



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

**{ITA 203 of 2007}**

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Judgment Delivered On: 06.9.2010

**ITA 203 of 2007**

**THE COMMISSIONER OF INCOME TAX**

... APPELLANT

THROUGH: Ms. Suruchi Aggarwal,  
Advocate

VERSUS

**SANJAY MOHAN AGGARWAL**

... RESPONDENT

THROUGH: None.

**CORAM:-**

**THE HON'BLE MR. JUSTICE A.K. SIKRI**  
**THE HON'BLE MS. JUSTICE REVA KHETRAPAL**

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)**

+ **CM No.5596/2010 in ITA No.203/2007**

1. The assessee passed away during the pendency of this appeal and subsequently, an application for substitution of the legal heirs was filed, in which notice could not be issued by ordinary process. Because of these reasons, this application was filed for substituted service and vide orders dated 06.04.2010 passed by the Registrar, the appellant was allowed to serve the respondent by way of publication in the newspaper "Statesman", Delhi Edition. The said notice has been published and the Registrar on 04.08.2010 passed the orders that service is complete.

In these circumstances, this application is treated as disposed of.



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**CM Nos.1181/2009 and 1182/2009**

2. Nobody appears on behalf of the respondent despite service. Attendance of Mr. V.K. Sabharwal, Advocate is noted in this appeal on behalf of the respondent, however, he appears in the connected appeal, i.e., ITA No.136/2007. As there is no opposition to these applications, prayers made in these applications are allowed. Delay in filing the application for substitution is condoned for the reasons stated therein and the prayer for substitution of legal heirs in place of the deceased respondent is also allowed.

These applications stand disposed of.

**ITA No.203/2007**

3. Nobody has appeared on behalf of the respondent in spite of service of notice by way of publication. We find that published notice related not only to CMs for substitution of legal heirs but also in respect of appeal as well. Therefore, the respondents are proceeded *ex parte*. This appeal is admitted and finally heard on the following question of law:-

“Whether on the facts of the present case, the ITAT was correct in law in deleting the addition of Rs. 12,07,95,915/- made by the Assessing Officer under Section 68 of the Act on account of unexplained cash credits?”

4. Search and seizure operation was conducted under Section 132 of the Act on 02.12.1997 on business and residential premises of the assessee and one Arvind Kumar Jain. During the course of search, cash, jewellery and bunch of papers were seized. In response to notice under Section 158BC dated 13.07.1998 of the Act, return of income for the



and seized materials in possession. Further notices were issued under Section 143 (2) and 142 (1) of the Act.

5. During the course of search, the assessee was found to be owner of different companies. Arvind Kumar Jain, proprietor of M/s Ayush Investments stated during the course of search that the actual owner of the concern was the assessee and he only carried out transactions on behalf of the assessee. Share of different companies were stated to have been sold through Ayush Investment Proprietorship concern of Arvind Kumar Jain, as broker. The sale proceeds in cash were deposited in the bank account of Ayush Investment and thereafter, account payee cheques were issued from these banks to the various companies belonging to the assessee.

6. Subsequently, payment received by these companies was found to be utilized for giving hawala entries to the persons in need of the same. It had been stated by Arvind Kumar Jain that he is owner only for the name sake and actual owner is assessee and whatever cash has been deposited was deposited by the assessee only. It was also found that the assessee was a hawala entry operator and for this purpose he floated a number of companies, concerns and firms, which are owned by his employees for the purpose of name sake only. For this purpose, different bank accounts have been opened where substantial cash was deposited and then transferred to the group companies. Hawala entries are then given through account payee cheques from the account of group companies where the amounts are introduced after so called sale purchase of shares through the self managed share brokers like Ayush Investment.

7. As and when entries were to be given to some outsider, the cash



cheque to the outsiders. For the reasons recorded in the order assessment, M/s Ayush Investment was held to be a benami concern of the assessee and accordingly the undisclosed income, as per Chapter XIV B, was assessed in the hands of the assessee.

8. Several additions were made by the AO while computing the undisclosed income for the block period. However, addition relevant for the present appeal was the addition of Rs. 12.07 crore made under Section 68 of the Act on account of unexplained cash credits. The contents of the present appeal are restricted to the aforesaid addition in the interest of brevity. The total cash deposits in the bank account of Ayush investment was computed by the AO at Rs. 12.07 crores and was added in the hands of the assessee in substantive manner for the Assessment year 1997-98 and 1998-99. However, it may be mentioned here that the same was added in the hands of Arvind Kumar Jain on protective basis as undisclosed income.

9. Being aggrieved by the aforesaid order of the Assessing Officer, the assessee went in appeal before the CIT (Appeal). The CIT (A) confirmed the finding of fact that Arvind Kumar Jain was in fact an employee of the assessee and he was only a name lender as far as proprietorship of M/s Ayush Investment is concerned. CIT (A) also affirmed the finding that the real owner of M/s Ayush Investment was the assessee. The modus operandi adopted by the assessee in depositing the sale proceeds in cash in the bank account of M/s Ayush Investment was also accepted by the CIT (A).

10. As noted above, the total amount thus deposited was Rs. 12.07 crores. An addition of this amount was made on account of unexplained cash credits. The CIT (A), however, deleted this amount as he was of

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He thus added a sum of Rs. 15.5 lacs calculated @ 1.5 % on the aforesaid deposits in the accounts and treated only Rs. 15.5 lacs as undisclosed income for the assessment years 1997-98 and 1998-99. The ITAT has dismissed the appeal of the revenue preferred against this order of the CIT (A). It is how the revenue is in appeal before us.

11. We have heard at length the learned Counsel for the Revenue on the question of law framed. Her submission is that the addition of Rs. 12.07 crores was made as the assessee had failed to satisfy the condition contained in Section 68 of the Act. She further argued that Mr. Arvind Kumar Jain has admitted that all the transactions were done on the behest and on the direction of the assessee and in these circumstances the assessee was asked to give explanation regarding deposit of this amount in cash in the account of M/s Ayush Investment. However, the assessee failed to give any explanation. He even did not give the identity of buyers to whom the shares were purportedly sold. On that basis, the Assessing Officer concluded that sale of shares was not genuine and it was the assessee who had made the deposits in the account for which he could not give any satisfactory explanation. In this backdrop, argued the learned counsel, there was no basis for CIT (A) to treat the said deposits as deposits of the third party/buyers and to presume that the assessee only got commissions on these deposits. After reading the orders passed by the Assessing Officer in the case of the assessee as well as Mr. Arvind Kumar Jain and also those of CIT (A) and ITAT, we inclined to agree with the submissions of learned counsel for the revenue. The Assessing Officer has described the nature and modus of deposits, as indicated by us in brief and has said that this aspect is considered in detail in the assessment order in the case of Arvind Kumar Jain. Perusal of the orders passed in the case of Arvind



this money was from the sale of shares. Following discussion contain  
the order of the Assessing Officer in respect of Arvind Kumar Jain is  
worth a quote:-

“Clearly such reply is not going to discharge the burden cast on the assessee as per section 68. As per this section, as well established by various judicial pronouncements, if any sum is found credited in the books of accounts of the assessee, he should satisfy the AO about the three conditions of such credit such as identity of the payee, his creditworthiness and the genuineness of the transaction. In this case, sale proceeds of lacs of rupees in each transaction has been received in cash and the buyers is not identifiable. The first and the basic requisite of section 68 has not been met successfully by the assessee. There are enough circumstantial evidence to raise grave doubts about the identity, credit worthiness and genuineness of these transactions.

First, the shares are of unlisted companies, and all of them have paid cash of lacs but have let no trace of their identities. In its letter of 13.12.1999, the assessee has pleaded that if the entire amount of sale proceeds has been received, then it is necessary to retain the full particulars of the buyers. But in his statement on oath dated 20.12.1999, it was stated that payments to the parties were made as and when the same was received from the buyers. And interestingly when asked to produce any record to show the pending balances relating to any such buyer, no direct reply was forthcoming. Third, no copies of transfer forms was made available which could have thrown light on their identities. Fourth, no written agreement exists between the assessee and the companies, for whom shares are being sold, about the conditions of sale, price at which to be sold etc. Only it has been stated that a commission of 0.15% to 0.5% is being received by the assessee.

Clearly the odds are heavily against the assessee. As has been held by the Supreme Court in the case of D.P. More in 82 ITR 540 (1971), the preponderance of probability is a valid evidence for I.T. Authorities. It is absurd to argue that the assessee could manage to sell shares of unlisted companies to the tune of 12 crores without knowing the details of the buyers. In the hands of the buyers, if they were engaged in trading of shares, such cash transaction would be covered by the mischief u/s 40(A)(3), and nobody would take such an unwarranted risk. In this context, it is important to note the assessee's version as per statement on



Sanjay Mohan Aggarwal only. No part of this money is from sale of shares. Have not signed any bill for the same. I have given back the entire amount from Ayush Investment to the different companies of Sh. Sanjay Mohan Aggarwal by cheque. It is not in my knowledge that there is any trading in shares”

12. These findings are not disputed by the CIT (Appeal). No reply is given to the query as to why the money deposited in the account of M/s Ayush Investment be not treated as money of the assessee but that of some third party and the assessee had got only commission on these deposits. The orders of the CIT (A) as well as ITAT have clearly glossed over the vital material facts brought on record by the Assessing Officer. These orders are accordingly set aside and assessment made by the Assessing Officer is restored. Question of law is answered accordingly.

  
(A.K. SIKRI)  
JUDGE

  
(REVA KHETRAPAL)  
JUDGE

**SEPTEMBER 6, 2010.**

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