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

% *Date of decision: 27.09.2023*

\+ **ITA 734/2019**

ASSISTANT COMMISSIONER OF INCOME TAX-27, NEW DELHI ..... Appellant

Through: Mr Shailendera Singh, Sr Standing Counsel with Ms Dachhita Shahi, Standing Counsel.

versus

MONTAGE ENTERPRISES PVT. LTD. ..... Respondent

Through: Mr M.P. Rastogi with Mr Manu K Giri, Advs.

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. This appeal concerns Assessment Year (AY) 2007-08.

2. *Via* this appeal, the appellant/revenue seeks to assail the order dated 14.01.2019, passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

3. Mr Shailendera Singh, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that there are two issues which have been raised in the instant appeal filed before this court.

4. First, the sustainability of the deletion of addition made under Section 68 of the Income Tax Act, 1961 [in short, "Act"] with regard to the

investment made in shares issued at premium by the respondent/assessee.

4.1 It is pointed out that the shares which bore a face value of Rs.10/- per share carried a premium of Rs.190/- per share.

4.2 The amount invested in the share capital of the respondent/assessee was Rs.20 crores.

5. Second, the erroneous inclusion of CENVAT Credit in the profits of the respondent/assessee for the purposes of arriving at the deduction available under Section 80IB of the Act.

6. In support of his submission with regard to the first issue, Mr Singh sought to place reliance on the observations made by the Assessing Officer (AO) in the assessment order dated 31.12.2009.

6.1 In particular, Mr Singh highlighted the fact that although an amount of Rs.20 crores was invested by Adhyay Equi Pref Private Limited [in short, "Adhyay"] *via* cheques in the period spanning between 20.02.2007 and 13.03.2007, on 19.02.2007, the credit balance in the account of Adhyay was "NIL".

6.2 This amount, as per the AO, ballooned to Rs.3 crores on 21.02.2007, *albeit* without a clue as to the source, and thereafter, the amounts were channeled by way of investment to the respondent/assessee.

7. It was also emphasized that after Rs.20 crores was invested, the credit balance in the bank account of Adhyay fell to a nominal figure.

7.1 It is pointed out that on 14.03.2007, the credit balance was Rs.7,200/-, which stood enhanced to Rs.82,200/- on 26.03.2007 and thereafter, to Rs.6,82,200/- on 31.03.2007.

7.2 In sum, the argument advanced by Mr Singh was that the state of affairs represented that the investment made in the shares of the

respondent/assessee was, in effect, undisclosed income.

8. As regards the second issue, Mr Singh submitted that the CENVAT credit availed by the respondent/assessee could not be construed as income derived from an industrial undertaking so as to entitle the respondent/assessee to claim a deduction under Section 80IB of the Act.

8.1 The submission was that the expression "derived from" in the said provision includes that income which has a direct nexus with the profits and gains of an industrial entity.

8.2 In other words, according to Mr Singh, although the self-CENVAT credit availed by the respondent/assessee would otherwise be income of the respondent/assessee, it was not a profit which was derived from the industrial undertaking.

8.3 In support of his plea, Mr Singh sought to place reliance on the judgment of the Supreme Court rendered in ***Liberty India vs. Commissioner of Income Tax*** (2009) 9 SCC 328.

9. Mr M.P. Rastogi, who appears on behalf of the respondent/assessee, submitted that no interference was called for with the impugned order passed by the Tribunal. In this behalf, Mr Rastogi sought to place reliance on the findings returned by the Tribunal.

10. We have heard the counsel for the parties and perused the record. As regards the first issue, it is crucial to bear in mind that the addition under Section 68 of the Act can only be made if the respondent/assessee fails to come through *vis-a-vis* the triple test enunciated by the court. The triple test requires an assessee to prove identity, creditworthiness, and the genuineness of the subject transaction.

11. In this case, concededly, there is no dispute with regard to the identity

of the investor. As indicated above, Adhyay was the investor.

12. The fact that Rs.20 crores have been invested *via* banking channels is not in dispute.

13. It is also not disputed that the respondent/assessee justified the premium that it had charged *qua* the shares by producing a valuation certificate of the Chartered Accountant. The valuation was made based on the Net Asset Value Method (NAVM). The valuation revealed that the shares of the respondent/assessee were worth Rs.200.52 per share.

14. We find from the assessment order that the AO has taken note of the fact that if other methods were used, the valuation would have been much higher. Therefore, there was on record a justification concerning the premium that the respondent/assessee received for its shares.

15. The issue, as noticed above, emphasised by Mr Singh was with regard to the credit balance available in the bank account *qua* Adhyay, before and after the investment.

16. That said, what has come through on perusal of the record is that the respondent/assessee has furnished the details of the cheque payments and therefore, there was enough and more material available with the AO to make further inquiry into the matter.

17. The AO, instead of making further inquiries, seems to have been burdened by the fact that the premium charged was high, which, according to us, was not the correct test for making an addition under Section 68 of the Act.

18. This aspect has been repeatedly emphasised by the courts including a coordinate bench of this court in ***Commissioner of Income-tax (Central)-III vs. Anshika Consultants (P.) Ltd.*** [2015] 62 taxmann.com 192 (Delhi). The

said judgment was cited with approval by the High Court of Madhya Pradesh in its judgment dated 07.08.2018 in ITA No.112/2018, ***Principal Commissioner of Income-tax (1) Indore vs. Chain House International (P.) Ltd***.

19. Therefore, according to us, the AO asked himself the wrong question and proceeded thereafter on the wrong path.

20. It is important to highlight, something which the Tribunal has noted, that in a query put by the AO to the representative of Adhyay, what was revealed is that it had a net worth of more than Rs.100 crores.

20.1 This assertion has remained undisputed. If this assertion is accepted, then one cannot doubt the creditworthiness of the investor i.e., Adhyay. We may, therefore, for the sake of convenience note the query directed to the investor, and the response received *vis-a-vis* the same:

> *"12. What is the net worth of your Company? Was any cash deposited in the bank account before depositing the share application money to M/s Montage Enterprises Pvt .Ltd.?*
> *Ans. The net worth of our Company is more than Rs.100.00 Crores. No, there is no cash deposit in the Bank Account before making the payment for Share Application Money to M/s Montage Enterprises Pvt. Ltd."*

21. Thus, according to us, no substantial question of law arises for consideration as far as the first issue is concerned.

22. As regards the second issue, in our view, the record shows that the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] ruled in favour of the respondent/assessee; a finding which was affirmed by the Tribunal.

22.1 The CIT(A) went into a detailed analysis of the issue at hand and correctly drew a distinction between the CENVAT credit, which is made available to a manufacturer against the duty drawback, and the Duty Entitlement Pass Book (DEPB) certificates issued to an exporter. DEPB are

"incentive profits" which are made available to an exporter who may not necessarily be a manufacturer and therefore, possibly, being ineligible for deduction under Section 80IB of the Act.

23. Both CIT(A) as well as the Tribunal have taken note of the judgment of a coordinate bench of this court rendered in ***Commissioner of Income-Tax vs. Dharam Pal Prem Chand Ltd.*** [2009] 317 ITR 353 (Delhi).

23.1 This judgment was carried in appeal before the Supreme Court. The Supreme Court bench comprising Hon'ble Mr Justice S.H. Kapadia and Hon'ble Mr Justice Swatanter Kumar [as they then were] dismissed the SLP i.e., Special Leave to Appeal (Civil) No.24055/2009 *via* the order dated 22.02.2010.

23.2 Noticeably, the judgment of the Supreme Court passed in ***Liberty India vs. Commissioner of Income Tax*** was also rendered by Hon'ble Mr Justice S.H. Kapadia [as he then was] on 31.08.2009.

24. Therefore, even as regards the second question, no substantial question of law arises for consideration.

25. Thus, for the foregoing reasons, we find that it is not a fit case for interference with the impugned order.

26. According to us, no substantial question of law arises for consideration.

27. The instant appeal is disposed of, in the aforesaid terms.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

SEPTEMBER 27, 2023 / pmc