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

ITA No. 986 OF 2005
&
ITA NO. 989 OF 2005

% Date of Decision: September 30, 2010.

(1) ITA No. 986 OF 2005

The Commissioner of Income Tax . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate

VERSUS

Smt. Bela Jain . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha, Ms. Akanksha Aggarwal and Mr. Somnath Shukla, Advocates.

(2) ITA NO. 989 OF 2005

The Commissioner of Income Tax . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate

VERSUS

Smt. Bela Jain . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha, Ms. Akanksha Aggarwal and Mr. Somnath Shukla, Advocates.

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI
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)*

By this common order, we propose to decide these appeals. Keeping in view the commonality of the question, the parties and the impugned order of the Tribunal, instead of referring the facts of each

case, our purpose would be served by taking note of the facts frc ITA 986/2005.

1. On 1st February, 1995 the residential premises of the assessee and other premises of the Bigjos Group with which the assessee is connected, were searched. During the search, statement of the assessee was recorded under Section 132 (4) of the Income-Tax Act. This statement reads as under:-

> "Q.I am explaining to you the provisions of Explanation 5 to Section 271 (1) (c) read with section 132 (4) of the I.T. Act. Do you want to avail this opportunity?
>
> A. I have understood the provisions. I want to avail this opportunity and declare income as under:-
>
> (a) There are total deposits of ₹ 92,65,700/- in different companies towards share capital under different names as under:-

Name of the company	Financial	Years		
	91-92	92-93	93-94	94-95
Beejay Traders				860,000
Big Jos Overseas				45,000
Big Jos Stores		900,000		
Double Marketing	14,15,700	7,20,000		
Bigjos Estates			1,55,0000	4,25,000
Bigjos Securities			8,00,000	8,50,000
Total	14,15,700	16,20,000	29,10,000	33,20,000
		TOTAL :RS	92,65,700	

> All this investment of ₹ 92,65,700/- has been actually earned by me in the current period

> because the actual payment for the acquisition of all the shares invariably have been made in the current year 1994-95; though on paper part of the shares might have been acquired in the earlier years. The investment for acquisition was from income from other sources. This disclosure has been made voluntarily and is over and above the normal business income. Necessary taxes will be paid as per law."

2. On the basis of this statement, notice under Section 148 was issued to the assessee. It was on the premise that the assessee had filed the Income-Tax Return only till the assessment year 1993-94 and thereafter, she had not filed the return. The Assessing Officer, in these circumstances, wanted to investigate the matter. As is clear from the aforesaid statement, the assessee had stated that shares were purchased by certain persons in respect of the companies mentioned in the tabulated charge extracted in this statement during the financial years 1991-92, 1992-93,1993-94 and 1994-95. Different amount was spent by those persons (whose particulars are not available on record) in these years. However, as per the statement, these persons were paid the entire amount of ₹ 92,65,700/- 'in the current period' i.e. in the financial year 1994-95 (corresponding to assessment year 1995-96). The notice under Section 148 was issued in respect of the assessment year 1994-95 (corresponding to financial year 1993-94). The 'Reasons to Believe' which form the basis for issuance of that notice read as under:-

> "During the course of search Smt. Bela Jain in her statement u/s. 132(4) of the I.T. Act admitted to have paid out unaccounted cash of ₹ 92,65,700/- to certain people in exchange for cheques received

from them towards contribution to the share capital of various companies floated by Big Jo's group. Subsequently Smt. Bela Jain retracted her statement claiming it to have been made under coercion and threat. During her statement she had specifically mentioned that she had paid money during financial year 1994-95 in cash in lieu of cheques received during the financial year 1993-94 for the following companies:-

1.Double Marketing Royalty	₹ 5,60,000/-
2.Big Jo's Estates ltd.	₹ 5,50,000/-
3.Big Jo's Securities & Credits Pvt. Ltd.	₹ 8,00,000/-
TOTAL	₹ 29,10,000/-

Smt. Bela Jain had filed her return of income only upto asstt. Year 1993-94. She has shown income from property, shares from registered firm as well as profit from Haryali Nursery in her personal return, apart from income from other sources such as dividend, etc.

During the search some stock discrepancies in respect of Haryali Nursery was also detected.

In order to assess the receipt of share capital into the group companies of Big Jos group during the financial year 1993-94 vis-à-vis the admission of Smt. Bela Jain of having made cash payments against cheques receipts, it is necessary to bring on record her return of income for the asstt. Year 1994-95, which has not yet been filed, as per this office record.

Issue notice u/s 148 accordingly"

3. The Assessing Officer thereafter proceeded with t assessment and passed assessment orders on 31st March, 1998. In respect of this assessment year, he added an income of ₹ 23,50,000/- giving following basis:-

> "As discussed in the separate assessment orders of the Big Jo's group of companies, the share capital introduced by those group of companies are primarily repaid in cash by the directors of the companies. The total capital paid by the directors are Rs 23,50,000/- for the simple reason that she is the director who had repurchased the share capitals from the bogus shareholders. The addition made on this ground is worked out to Rs. 23,50,000/-".

As noted above in the statement, the assessee had mentioned in her statement that in respect of assessment year 1994-95, shares of ₹ 29,10,000/- were purchased for which cash was paid in the assessment year 1995-96. However, the Assessing Officer made an addition of ₹ 23,50,000/- but did not provide any reason for doing so.

4. The assessee preferred appeal thereagainst before the CIT (Appeal) and raised following submissions.

In the first instance, she challenged the validity of proceedings initiated under Section 147 of the Act itself. Her submission was that there was no basis for issuing such notice, inasmuch as; (a) the notice was issued on wrong premise that the assessee had not filed return for the assessment year which was in fact filed; (b) there was no nexus with the issuance of notice in respect of assessment year in question when the statement was recorded.

The addition was challenged on merits as well. The CIT (Appeal) repelled the challenge to the validity of the proceedings under

Section 147 of the Act. According to him, even if the assessee h filed the return for the assessment year in question, the fact remained that she had not declared any income on account of cash paid to the subscribers of capital in the said return. Therefore, even after the assessee rectified the mistake by bringing the correct facts in the notice of the Assessing Officer, the reasons for the belief of escapement of income, represented by the unaccounted cash paid to the subscribers of capital, remained intact and unaffected.

5. In so far as second plea on the basis of which initiation of these proceedings were challenged, the CIT (Appeal) was of the view that though in the statement the assessee had stated that she had paid the entire cash in the financial year 1994-95, that could not be believed. According to him, the Assessing Officer was right in his belief that a dummy subscriber would not subscribe without receiving the cash first. Therefore, even if the assessee had stated that entire cash for all these four years was paid only in the last year i.e. financial year 1994-95, the Assessing Officer could have assessed that cash must have been paid before subscribing the share capital by the dummy subscribers. Thus, according to the CIT (Appeal), issuance of notice for the assessment year 1994-95 in respect of shares subscriber relating to that year was valid. On merits, however, the CIT (Appeal) denounced the approach of the Assessing Officer on the ground that the discussion incorporated in the order while making assessment of the group companies could not form the basis of addition. Moreover, addition of ₹ 23,50,000/- was made for

which no basis or justification was given by the Assessing Offic There was no discussion either as to why the addition to the extent of aforesaid amount was made when the shares were purportedly subscribed to the tune of ₹ 29.10 lacs. According to him an examination of the assessment record of the assessee was necessary and no material pertaining to this issue was confronted to the assessee at any stage. He accordingly remitted the case back to the Assessing Officer on this issue.

6. Both the assessee as well as the revenue has filed an appeal against the aforesaid order of the CIT (Appeal). The Tribunal first took up the issue regarding initiation of the proceedings under section 147 of the Act and agreed with the assessee's submission. It has held that the very notice issued under Section 148 of the Act was illegal and thus quashed the assessment on this ground. For this reason, ITAT has not touched the merits of the case.

7. In the opinion of the Tribunal, there was no material before the Assessing Officer, apart from the solitary statement of the assessee recorded under Section 132 (4) of the Act at the time of search. However, the Assessing Officer had not acted on the basis of the said statement. The facts disclosed above would show that the statement was accepted only to the extent that cash was paid. At the same time the part of the statement that this entire cash was paid in the financial year 1994-95 was not accepted. That could not be the basis of the issuing the notice under Section 148 of the Act. If the statement was to be accepted on its face value, then according to

that statement entire cash was paid in the financial year 1994-and, therefore, addition, if any, could have been made only in the assessment year 1995-96 and there was no reason for re-opining the assessment in respect of assessment year 1994-95.

8. After hearing the counsel for the parties, we are of the opinion that the approach of the Tribunal is without blemish. Section 132 (4) of the Act reads as under:-

> "The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act"

9. It is an admitted case that during the search no books of accounts or documents or money or bullion or jewellery or any other valuable articles or things were found. As pointed above, it is the solitary statement of the assessee, which too was retracted immediately thereafter. Furthermore, apart from this statement there was no particulars coming forward *namely* who are the dummy subscribers, whether shares from the so called dummy subscribers were transferred in the name of the assessee or assessee remains the benami owners thereof and is in the control and possession of those shares etc. No such questions were even put by the Assessing Officer to the assessee after recording the statement. Thus the only material for issuance of the notice under Section 148 was this statement. Even if this statement was to be believed, this would have been the basis for issuing notice in the assessment year 1995-

96 and not the assessment in question i.e. 1994-95. It was merely figment of imagination on the part of the CIT (Appeal) that the statement should not to be believed to the extent that the cash was paid in the current financial year i.e. 1994-95 as normally such cash is paid at the time of purchase of shares by the so called dummy subscribers. This is even not recorded in the 'Reasons to Believe' by the Assessing Officer. Therefore, the order of the CIT (A) on this aspect was clearly erroneous and justifiably set aside by the ITAT.

10. We may go to the extent of observing that even the remitting of case back to the Assessing Officer would not serve any purpose in the aforesaid facts situation. We, thus, are of the opinion that no substantial question of law arises. These appeals are accordingly dismissed.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 30, 2010.
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