* THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.08.2011

\+ ITA No. 1158/2007

MOD CREATIONS PVT. LTD. ..... APPELLANT

Vs

INCOME TAX OFFICER ..... RESPONDENT

Advocates who appeared in this case:
For the Appellant: Mr. S. Krishnan, Advocate
For the Respondent: Mr. Sanjeev Sabharwal, Advocate

CORAM :-
HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER , J (ORAL)

1. The learned counsels for both parties agree that the appeal can be admitted and heard on the basis of the pleadings and material on record.

2. Admit.

2.1. The only question of law which arises for our adjudication is as follows:

> *"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal (for short 'ITAT') was justified in sustaining ₹8,24,000.00 on account of unexplained cash credit under the provisions of Section 68*

of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act')?"

3. In the captioned appeal, we are concerned with the Assessment Year 2002-2003. The assessee has filed this appeal as it is aggrieved by the judgment dated 27.4.2007 passed by the ITAT. As indicated hereinabove the only issue which arises for our consideration is as to whether the ITAT erred, in the given facts & circumstances of the case in sustaining the addition of sum of ₹8,24,000.00 in the income of the assessee.

4. In order to decide the aforementioned issue the following facts are required to be noticed.

4.1 The assessee is engaged in the business of trading in imported tailoring accessories like buttons etc. During the relevant assessment year, the assessee had raised unsecured loans from its Directors and shareholders. The total amount of loan raised was, in fact, added to its income, i.e. ₹8,24,000.00. The persons, who had lent money to the assessee company were five (5) in number. Out of the five (5) persons, two (2) persons were at the relevant time the Directors of the assessee, while the other three (3) persons were, its shareholders.

4.2 The Assessing Officer (for short 'AO') while carrying out the assessment sought information from the assessee vide notice dated 10.10.2003 qua the credits found in its books of accounts, vis-a-vis the loans extended by the five (5) persons, who were its Directors and shareholders. In response to the notice issued by the AO, a reply

dated 14.12.2004 was submitted by the assessee, setting out the following details:

Name	Amounts recd. & advanced to 'a' co.		Source
1. Shri Krishan Lal Johar	19.5.01 22.6.01	₹35,000/- ₹77,000/-	Opening Balance Commission received from Alfa TV Studio (P) Ltd. on 19.6.01 at ₹77,800/-
	8.1.02 23.3.02	₹1,00,000/- ₹50,000/-	Gift received on 4.1.02 Commission received from creative Edge Mens Wear at ₹89,590/-
2. Shri Anil Kumar Malik	9.1.02	₹1,00,000/-	Gift received of ₹One Lac on 5.1.02
	12.1.02	₹70,000/-	Commission of ₹69,389/- received from Goyal Offset Printers on 10.1.02
	15.1.02	₹40,000/-	Commission received from Earth Leasing & Finance (P) Ltd. at ₹40,450/- on 12.1.02
3. Smt. Meenu Malik	25.6.01	₹52,000/-	Commission received from Shally Summon Productions at ₹52,500/- on 23.6.01.
	6.6.02	₹76,000/-	Commission of ₹77,818/- received from Designers Point (I) Pvt. Ltd. 28.1.02.
4. Smt. Shashi Malik	22.6.01	₹55,000/-	Commission of ₹55,400/- received from Shally Summon Productions on 22.6.01.
	16.2.02	₹74,000/-	Commission of ₹74,680/- received from Designer's Point India (P) Ltd. on 28.1.02.
5. Smt. Ranjana Kumari	28.3.02	₹1,30,000/-	Commission of ₹1 lac received in March, 2002.

4.2 On receiving the reply, the AO followed it up with a notice under Section 131 of the IT Act. The said notice under Section 131 of the IT Act was issued to, one such Director of the assessee, i.e., Mr. Krishan Lal Johar.

4.3 Mr. Krishan Lal Johar attended the proceedings before the AO. In the course of proceedings certain questions were put to Mr. Krishan Lal Johar. It is not disputed that the other four (4) creditors, that is, one (1) Director, Mr. Anil Kumar Malik; and three (3) shareholders Mrs. Meenu Malik, Mrs. Shashi Malik and Mrs. Ranjana Kumari, did not personally appear before the AO. It is also not in dispute that the assessee company was also issued a notice under Section 142(1) of the IT Act, on 12.1.2005. Pursuant to this notice, the assessee filed a reply on 24.1.2005.

4.4 It is also not in dispute that in so far as the other creditors were concerned they filed their affidavits stating therein the source of funds, which were used in lending the amounts to the assessee company. The AO also records in the assessment order that the said creditors filed with him their income tax returns as well as their bank statements.

4.5 It may be noted at this stage that the AO after perusing the reply of the creditors as well as that of the assessee issued summons under Section 131 of the IT Act, on 24.2.2005, even to the entities which evidently had paid commission and given gifts to the five (5) creditors (hereinafter referred to as sub creditors) which formed the source of

funds available with the said creditors. The notices under Section 131 of the IT Act were issued to the following entities/persons:

i) M/s. Vasu Apparels (P) Ltd.

ii) Mr. Ramesh Kumar Goel.

iii) Mr. Deepak Gupta.

4.6 It is important to note that even though these notices had been sent to the aforementioned entities/persons only on 24.2.2005, the AO proceeded to pass the assessment order within four (4) days of the issuance of notice, that is, on 28.2.2005.

4.7 Suffice it to say at this stage that, the AO after perusing the material placed before him and explanation given by the assessee came to the conclusion that both the genuineness of the transactions as also the creditworthiness of the creditors remained unexplained. Consequently, the AO directed that the unexplained credit in the books of accounts of the assessee to the extent of ₹8,24,000.00 be added to its income.

4.8 The assessee being aggrieved by the order of the AO preferred an appeal before the Commissioner of Income Tax (Appeals) {for short 'CIT(A)}. The CIT(A), after a detailed examination of the material placed on record as well as pleas of the assessee and the revenue reversed the view taken by the AO.

4.9 The Revenue being aggrieved by the order of the CIT(A) preferred an appeal to the ITAT. The ITAT in turn reversed the view taken by the CIT(A). The necessary consequences of which was the AO's order was sustained.

5. In support of the appeal, we have heard both, Mr. Krishnan, learned counsel for the appellant/assessee and Mr. Sabharwal, learned counsel for the respondent/revenue.

6. Mr Krishnan largely relied upon the order of the CIT(A). It was the submission of Mr Krishnan that the three tests which are ordinarily applied to an assessee to explain credits found in his books of accounts are as follows:

(i) Identity of the creditors;(ii) The credit worthiness of the creditors; and (iii) the genuineness of the creditors.

6.1 Mr Krishnan elaborated the aforementioned submission by submitting before us that in so far as the identity of the creditors was concerned, there was a concurrent finding of fact, which is not in dispute. The finding records that creditors in this case are directors and shareholders of the assessee.

6.2 In so far as the creditworthiness of the said creditors is concerned, Mr. Krishnan submits that the bank statements as well as the income tax returns of the said creditors had been filed with the AO. The said creditors, as has been found by the authorities below, were assessable to tax. It is his submission that even though the assessee was not required to give explanation vis-à-vis the sub-creditors; the identity as well as addresses of the sub creditors were available on record.

6.3 As regards the genuineness of the transaction, Mr. Krishnan submits that all transactions had been routed through banks, and necessary material has been placed before the authorities below.

6.4 Mr. Krishnan submits that once the assessee had done the needful, the onus shifted on to the revenue, and if the revenue contended that the monies which the sub-creditors gave to the creditors was that of the assessee then, the revenue would have to prove the same by placing on record the necessary material and cogent evidence in that regard. In this case, Mr. Krishnan submits, no such material has been placed on record nor is there any finding to that effect.

6.5 In support of the aforesaid submissions Mr Krishnan relied upon the following judgments. *CIT vs Value Capital Services P. Ltd. (2008) 307 ITR 334 (Del)* and *Nemi Chand Kothari vs CIT & Anr. (2003) 264 ITR 254*.

7. As against this, Mr. Sabharwal before us submits that the details supplied by the assessee would show that the source of funds of the creditors was by way of commissions and gifts. Mr. Sabharwal further submits that in this case the assessee impeded the inquiry of the AO inasmuch as the assessee neither produced the creditors for examination before the AO (except Mr. Krishan Lal Johar) nor did the sub-creditors appear before the AO, despite notice having been issued under Section 131 of the IT Act.

7.1 It was, therefore, Mr Sabharwal's submission that the A.O. had correctly made the addition to the income of the assessee. Mr Sabharwal in support of his pleas relied upon that portion of the A.O.'s order wherein the questions put to Sh. K.L. JOhar are set out. Relying upon the answers to the questions put by the A.O. Mr Sabharwal

submitted that it could easily be gathered that the transactions in issue involved circulation of funds from the assessee to the creditors through the aegis of the sub-creditors. In other words the credits were nothing but a device adopted by the assessee to introduce its own unexplained money through the aforementioned creditors and sub-creditors. Mr Sabharwal thus contended that the onus to prove the genuineness of the transaction was on the assessee and merely because the impugned transactions had been routed through the banking channels, would not discharge the assessee of the onus cast on it. In support of his submissions the learned counsel relied upon the judgment of the Supreme Court in the case of *CIT vs P. Mohanakala (2007) 291 ITR 278 (SC)*.

8. We have heard the learned counsel for the parties. It is clear that the addition was made by the A.O. broadly for the following reasons:

(i) At the point in time when loans were advanced to the assessee, the aforesaid creditors did not have sufficient balance to their credit in their respective bank accounts.

(ii) Cheques were issued from the creditors' bank accounts in favour of the assessee in close proximity to the date when monies were received by the creditors in the form of commission/ gifts. De hors these receipts, the creditors would not have had sufficient money to advance to the assessee in the form of loan.

(iii) The statement made by Sh. K.L. Johar, director of the assessee under Section 131 of the I.t. Act, showed that he was unaware of some

of the aspects related to his earnings and receipt of gifts etc. Therefore, the entries in the books of accounts of the assessee were in the nature of accommodation entries.

(iv) Out of five (5) creditors, four (4) creditors did not personally appear before him in response to the summons issued to them.

(v) The said creditors had paid small amounts as tax qua their individual returns and that tax had not been deducted at source in respect of commission received by them.

9. We may note at this stage that in the order of the CIT(A) there is a discussion with respect to the response received from the assessee on these aspects. Broadly, the CIT(A) recorded the fact that in so far as the credit worthiness of the aforementioned creditors was concerned they had in support of their submission disclosed that their source of funds were largely commissions (except two instances where gifts were received), in support of which certificates have been submitted from parties who had paid the commission. It is also observed in the CIT(A)'s order that parties which paid the commission, as also donors of gifts, were assessed to tax and confirmations in respect of commission as well as gift deeds were also alluded to.

9.1 As regards the creditors which included the four creditors who had not appeared before the A.O., following documents were filed:

(i) Acknowledgements of returns filed for assessment year 2002-03;

(ii) Computation of income for assessment years 2002-03;

(iii) Statement of bank accounts; and

(iv) Affidavits stating that monies have been advanced to the assessee.

9.2 Apart from the above in the order of CIT(A) there is a reference to a letter dated 28.02.2005 issued on behalf of four creditors who did not appear before the A.O. wherein they alluded to the fact that they had placed relevant material before the A.O. and thus did not feel the need to appear in person unless the queries remained unanswered. In any event they offered to supply further information if a specific query in that regard were to be raised by the A.O.

9.3. As regards the failure on the part of Mr K.L. Johar to give specific details in respect of questions put to him by the A.O., the CIT(A) observed in his order that it was argued before him that on account of Mr. K.L. Johar's age, who at the relevant time was approximately 70 years of age, he was unable to give some details in respect of the queries put to him, though he had supplied the complete address of the donors from whom the gift had been received which included the name and locality where the donors resided. The CIT(A) has made a record of these submissions in paragraphs 3 to 5 of his order. After recording these submissions the CIT(A) in paragraph 6 returned the following findings of fact:

(i) The identity of the creditors could not be doubted as the assessee was able to show the existence of five creditors.

(ii) The genuineness of the transaction was also established as all transactions routed through bank accounts and monies were paid by

the assessee through cross-cheques. In other words payments were made through banking channels and were thus verifiable.

(iii) The assessee had filed copies of bank accounts of the creditors, who showed not only the transactions related to the cheques issued to the assessee but also those related to other entries in the said account. Therefore, the genuineness of the transaction could not be doubted.

(iv) As regards credit worthiness of the creditors, the reliance was placed on the returns filed by the creditors for the relevant year and the fact that they were assessed to tax.

(v) The fact that the creditors' Permanent Account Number (in short 'PAN') as well as the credit entries made in their bank accounts were available with the A.O., was also noticed. It was also noticed that PAN of other parties, who had made the payments to the creditors, were also available. The details of the two donors, who had given gifts of ₹ 1 lac to the two creditors, were also available with the A.O.

10. With these materials on record, a finding was returned that credit worthiness of the aforementioned creditors was established. The CIT(A) thus came to the conclusion that in these circumstances non-appearance of the remaining four creditors before the A.O. was not material and that in the wake of the material before the A.O. the onus had shifted on to the revenue to prove, if it disputed, as it did, the genuineness of the loans extended to the assessee. The CIT(A) also disagreed with the A.O.'s observation that since the creditors had paid small amounts as tax against their individual assessments, it would

demonstrate that the loans advanced to the assessee were not genuine.

11. In our view, with the findings of fact recorded by the CIT(A), the ITAT ought not to have reversed the said findings unless it come to the conclusion that they were perverse based on tenable reasoning. On the other hand, the ITAT has reversed the order of the CIT(A), as observed in paragraph 18 of the impugned judgment passed by the ITAT, solely on the ground that despite opportunities having been granted to the assessee/ directors/ shareholders, the assessee had done "*nothing substantial*" to prove the genuineness of the transaction and the credit worthiness of the creditors/ persons, who lent the money to the assessee. This, according to the ITAT, showed "*malafide intention*" of the assessee. The Tribunal concluded by saying that in view of these two aspects, the assessee had failed to establish that the order of the A.O. was perverse or based on inadmissible findings and, therefore, since there was no illegality, perversity or miscarriage of justice in the order of the A.O., the same has to be sustained.

12. In our view, the Tribunal has adopted an erroneous approach on the aspects of genuineness of the transaction in issue and the credit worthiness of the persons/ creditors who lent money to assessee. As noticed above, the first aspect, i.e., identity of the creditors was established before any of the authorities below. It will have to be kept in mind that Section 68 of the I.T. Act only sets up a presumption against the assessee whenever unexplained credits are found in the books of accounts of the assessee. It cannot but be gainsaid that the

presumption is rebuttable. In refuting the presumption raised, the initial burden is on the assessee. This burden, which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors. It is no part of the assessee's burden to prove either the genuineness of the transactions executed between the creditors and the sub-creditors nor is it the burden of the assessee to prove the credit worthiness of the sub-creditors. [See ***Nemi Chand Kothari*** (*supra*)].

13. In the light of the above principle, let us examine as to what the authorities below found vis-à-vis the genuineness of the transactions and the creditworthiness of their creditors.

(i) The fact that there was sufficient balance available with the creditors when cheques have been issued to the assessee company was established.

(ii) It was also established that the funds available at the relevant point in time were not infused into the bank accounts of the creditors by way of cash but were in fact credited to their account again by way of cheques largely on account of commissions received by them save and except two transactions of ₹ 1 lac each received by two creditors from verifiable donors.

(iii) The bank accounts as well as returns filed by the creditors who were assessable to tax alongwith their PANs' were also available with the A.O.

(iv) The assessee in turn had received the monies by way of cheques in respect of which credits were made in their books of accounts.

(v) The creditors had also placed on record receipts of commission as well as the gift deeds in respect of gifts made to the donors.

(vi) The identity and addresses of sub creditors was also available.

14. With this material on record in our view as far as the assessee was concerned, it had discharged initial onus placed on it. In the event the revenue still had a doubt with regard to the genuineness of the transactions in issue, or as regards the credit worthiness of the creditors, it would have had to discharge the onus which had shifted on to it. A bald assertion by the A.O. that the credits were a circular route adopted by the assessee to plough back its own undisclosed income into its accounts, can be of no avail. The revenue was required to prove this allegation. An allegation by itself which is based on assumption will not pass muster in law. The revenue would be required to bridge the gap between the suspicions and proof in order to bring home this allegation. The ITAT, in our view, without adverting to the aforementioned principle laid stress on the fact that despite opportunities, the assessee and/or the creditors had not proved the genuineness of the transaction. Based on this the ITAT construed the intentions of the assessee as being malafide. In our view the ITAT ought to have analyzed the material rather than be burdened by the fact that some of the creditors had chosen not to make a personal appearance before the A.O. If the A.O. had any doubt about the material placed on record, which was largely bank statements of the creditors and their income tax returns, it could gather the necessary information from the sources to which the said information was

attributable to. No such exercise had been conducted by the A.O. ... any event what both the A.O. and the ITAT lost track of was that it was dealing with the assessment of the company, i.e., the recipient of the loan and not that of its directors and shareholders or that of the sub-creditors. If it had any doubts with regard to their credit worthiness, the revenue could always bring it to tax in the hands of the creditors and/or sub-creditors. [See *CIT Vs. Divine Leasing & Finance Ltd., (2008) 299 ITR 268 (Delhi)* and *CIT Vs. M/s. Lovely Exports (P) Ltd. (2008) 216 CTR 195 (SC)*].

15. This also answers the observations made by the A.O. with regard to some of the queries raised by the A.O. with Mr. K.L. Johar. Having regard to the answers given by Mr. K.L. Johar, we are not persuaded to hold that the answers by itself diluted the veracity of the material on record to explain the impugned credits in the assessee's books of accounts.

16. This brings us to the last aspect of the matter with regard to the non-appearance of the sub-creditors to whom the notices have been issued under Section 131 of the I.T. Act by the A.O. As observed above, notices had been issued to the sub-creditors on 24.02.2005. The A.O. without giving sufficient time for the services to be effected on the said noticees, within a period of four days proceeded to frame the assessment order. As a matter of fact the A.O. quite curiously, has observed in the assessment order, that the said noticees have preferred not to reply to the summons issued to them. There is no observation whatsoever as to the date on which the said notices were

dispatched and thereafter served on the said noticees. It is not uncommon that notice issued by the revenue get dispatched much later than the date mentioned on the notice and as a matter of fact get served on the noticee either on the date of appearance or thereafter. The aforesaid circumstances, according to us, show that the A.O. framed the assessment in haste. If the A.O. was genuinely interested in establishing the allegations made in the assessment order, which is, that the assessee had routed its own money through the device of creditors and sub-creditors, it ought to have given sufficient time to the said noticees to produce relevant material before him. These are aspects which the ITAT did not examine.

17. As regards the judgment cited by Mr Sabharwal is concerned in our view the same is distinguishable on facts. In the case of ***P. Mohanakala*** *(supra)* the assessees evidently had received gifts from two foreign agents by the name of Ariavan thotan and Suprotoman, who were, according to the revenue, aliases of one Sampat Kumar. In the course of scrutiny the A.O. recorded the submissions of the assessees who were before him. The statements of the said Sampat Kumar were also recorded. It appears that Sampat Kumar did not reveal the details of his bank accounts in India. There was also correspondence available which persuaded the A.O. to conclude that Sampat Kumar had given the gifts perhaps in lieu of compensatory payments to be made in respect of gifts made by him to the assessee. It is in these facts that the court ruled in favour of the revenue and against the assessees by observing that the High Court was not

justified in interfering with the concurrent findings of fact arrived at by the authorities below including the ITAT. We may only note the principle enunciated in the said judgment, which ultimately in the facts of each case, would determine as to whether the explanation offered by the assessee in respect of credit entries ought to be accepted or not. The observations being apposite are extracted hereinbelow:-

> *"15. The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessees; such credit has to be of a sum during the previous year; and the assessees offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."*

18. Before we part with the judgment we may only notice that this court vide its order dated 23.09.2009 had directed the counsel for parties to inform the court "as to whether the five directors who had given loan to the company had shown cash deposited in their bank accounts in their respective income tax return in the relevant year and how the same was assessed". In response to the above, the learned counsel for the assessee filed a set of documents on 11.11.2009 which included the copies of returns, statements of income, balance sheet, profit and loss account and bank statements of K.L. Johar. Similar documents, except the bank statement of other four creditors, were also filed. None of these documents were put in issue by the revenue.

19. For the aforementioned reasons, we are of the view that the judgment of the ITAT ought to be reversed and that of the CIT(A) be sustained. It is ordered accordingly. The appeal is allowed. The question of law as framed is answered in the affirmative and in favour of the assessee.

RAJIV SHAKDHER, J.

SANJAY KISHAN KAUL, J.

AUGUST 29, 2011
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