of ATP. Mr. Vaidya is a NRI residing in USA. In support, confirmations with income tax acknowledgement were filed wherein he confirmed that during the period 1.4.2000 to 31.3.2001, he has given interest free loan of Rs.2,03,23,000/- to Mr. P.N. Jain and Rs.1,24,30,000/- to Ms. Urvashi Jain.

(iv) Ownership of the appellant company has been taken over by the Vaidya family.

3. The CIT(A), taking into consideration all these facts, upheld the order passed by the AO. His reasons in support of the order were as under:-

a) Statement of Mr. P.N. Jain was contrary to facts because ATP had advanced Rs.1,86,44,000/- whereas in his statement Mr. Jain has stated that ATP had advanced Rs.5,13,87,000/-.

b) In the remand proceedings, appellant has taken fresh stand amount of Rs.3,27,53,000/- was given by Mr. Y.C. Vaidya as



relied upon because details such as cheque numbers, bank from which the amounts were transferred to the accounts of Mr. P.N. Jain and Mr. Urvashi Jain were not provided.

c) Mr. P.N. Jain was not aware of the source of deposits in his and in his daughter's account. It proves that they did not borrow any money either from ATP or from any other person.

d) Neither the appellant has returned the loan to Mr. P.N. Jain and Mr. Urvashi Jain nor the loan taken by Mr. P.N. Jain and his daughter has been returned to ATP and Mr. Y.C. Vaidya. All this show that amount of Rs.5,12,87,200/- was appellant's own money which has been routed through ATP and some other persons.

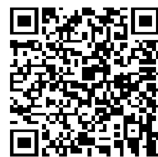
4. The assessee went in further appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT, however, has dismissed the appeal holding that the genuineness of the transaction has not been established. It is clear from the order of the CIT(A) as well as that of ITAT that money in question, concededly did not belong to either Mr. P.N. Jain or his daughter Ms. Urvashi Jain. In the assessee company, this money was shown to have been invested by these two persons. Obviously, it was unaccounted money insofar as these two persons are concerned. Only at the appellate stage, Mr. Jain revealed that the amount was in fact received from ATP. The case, therefore, sought to be put up was that the real person who advanced the loan was ATP and it was routed through the accounts

CIT(A) as well as ITAT has held the transaction to be not gen bogus.

5. The submission of learned counsel for the appellant assessee was that once the source was explained, there was no occasion for making any additions under Section 68 of the Act. On the other hand, learned counsel for the Revenue argued that as far as the assessee company is concerned, the entries of loan are shown to have been made by Mr. Jain and his daughter. The assessee had tried to substitute the creditor by alleging that ATP gave the loan and not Mr. P.N. Jain and his daughter and, therefore, additions were rightly made. It was found that Mr. Jain and his daughter could not satisfy as to how they had made investment of this magnitude.

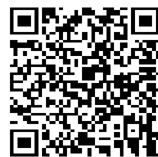
6. After hearing the counsel for the parties at length, we are of the opinion that ITAT has rightly arrived at a finding of fact, on the analysis of all the relevant material on record, that genuineness of the transaction has not been established and the assessee has failed to independently prove the same. Relevant discussion in this behalf runs as follows :-

> "19. It further means that even before taking the loan or at the time of taking loan the assessee has to satisfy himself that in case the enquiries are conducted by the Assessing Officer he would be able to establish the nature of credit, identity of the creditor, source of credit and the genuineness of the transaction. Now in the instant case the assessee has been able to establish the nature of the credit i.e. it was a loan transaction, the identity of the creditor i.e. it took interest free loan from its erstwhile Directors Shri P.N. Jain and his college going daughter Ms. Urvashi Jain through banking channels and



names to the assessee. Further, M/s. ATP and Shri Y.C. Va[illegible] had been able to demonstrate before us that they had suffi[illegible] sources for advancing the amount as loan to Shri P.N. Jain and Ms. Urvashi Jain, for investments in their names in the assessee company, without charging any interest.

20. The question that arises before us is that despite the assessee having established the above mentioned facts whether we can still look into the genuineness of the transaction or the same should be taken to be implied stand established and the assessee is still required to independently prove the genuineness for the entire transaction i.e. from the day of the proposal for taking the loan from the creditor till the completion of the loan transaction in the light of entire surrounding circumstances and human probabilities as laid down by the Apex Court in the case of Sumati Dayal (supra) while discussing the provisions of Section 68 and genuineness of the credit in the books of amount of the assessee. Which further means that we are required to view the transaction as a whole and not as fragments in different stages. For such a view we would have to consider the persons amongst whom such transaction has been executed because the company is only a juristic person and it enters into transactions through its directors or the persons authorized under law. Hence, in the instant case we cannot ignore circumstances in which the loan transaction has taken place because it was between the assessee company and its two directors, or of whom is a college going daughter of the other director/creditor. The other circumstance to be taken into consideration is that the directors who advanced the loan were admittedly not at all men of means for advancing such huge amount of loan amounting to about Rs. 5 crores and second that the assessee even for taking such huge amount of the loan does not want to pay any interest for which the creditors also agreed. Further, that as to why the assessee did not intend to pay any interest for such loan and as to why the creditors agreed for advancing such huge amount without interest when they did not derive any benefit out of such transaction. The other circumstance to be considered is that no written agreement has been executed or any other material has been brought on record to indicate the period for which the loan amount was advanced/taken because even on the date of hearing before us it has been admitted by the learned AR for the assessee that the loan amount has not been paid by the assessee to the creditors and the loan is still standing to the credit of these erstwhile directors (as later on they resigned from the directorship of the assessee company) in the books of the assessee. The other relevant circumstance required to be considered is that why the creditors, being directors of the assessee company at that time chose to advance loan in their names, when admittedly they did not have any means to advance the same to the assessee company and later on



such loan in their own names still chose to take such amou interest free loan from M/s. Toby Consultants and Shri Va for making investment in the assessee company by advancing the same as interest free loan. Here again we find that without any written agreement M/s Toby Consultant and Shri Vaidya agreed to advance such huge amount of loan free of interest simply for making the investment in the assessee company that too in the name of Shri P.N. Jain and Ms. Urvashi Jain and not in their own names. We are of the opinion that it is humanly improbable that a person merely knowing another person for a long period, even though having very good relation, would advance such huge amount of loan free of interest for a indefinite period merely for investing in a company, that too not in their name but in the name of that person, may be for any benefit and without securing that huge amount by executing an agreement of any sort more so, when the amount still finds credited in the books of the assessee in the names of Shri P.N. Jain and Ms Urvashi Jain and they can legally claim the recovery of the same from the assessee company, as undisputedly the debt still remains un-discharged.

21. On considering the facts, discussed above, the surrounding circumstances and applying the test of human probabilities, as laid down by the Apex Court in the case of Sumati Dayal (supra) while discussing the provisions of Section 68, we are of the opinion it is highly improbable that Shri P.N. Jain and Ms. Urvashi Jain entered into such a loan transaction with the assessee that too after taking such a huge amount on loan from M/s ATP and Shri Y.C. Vaidya where from such a loan transaction neither these two creditors not the sub-creditors would have benefited in any manner. Similarly, it is highly improbable from M/s ATP and Shri Y.C. Vaidya to advance loan to Shri P.N. Jain and his college going daughter Ms. Urvashi Jain without charging any interest merely for the purpose of investing in the assessee company for capturing the assessee company by obtaining their shares, without entering into any written agreement safeguarding their interest and the return of the loan and more so when M/s ATP and Shri Y.C. Vaidya could have directly made such investments in the assessee company in their own names and could have also obtained its shares directly, without invoking Shri P.N. Jain and Ms. Urvashi Jain. In view of the detailed discussion made hereinabove in this order, we have come to a conclusion that the assessee has not succeeded in proving the genuineness of the transaction as it is improbable when the test of human probabilities is applied to the surrounding circumstances of the case is entirely. Thus, the assessee, having failed to test of human probabilities, is unable to prove the genuineness of the loan transaction, so, in view of the ratio of the decisions (supra) relied upon the ld. DR for the revenue it is held that in view of the provisions of Section 68, since the genuineness of

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consideration is to be charged to IT as the income o assessee for that year and hence the impugned addition m sustained by the tax authorities below under section 68 of the Income-tax Act are upheld. Accordingly, the order of the CIT(A) in this regard is upheld and the grounds of appeal taken by the assessee are rejected."

7. No question of law, therefore, arises and the appeal is dismissed.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

November 23, 2009
nsk

- fresh CM 4575/10 - for correction in order dt 23.11.09 (Counsel Name)