



THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 30.04.2013

+ **ITA 225/2013**

COMMISSIONER INCOME TAX-V

..... Appellant

versus

NIPUAN AUTO PVT LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Rajpal, Advocate.

For the Respondent : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the order dated 28.12.2012 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No. 1493/2012 pertaining to the assessment year 2006-07.

2. The Assessing Officer had made the additions of ₹ 37,75,465/- and ₹ 30,41,000/- under Section 68 of the Income Tax Act, 1961 on account of alleged unexplained investment and alleged unexplained cash credits which were shown as share application money received by the assessee, respectively.

3. The assessee went up in appeal before the Commissioner of Income-tax (Appeals) who had substantially allowed the appeal of the assessee. In so far as



the addition of ₹ 37,75,465/- is concerned, the CIT (Appeals) deleted the addition to the extent of ₹ 35,85,465/- which was essentially the unsecured loan received from Mr Alok Aggarwal. In so far as the loans and advances received from Smt Sadhna Aggarwal to the extent of ₹ 1,90,000/- (₹ 1,50,000 plus ₹ 40,000/-) was concerned, the Commissioner of Income-tax concurred with the Assessing Officer that the same had not been explained. Therefore, to that extent (i.e., to the extent of ₹ 1,90,000/-) the Commissioner of Income-tax (Appeals) confirmed the addition. However, with regard to the amount advanced by Mr Alok Aggarwal, to the extent of ₹ 35,85,465/-, the Commissioner of Income-tax (Appeals) deleted the same.

4. The Commissioner of Income-tax (Appeals) also deleted the addition of ₹ 30,41,000/- on account of share application money by holding that the assessee had discharged its burden to establish the identify and creditworthiness of the share applicants as also the genuineness of the transactions. The Income Tax Appellate Tribunal concurred with the views of the Commissioner of Income-tax (Appeals).

5. In so far as the addition on account of unexplained investment was concerned, the Commissioner of Income-tax (Appeals) had directed the Assessing Officer to submit a remand report. The directions given by the Commissioner of Income-tax (Appeals) in that context were as under:-

“4.2 During the course of appellate proceedings, the matter was remanded to the file of the AO as follows:-

During the course of appellate proceedings, it is noticed that you have made additions on account of unsecured loans for failure on the part of the directors Sh Alok Agarwal and Smt Sadhna Agarwal to attend the proceedings and explain the genuineness of the transactions. The AR has given a list of forty seven persons in case of Sh Alok Agarwal, one of the directors, in whose bank account there were cash deposits and from where the loan was advanced to your assessee and



confirmed that the directors are ready to depose before you so that the genuineness and credibility of the transaction can be verified. In view of the same, you are directed to call Sh Alok Agarwal and Smt Sadhna Agarwal with a view to verify the genuineness of receipt of loan of ₹ 37,75,465/- by your assessee. You may also call for the I.T. Returns of these persons along with their bank statements and agreements to sell the land so that the loan transaction can be verified to the hilt.”

6. The Commissioner of Income-tax (Appeals), noted that the Assessing Officer, by virtue of his report dated 18.09.2010, had indicated that initially the said Mr Alok Aggarwal and Smt Sadhna Aggarwal who were Directors of the Assessee Company did not respond to the notices issued by him. However, subsequently the Directors appeared and filed details including copies of their income-tax returns for the assessment years 2005-06 and 2006-07. In so far as Mr Alok Aggarwal was concerned, in his income-tax return for the assessment year 2005-06 he had disclosed capital gains to the extent of ₹ 65,480/- and in respect of the assessment year 2006-07, the said Mr Alok Aggarwal had disclosed a capital loss to the extent of ₹ 5,87,940/- but, at the same time he disclosed sale proceeds of land to the extent of ₹ 48,16,742/-.

7. From the above, the Commissioner of Income-tax (Appeals) concluded that Mr Alok Aggarwal had ample availability of funds from which he could have advanced the loan of ₹ 35 lacs (approximately) to the assessee during the year in question after depositing the same in his bank account. It is in this backdrop that the addition made by the Assessing Officer under Section 68 was deleted to the extent of the advances given by the said Mr Alok Aggarwal. However, with regard to the amounts received from Smt Sadhna Aggarwal, since, she had not disclosed any capital gains or availability of funds during the years in question, the Commissioner of Income-tax (Appeals) concluded that the said amount of ₹ 1.9 lacs remained unexplained and, therefore, the addition made by the Assessing Officer, to that extent, was upheld. It may also be pointed out at



this juncture that inasmuch as the amount received from Mr Alok Aggarwal were in cash and were otherwise, than by way of account payee cheques/drafts, the Assessing Officer was directed to initiate penalty proceedings under section 271D and 271E of the said Act for the alleged violation of sections 269SS and 269TT.

8. The Income Tax Appellate Tribunal examined the order passed by the Commissioner of Income-tax (Appeals) and concurred with the views taken by him. We also find no reason to take a different view. In any event, no substantial question of law arises for our consideration in so far as the addition, on account of unexplained investment is concerned.

9. With regard to the addition made on account of share application money allegedly received by the assessee from two companies, the learned counsel for the appellant/revenue submitted that merely furnishing the income-tax returns and bank statements etc. of the share applicants would not be sufficient. It was further necessary for the assessee to have discharged the burden of proving the creditworthiness of the share applicants by producing the share applicants and by other evidence to the satisfaction of the Assessing Officer. Reliance was placed on the decision of this court in the case of **CIT Vs. Nipun Builders and Developers Pvt. Ltd.**: ITA No.120/2012 decided on 07.01.2013. The learned counsel for the appellant had placed reliance on paragraphs 8 and 9 of the said decision. The said paragraphs are reproduced hereinbelow:-

“8. So far as the creditworthiness of the share subscribers is concerned, the contention of the assessee before us is that it was proved by the bank statements of those subscribers submitted before the AO. The AO has not referred to them in the assessment order but it is not in dispute that the copies of the bank statements were furnished before him. Even assuming that the bank statements were filed before the AO, that by itself may not be sufficient to prove the creditworthiness without any explanation for the deposits in the



accounts and their source. The usual argument in all such cases, including the present case, is that it is not for the assessee to prove the source of source and origin of origin of the receipts. We are alive to the difficulty that may be faced by an assessee to unimpeachably establish the creditworthiness of the share subscribers but at the same time we are of the opinion that mere furnishing of the copies of the bank accounts of the subscribers is not sufficient to prove their creditworthiness. There must be, in our opinion, some positive evidence to show the nature and source of the resources of the share subscriber himself and therefore it is necessary for him to come before the AO and confirm his sources from which he subscribed to the capital. In the present case the assessee did not produce the principal officer of the companies who subscribed to the shares; it merely filed a letter at the “dak” counter of the AO, stating that the communications sent by it to the share subscribers have not come back unserved. This is not compliance with the direction of the AO who had issued notice to the assessee to produce the principal officers of the subscribing companies. As is well known, in the case of private limited companies, it cannot be denied that there is a continuing contact and relationship with the share holders and if the assessee was serious enough to establish its case, it ought to have produced the principal officers of the subscribing companies before the AO so that they can explain the sources from which the share subscription was made. That would also have taken care of the difficulty of the assessee in proving the creditworthiness of the subscriber companies. It was, therefore, in the assessee’s own interest to have actively participated and cooperated in the assessment proceedings and complied with the direction of the AO to produce the principal officers of the subscribing companies. Instead, the assessee took an adamant, if we may use that expression, attitude and failed to comply with the direction of the AO; not only that, it challenged the AO’s finding that the summons sent to the companies came back unserved with the remark “no such company”, which was also supported by the report of the inspector who made a visit to the addresses. The assessee thus took a very extreme stand which was in our opinion not justified; certainly it did nothing worthwhile to discharge the onus to prove the creditworthiness of the subscribing companies.

9. We referred to the argument of the assessee that it is not part of its onus to prove the source of source and origin and origin of the share subscriptions. In addition to what we had said with reference to that



argument in the preceding paragraph we cannot also help observing that the basis of the argument is perhaps the judgment of the Madras High Court in *S. Hastimal vs. Commissioner of Income Tax, Madras*, (1963) 49 ITR 273. That was a case of reassessment commenced in the year 1957 calling upon the assessee to explain a credit in his favour in the books of account of the firm, made in the year 1947. The assessee explained that he had borrowed the amount from one V in order to provide the monies to the firm. The explanation was not accepted right up to the Tribunal. Commenting on the order of the Tribunal, a Division Bench of the Madras High Court observed as under:-

“The Tribunal however has not chosen to accept the assessee’s case on grounds which we are unable to appreciate. The Tribunal commenting upon the fact that the books of account of the assessee were kept only at Phalodi, that pakka and katcha roker of the assessee at Phalodi had not been produced, and that the necessary link between the borrowing of Vijayaram and the money brought to Coonoor had not been established. As stated already, with regard to the sum of ₹ 15,000, the assessee produced indisputable documentary evidence to show that the amount came out of his borrowing at Jodhpur whether it was from Vijayaram Ganeshdas or from Gowri Shankar Bagdy. The assessee has been able to point out a source for this sum of ₹ 15,000 and this cannot be refuted by a mere steady disability on the part of the department or the Tribunal. After the lapse of ten years the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well.”

The quoted observations will clearly explain the context and setting in which they were made. They cannot, therefore, be understood as placing an embargo on the power of the AO to ask the assessee to prove the creditworthiness of the creditor/share holder for the purpose of Section 68. In an appropriate case, if the facts and circumstances justify, it would be open to the AO to seek information from the assessee as to the creditworthiness of the creditor/share subscriber which may include information as to the sources of the creditor/share subscriber. If proving the creditworthiness of the creditor/subscriber is now judicially accepted as one of the ingredients of the onus cast on the assessee under Section 68, we do not see how proof of the



resources of the creditor/share subscriber can be completely excluded from the sweep of the burden. It may not be required of the assessee to give in-depth particulars and details about the resources of the creditor or the share subscriber, but the minimum required of him would be, in our opinion, information that will prima face satisfy the AO about the creditworthiness. Mere furnishing of the bank statements of the share subscribers without any explanation for the deposits in the accounts may not meet the requirements of Section 68. It may be necessary to know the business activities of the share-subscribers in order to ascertain whether they are financially sound and are able to purchase shares for substantial amounts; if they have borrowed monies for making the investment, whether they were capable of repaying them having regard to the nature of their business, volume of the business, etc. These are very relevant, in our opinion, to establish the creditworthiness of the investors. It is for this purpose that it is necessary for the assessee, in appropriate cases where the facts and surrounding circumstances justify, to seek the assistance of the principal officer of the subscribing companies and present him before the AO so that he will be in a position to explain in detail the source from which the shares were subscribed. A curious aspect of the matter which cannot be lost sight of is that the record reveals the assessee's ability to procure the share applicant's bank statement. This speaks volume about its conduct, and belies the argument about its inability to ensure the presence of such company's principal officers."

10. From a reading of the above extract, it is apparent that the case of ***Nipun Builders and Developers Pvt. Ltd.*** (*supra*) was different and is distinguishable from the present case. In that case, the summons sent by the Assessing Officer to the Companies who had applied for shares had been returned with the remarks "no such company". Whereas in the present case, the identity of the two companies which are sister companies stood established. Furthermore, this is not a case of mere furnishing of copies of bank accounts of the subscribers. But, in the present case, as noted by the Commissioner of Income-tax (Appeals) the assessee had filed the income-tax returns of the subscriber companies as also their bank statements and balance sheets in addition to the confirmation letters



from the said two companies. A copy of the Form No. 2 filed by the assessee with the Registrar of Companies regarding the allotment of shares to the said two companies had also been furnished. It is in this backdrop that the Commissioner of Income-tax (Appeals) had concluded that the assessee had been able to prove its case and that the Assessing Officer could not shift the burden back onto the Assessee Company without the Assessing Officer producing any tangible material to doubt the veracity of the documents furnished by the assessee. The Income Tax Appellate Tribunal concurred with the views taken by the Commissioner of Income-tax (Appeals).

11. It is obvious that in the context and factual matrix of the present case, the case of ***Nipun Builders and Developers Pvt. Ltd. (supra)*** is distinguishable. The assessee in the present case, as rightly observed by the authorities below and particularly by the Commissioner of Income-tax (Appeals) has been able to discharge the initial burden to establish the identity, creditworthiness and genuineness as regards the transactions concerning the allotment of shares. In that view of the matter no substantial question of law arises for the consideration of this court. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

APRIL 30, 2013
‘RK’