



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

Reserved on: 13.01.2014  
Pronounced on: 20.02.2014

+ **ITA 142/2013**

M/S. BON SALES (P). LTD. ....Appellant  
Through: Sh. Ajay Vohra with Ms. Kavita Jha,  
Advocates.

Versus

THE COMMISSIONER OF INCOME TAX .....Respondents  
Through: Sh. Rohit Madan, Sr. Standing Counsel  
with Sh. Ruchir Bhatia, Jr. Standing Counsel.

**CORAM:**  
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**  
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**MR. JUSTICE S. RAVINDRA BHAT**

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1. The assessee in this appeal questions the decision of the Income Tax Appellate Tribunal (ITAT) by which the Revenue's appeal was allowed for the assessment year (AY) 1996-97.
2. The substantial question of law framed for consideration by this Court is as follows:

*“Did the Tribunal fall into an error in holding that the assessee had not discharged the initial onus cast upon it under Section 68 and furnishing satisfactory explanation in*



*respect of the total amount of ₹29,70,900/- in the facts and circumstances of the case?”*

3. The assessee company was engaged in manufacturing of cotton buds and cotton balls. Since its business was not running profitably, it took up the business of consultancy in real estate development. During the concerned assessment year, the Assessing Officer (AO) noted that the assessee had received two amounts from two Non-Resident Indians (NRIs). The first was from Vinay Kumar Kedia (an amount of ₹14,97,400/-), and the second was from Sh. Narottam Singh (an amount of ₹14,73,410/-). During the course of enquiry, the assessee said that these amounts were received for purchase of land on behalf of these NRIs. The AO observed that the foreign exchange remittances and certificates disclosed that the amounts had not been sent by two persons but by two companies, namely M/s. Thailand and General Co. Ltd. and M/s. Preet Trading Co. Ltd. of Thailand. He, therefore, queried that since the remittance were received from two companies, how the credit entries could be made in the books of accounts of the assessee in the name of NRIs remained unexplained. Since nothing was forthcoming, the AO treated it as unexplained and assessed/brought them to tax under Section 68 of the Act. The CIT, upon appeal, considered the issue in the light of the evidence pertaining to the sale deed through which these lands were purchased in the names of Sh. Vinay Kumar Kedia and Sh. Narottam Singh. The CIT accordingly deleted the additions. The Revenue's appeal to the Tribunal was successful. On 20.08.2004, the Tribunal noticed that the assessee had produced substantial evidence to prove the



creditworthiness of the creditors. Yet, the main question remained unanswered even in the order of the CIT. The AO's query was that the foreign remittance to the assessee was made by two companies but the assessee had credited the remitted amounts in favour of Sh. Vinay Kumar Kedia and Sh. Narottam Singh. The AO's doubt led to the query as to how these credit entries could be made in the name of two individuals when the remittance were received from two companies. This query remained unanswered by the assessee. The Tribunal took note of the sale deeds placed on record to establish the genuineness of the transaction. However, since the AO had doubted the basis of the credit entries which had not been cleared before the Tribunal, the matter was remitted for consideration to the AO again.

4. This time round, the AO, in the order, noted the Tribunal's direction. The AO observed that as far as the production of those two individuals was concerned, the assessee's explanation was that since they lived abroad, it was not possible to comply with such a requirement. The assessee was also unable to collect any evidence or show whether the two companies which had remitted the amounts were substantially owned or any substantial shareholding in them was owned by the said two individuals. The assessee again repeated before the AO the assertion that it had purchased land on behalf of the two persons and they were duly registered in their names. The AO rejected the assessee's explanations and confirmed the addition yet again.

5. The assessee's appeal was successful. The order of the appellate Commissioner allowing the assessee's claim was premised on the



affidavits of one Ms. Rosna Singjirakul as well as that of Sh. Vinay Kumar Kedia and Sh. Narottam Singh, the two purchasers. The CIT was satisfied as to the link in the chain of transactions that led to the two individuals. The CIT, therefore, held that in substance the amounts deposited with the assessee pertained to the said two Sh. Vinay Kumar Kedia and Sh. Narottam Singh and had been received by way of advance for the cost of land that was purchased by them from the appellant in the subsequent years. The CIT (Appeals) also noted that the assessee had received commission and development charges which were credited to the P&L account in the subsequent years and taxed accordingly.

6. The Tribunal accepted the Revenue's appeal. Its reasoning is premised upon the previous remand order where according to it the directions were clear that the AO had to afford an opportunity to the assessee to prove whether the two companies were owned by Sh. Vinay Kumar Kedia and Sh. Narottam Singh and the link between the two. The inability expressed by the assessee to do so, and its exclusive relevance on affidavits filed before the AO, according to the Tribunal, were not sufficient or adequate explanation as to avoid the income being added under Section 68. It accordingly directed the addition of those amounts, restoring the order of the AO.

7. In the present appeal, it is contended that the assessee did all that was expected of it and indeed lawfully required of it in the remand proceedings. Learned counsel, Sh. Ajay Vohra, argued that by producing the affidavits of the three individuals, i.e. the lady – Ms.



Rosna Singjirakul, who facilitated the transaction and the two individuals who were the ultimate purchasers, the assessee in fact established the identity of the persons extending the credit or giving the money as well as the genuineness of the transaction. Emphasizing that the genuineness was also established or proved through other means, such as the registered sale deed and the entries in the books of accounts depicting the commission payable to the assessee, learned counsel emphasized that the law pertaining to Section 8 did not cast as onerous a burden as was understood by the Tribunal in the circumstances of this case. Placing reliance on *CIT v. Value Capital Services (P.) Ltd.*, [2008] 307 ITR 334 (Delhi), *CIT v. Divine Leasing & Finance Ltd.*, [2008] 299 ITR 268 (Delhi) and various other decisions, it was submitted that the inability to produce evidence that was impossible to access could not result in the assessee being placed disadvantageously. Learned counsel submitted that as to whether M/s. Thailand and General Co. Ltd. and the other firm who were the remitters in this case were the real investors had to be seen in the light of the end-use of the amount. Learned counsel submitted that these two concerns were more in the nature of facilitators for financial transactions that were commonly prevalent in Thailand which routinely facilitated remittances abroad from that country.

8. Reliance is placed upon the decision of the Supreme Court in *Commissioner of Income Tax. v. Lovely Exports Pvt. Ltd.*, 216 CTR 195 (SC). In that case, the Court affirmed the judgment of the Division Bench which had ruled that so long as the identity of the person



making the investment or the source of funds could be traced, the assessee is said to have discharged the burden placed upon him. The assessee also relied upon the judgments reported as *CIT-IV v. Dwarkadhish Investment (P.) Ltd.*, 2010 (330) ITR 298 (Del); *CIT v. Oasis Hospitalities (P.) Ltd.*, 2011 (333) ITR 119 (Del) and *CIT v. Victor Electrodes Ltd.*, 2012 (329) ITR 271 (Del). It was urged that in the light of these decisions, the approach of the Tribunal amounted to casting an unreasonable, if not impossible, burden on the assessee. The assessee argued in addition that for the Revenue to infer that the amounts in question were really *benami* or from a dubious source, the onus was upon it. In other words, once the genuineness of the transactions and the identity of the persons concerned were shown, the Revenue had to proceed further with concrete materials to conclude that the amounts were *benami*. Learned counsel also relied upon the decision reported as *CIT v. Divine Leasing and Finance Limited*, [2008] 299 ITR 268 (Delhi). Learned counsel for the respondent relied upon the findings of the Tribunal in the impugned judgment and urged the Court not to interfere with them. It was argued that the remand order by the Tribunal on the previous occasion was on the pointed issue regarding the identity of the two companies, i.e. M/s. Thailand and General Co. Ltd. and M/s. Preet Trading Co. Ltd. of Thailand. Further, learned counsel argued that the assessee's reliance upon the affidavits of Sh. Vinay Kumar Kedia and Sh. Narottam Singh on the one hand and the affidavit of Ms. Rosna Singhjirakul was insufficient, and there needed to be a clear confirmation from the two foreign remitters, i.e. M/s. Thailand and General Co. Ltd. and M/s. Preet



Trading Co. Ltd. of Thailand. In the absence of these, it could equally be held by the AO that the entries shown in the books of accounts in respect of the transaction could well cover some other commercial activity, and the property purchased could well be in reality off\_2in relation to some other commercial transaction. Therefore, the scope of the remand was specific, i.e. the link between the two remitters in the chain of investment. If the two purchasers had been facilitated in their transactions by Ms. Rosna Singhjirakul, what was expected of the assessee was to show that the immediate remitters today, i.e. the two Thai companies had indeed facilitated the transaction as was stated by Ms. Rosna Singhjirakul.

9. From the above discussion, what is evident is that the assessee's explanation for the receipt of ₹29,70,810/- was that it was in respect of a transaction facilitated by it as a property consultant to the two individuals – Sh. Vinay Kumar Kedia and Sh. Narottam Singh. It relied upon the sale deeds executed in favour of those individuals and also the relevant entries in its books to say that the amounts were received as consideration payable on behalf of those individuals to the vendors of the properties and that the fee payable had been debited from their account. Superficially, the explanation seems plausible. Yet, the Court cannot lose sight of the fact that the identity of the investor and the genuineness are the twin requirements that have to be established to the satisfaction of the AO in each case where Section 68 is sought to be invoked. Section 68 is in the nature of an attributive or “deemed” income in the hands of the assessee, and the AO is given the



power to include unexplained cash in the hands of the assessee. *Lovely Exports* (supra) and various other decisions culminating are forthright that if the identity of the transaction and the genuineness are established, the burden cast upon the assessee is said to be discharged and the AO, in order to invoke Section 68, has to probe further and discharge the onus placed upon the Revenue. The question in this case, therefore, is whether those requirements are said to have been met with by the Revenue.

10. The remand in the first round of the litigation was on a narrow and pointed aspect, i.e. the identity of the remitters, M/s. Thailand and General Co. Ltd. and M/s. Preet Trading Co. Ltd. of Thailand. No doubt, the affidavits of the purchasers (of the property), Sh. Vinay Kumar Kedia and Sh. Narottam Singh in support of the assessee's assertions as well as the affidavit of Ms. Rosna Singhjirakul, to some extent, advance its case. At the same time, the immediate foreign remitters' explanation is absent. The assessee contends with some vehemence that being foreign nationals or concerns, it was not possible to secure their confirmations or affidavit and further, they are beyond the pale of jurisdiction of the Indian authorities. Whilst that may be so, this Court cannot help notice that when asked to produce materials in support of its contention after the remand, the assessee was able to secure affidavits of Ms. Rosna Singhjirakul as well as the alleged purchasers, i.e. Sh. Vinay Kumar Kedia and Sh. Narottam Singh. When the scope of remand itself is narrow and limited, in proving of entire chain of transactions leading to the remittance to the



assessee, the missing link was also an aspect which had to be established. This becomes critical because the monies were immediately remitted to the assessee by the two Thai companies - M/s. Thailand and General Co. Ltd. and M/s. Preet Trading Co. Ltd. of Thailand. The scope of the remand was defined in the previous order of the Tribunal dated 20.08.2004, the relevant part of which is extracted below:

*“We have carefully examined the order of the lower authorities and we are of the considered opinion that it is a fit case where the issue should be restored to the file of the AO for its re-examination and also to afford an opportunity to the assessee to prove whether these two companies are owned by Shri Vinay Kumar Kedia and Shri Narottam Singh. If not, how the assessee has made the credit entries in its books of account when the foreign remittance was made to it by these two companies. We, therefore, set aside the order of the CIT(A) and restore it to the file of the AO for readjudication of the impugned issue after affording an opportunity of being heard to the assessee.”*

11. There is no need for any authority for the proposition that the scope of enquiry of lower authority or Court in the face of a remand is confined to the points required of it to return a finding. Having regard to this aspect, once the Tribunal had spelt out what was expected of the assessee, it was not now open for the latter to contend that the requirement was unreasonable. The assessee did not appeal against the remand nor seek dilution of points on which the Tribunal recollected finding after due enquiry. In these circumstances, it is now not open for the assessee to state that even though it could afford explanations



by way of affidavits of the two individuals and the foreign national, its inability to secure any confirmation or documentary proof in support of its contention that the two foreign remitters did not have any independent transaction carries no consequence. Since this aspect goes to the root of the second requirement under Section 68, this Court is of the opinion that the genuineness of the transaction alleged by the assessee cannot be said to have been shown by it in discharge of the initial burden placed on it by Section 68 of the Income Tax Act.

12. In the light of the above findings, the appeal has to fail; it is accordingly dismissed with no order as to costs.

**S. RAVINDRA BHAT**  
**(JUDGE)**

**RAJIV SAHAI ENDLAW**  
**(JUDGE)**

**FEBRUARY 20, 2014**

