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

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Decision delivered on: 23.08.2023

+ **ITA 1005/2005**

COMMISSIONER OF INCOME TAX, DE ..... Appellant

Through: Mr Sunil Agarwal, Sr Standing Counsel with Mr Shivansh B. Pandya, Standing Counsel and Mr Utkash Tiwari, Adv.

versus

M/S MAYANK SERVICE LTD ..... Respondent

Through: Mr Rishi Raju, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**HON'BLE MR. JUSTICE GIRISH KATHPALIA**

[Physical Hearing/Hybrid Hearing (as per request)]

**RAJIV SHAKDHER, J. (ORAL):**

1. The above-captioned appeal was admitted on 25.01.2007, when the following questions of law were framed for the consideration of this court:

“(1) Whether the Income Tax Appellate Tribunal was right on facts and in law in deleting the addition of Rs.45 crores made by the Assessing Officer under Section 68 of the Income Tax Act, 1961?

(2) Whether the order of the Income Tax Appellate Tribunal is vitiated on account of a perverse interpretation of the facts of the case?”

2. To adjudicate this appeal, the following broad facts are required to be noticed.

2.1 In Financial Year (FY) 1999-2000, relevant to Assessment Year (AY) 2000-01, the respondent/assessee had received Rs.45 crores by way of private placement from five (5) companies towards share capital and share



premium account.

2.2 The investor companies had bought shares bearing a face value of Rs.10/- at a premium of Rs.90/- per share. Thus, out of Rs.45 crores, Rs.4.50 crores was received as share capital, while the remaining amount, i.e., Rs.40.50 crores was received as share premium by the respondent/assessee. The names of the five (5) investor companies, and other details, are set forth hereafter :

<i>S.No</i>	<i>Name/Address of Share Applicant</i>	<i>Face Value of Share Capital [In Rs)</i>	<i>Share Premium [In Rs]</i>	<i>Total Amount</i>
1.	<i>Shuklamber Exports Ltd, 10159, Padam Singh Road, Karol Bagh, New Delhi-110005</i>	<i>20,00,000/-</i>	<i>1,80,00,000/-</i>	<i>2,00,00,000/-</i>
2.	<i>Mercurial Finest Ltd, 10159, Padam Singh Road, Karol Bagh, New Delhi-110005</i>	<i>37,00,000/-</i>	<i>3,33,00,000/-</i>	<i>3,70,00,000/-</i>
3.	<i>Credible Nivesh Ltd, 10159, Padam Singh Road, Karol Bagh, New Delhi-110005</i>	<i>80,00,000/-</i>	<i>7,20,00,000/-</i>	<i>8,00,00,000/-</i>
4.	<i>Sukaram Marketing Ltd, 5, Russel Street, Kolkata-700 071</i>	<i>1,56,50,000/-</i>	<i>14,08,50,000/-</i>	<i>15,65,00,000/-</i>
5.	<i>Sheetal Exports Ltd, 9 Ezra Street, Kolkata, 700 001</i>	<i>1,56,50,000</i>	<i>14,08,50,000/-</i>	<i>15,65,00,000/-</i>
	<b><i>Total</i></b>	<b><i>4,50,00,000/-</i></b>	<b><i>40,50,00,000/-</i></b>	<b><i>45,00,00,000/-</i></b>

2.3 As would be evident from the information extracted hereinabove, out of the five (5) companies, the first three (3) companies [listed at serial number 1 to 3] were located in Delhi, *albeit* at the same address, while the remaining three (3) companies were based in Kolkata.

3. The record also reveals that the respondent/assessee having received



funds in the form of share capital and share premium, in turn invested in the share capital and share premium of three (3) out of five (5) companies. These companies were Shuklamber Exports Ltd. [serial number 1], Sukaram Marketing Ltd. [serial number 4] and Sheetal Exports Ltd [serial number 5]. The details concerning these investments made by the respondent/assessee are set out hereafter:

<i>S.No</i>	<i>Name/Address of Share Applicant</i>	<i>No, of Shares Purchased</i>	<i>Amount Invested</i>
1.	<i>Shuklamber Exports Ltd, 10159, Padam Singh Road, Karol Bagh, New Delhi-110005</i>	<i>30,000</i>	<i>Rs 30,09,000/-</i>
4.	<i>Sukaram Marketing Ltd, 5, Russel Street, Kolkata-700 071</i>	<i>15,55,000</i>	<i>Rs 15,55,50,000/-</i>
5.	<i>Sheetal Exports Ltd, 9 Ezra Street, Kolkata, 700 001</i>	<i>9,67,000</i>	<i>Rs 9,67,00,000/-</i>

3.1 Thus, out of the total investment of Rs.45 crores, the respondent/assessee had invested Rs.25,52,50,000/- in the three (3) companies referred to above.

3.2 The record also reveals that over a period of four AYs, which included the AY in issue, i.e., AY 2000-01 and previous three AYs, the respondent/assessee had either filed a loss return or filed a return showing minuscule profit.

3.3 Thus, in the AY in issue in 2000-01, the respondent/assessee had returned an income of Rs.2,918/- while in the immediately preceding AY, it had filed a loss return. The return for 1999-2000 showed a loss of Rs.2,110/-

3.4 Likewise, for AY 1998-99, the respondent/assessee had file a loss



return; the loss disclosed was Rs.24,030/-. Similarly, in AY 1997-98, the respondent/assessee had disclosed a meager income amounting to Rs.68,100/-.

4. Having regard to the fact that financials of the respondent/assessee were poor, the Assessing officer (AO) sought to investigate the matter further and, hence, issued summons under Section 131 of the Income Tax Act, 1961 [in short, “Act”] to the investor companies.

5. It appears that the directors of the investor companies did not appear. However, the respondent/assessee placed before the AO documentation in the form of confirmations and Permanent Account Number (PAN) as also bank statements to establish the genuineness of the transaction. Although, these documents were filed, the AO was not persuaded to hold that the transaction in issue had met the triple test enunciated by the Courts to enable an assessee to discharge of onus with regard to the unexplained credit entries found in the books of accounts.

5.1 The triple test evolved by the Courts concerns the following: establishment of the identity and the creditworthiness of the creditor, and the creditworthiness as also the genuineness of the transaction.

6. Given this position, the AO made an addition of Rs.45 crores under Section 68 of the Act to the income declared by the respondent/assessee as, according to him, the said amount constituted unexplained cash credit.

7. Being aggrieved, the respondent/assessee filed an appeal before the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”].

8. The CIT(A) *via* order dated 18.03.2004 confirmed the order passed by the AO. It is important to note that, although, the CIT(A) concluded that the



identity of the investors was established he was not persuaded to hold that the transaction was genuine and, accordingly, sustained the addition made by the AO.

8.1 This conclusion of the CIT(A) was pivoted on the fact that the respondent/assessee had failed to discharge the onus placed on it, which was, to explain the nature and source of credit found in its books of accounts.

9. It is against the aforesaid backdrop that the respondent/assessee carried the matter in appeal to the Tribunal. The Tribunal, strangely, made note of the following submissions advanced on behalf of the respondent/assessee without returning a finding of fact as to whether or not each one of them was borne out from the record :

*“6. The stand of the assessee all-through has been consistent. The ld. counsel for the assessee has brought to our attention the fact that all the five companies involved were existing assesseees; that their PAN numbers and confirmations, bank statements and balance-sheet , etc., were produced on record duly before the AO. It is submitted that the observation of the AO, as confirmed by the ld. Commissioner(A), that Section 133(6) of the Act was not complied with, is not factually correct. The assessee company has caused enquires to be made from all the five applicant companies to the share capital and share premium . All of them informed that the notice u/s 133(6) was duly complied with. All of them had, in pursuance to the said notice, submitted before the assessee, copies of bank account, copy of the account with the assessee, as also their Income Tax receipts and Income Tax account number. In response to the summons u/s 131, they had appeared before the AO of the assessee company. However, for reasons best known to him, the AO did not record their statements. The Assessee also furnished copies of the replies filed by the applicant companies in response to the query of the AO. As per these replies also, these companies had furnished, at all stages of the asstt. proceedings, the relevant documentary evidence, as required. These companies, according to the assessee, and as per the record produced, are companies incorporated under the Companies Act, 1956. They have been regularly filing their returns of income under the Income Tax Act. Also, they have owned capital funds much in excess of their investments in the assessee”*



company. The details of such funds vis-à-vis, the investment made, have been brought on record. This establishes the credit-worthiness and the genuineness of the investment made by the investment companies in the assessee company.”

[Emphasis is ours]

10. After recording the submissions advanced on behalf of the respondent/assessee, the Tribunal reversed the view taken by the CIT(A) by concluding that the respondent/assessee had discharged its onus. For the sake of convenience, the relevant observations made by the Tribunal in this regard are extracted hereafter:

“8. Undoubtedly, Section 68 casts upon an assessee the duty to explain beyond the pale of doubt, the sources of any cash credit in its books of account. However, the purview of Section ceases here. If the assessee has been able to prove the nature and sources of cash credit received, the burden of proof lifts. It thereafter shifts on to the Department to prove otherwise. The assessee cannot be put to prove the source of his source. Once the nature of source and identity of the investor is established, no other proof is required. Once there is no case to doubt either the genuineness or the existence of the identity of the investor companies, there is no reason why the addition should have been made. In the case of Stellar Investment, 251 ITR 263(SC), the Hon’ble Supreme Court upheld the order of the Hon’ble High Court holding that even if it was to be assumed that subscribers increased share capital were not genuine, under no circumstances could the amount of share capital be regarded as the undisclosed income of the assessee.”

[Emphasis is ours]

11. In our view, the conclusion reached by the Tribunal that the respondent/assessee proved the nature and source of the investment made in its share capital and towards share premium, was founded, if not fully, substantially, on the submission made on behalf of the respondent/assessee that information sought *via* notices issued under Section 133(6) of the Act had been furnished and that although in response to the summons issued under Section 131 of the Act, the concerned persons had appeared before the



AO, their statements were not recorded.

12. As is evident from paragraph 6 of the impugned order, the Tribunal went on to record that not only the respondent/assessee had furnished copies of the replies filed by the investor companies in response to the queries raised by the AO, but had also placed before him the relevant documentary evidence.

13. These submissions seem to have been taken by the Tribunal on their face value. Nothing has been shown to us which would demonstrate, firstly, that the directors of the investor companies had, in fact, appeared before the AO. Secondly, that replies had been furnished by the investor companies in response to the queries raised by the AO.

14. Besides this, what is disconcerting in this matter (and something which learned counsel for the respondent/assessee has not been able to answer) is the following:

(i) If the financials of the respondent/assessee were that it had earned almost negligible profit in the AY in issue and had failed to register a profit in the preceding two years, why would any investor be interested in infusing Rs. 45 crores in the respondent/assessee?

(ii) We may have ignored the aspect above, if otherwise there was material on record which would have shown that the investors had the necessary wherewithal to invest monies in the respondent/assessee. Examination of creditworthiness of the investor companies was critical; without having the relevant material on record, the Tribunal could not have concluded that the respondent/assessee had discharged its onus.

15. As indicated right at the beginning of our narration, out of Rs.45



crores invested in the respondent/assessee, Rs.25,52,50,000/- was reinvested by the respondent/assessee in three (3) out of the five companies, i.e., in Shuklamber Exports Ltd., Sukaram Marketing Ltd. and Sheetal Exports Ltd.,i.e., nearly the entire amount was repaid.

16. The Tribunal somehow did not deem it fit to inquire as to why more than 50% of the amount raised by the respondent/assessee was invested by it in the three companies referred to hereinabove.

17. The Tribunal, as a matter of fact, did not inquire into the financials of investor companies and, therefore, according to us, the test of creditworthiness was also not met in this case.

18. Therefore, in our view, for the reasons given above, the transaction in issue failed to meet the test of creditworthiness and genuineness even if one were to accept that it fulfilled the test of identity.

19. Thus, for the foregoing reasons, we are of the view that the finding returned by the Tribunal that the respondent/assessee had discharged its onus is perverse.

20. Accordingly, both questions of law as framed are answered in favour of the appellant/revenue and against the respondent/assessee.

21. The appeal is disposed of, in the aforesaid terms.

22. Parties will act based on the digitally signed copy of the order.

**RAJIV SHAKDHER, J**

**GIRISH KATHPALIA, J**

**AUGUST 23, 2023/aj**