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

\+ **ITA No.798 of 2009**

% Decision Delivered On: 2nd September, 2011

THE COMMISSIONER OF INCOME TAX
CENTRAL REVENUE BUILDING,
NEW DELHI . . . APPELLANT

Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

GOLD LEAF CAPITAL CORPORATION LTD.,
NEW DELHI . . .RESPONDENT

Through: Nemo.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. The instant appeal has been filed by the Revenue challenging the validity of remand and/or setting aside the order of Income Tax Authorities by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') whereby the assessee has been given opportunity for the fifth time to

make up the lacuna/fill in the evidence in this case to 'meet the ends of justice'.

2. The issue falls for consideration in the Assessment Year 1995-96 and relates to the addition made by the Assessing Officer (AO) under Section 68 of the Income Tax Act ('the Act' for brevity) on account of unexplained credits. During the course of assessment, the AO found that the assessee had received share application money from various alleged investors. Since he had some doubts about the genuineness of these transactions, he called upon the assessee to furnish the details of the investors and the particulars of receipts, etc. The assessee failed to supply any information in spite of various opportunities given because of which, the AO made addition of ₹2,25,57,000/-, as on account of share capital and share application money not proved.

3. Against that order, the assessee filed appeal before the CIT (A), the CIT (A) set aside the assessment order vide its decision dated 28.12.1998 directing the AO to frame *de novo* assessment after giving opportunity to the assessee as the assessee had produced some evidence before the CIT (A). On the basis of which the evidence produced, the

following observations were made by the CIT(A) while remanding the case:

> "……..one person, Sandeep Thapar figures in the account opening forms of all the three companies figuring here. The investing companies have one more person listed as a director. The antecedents of these persons to be verified and their exact role determined. The inter company transactions have to closely be analysed to arrive at the true state of affairs. For this purpose, I set aside the case to the file of the A.O. and he may collect any information required from my record. The assessee is to be framed denovo."

4. Despite repeated opportunities, the assessee gain failed to substantiate its claim and therefore, the AO vide its assessment order dated 20.3.2001 again determined the income of the assessee at ₹2,25,01,415/-, as originally assessed in original assessment order dated 30.3.1998. Against the aforesaid order, the assessee again filed an appeal before the CIT (A). The CIT(A) allowed a part of relief to the assessee vide its order dated 20.3.2002 on the following observations:

> "…that the true state of affairs had to be established after analyzing the inter-company involved, including Shri Sandeep Thapar. On one pretext or the other, the assessee has avoided meeting these requirements in the assessment proceedings and also before the undersigned. Therefore, I have no hesitation in holding that the onus under Section 68 of the Income Tax Act in respect of the share application money pending allotment of ₹1,79,50,000/- has not been discharged by the assessee in this case.

> As regards the share capital which has been allotted of ₹46,07,000/-, no addition can be made in the hands of the appellant company keeping in view the Hon'ble Supreme Court decision in the case of Stellar Investments – 251 ITR 263. However, ratio of this decision is not applicable to share application money against which shares have not been allotted. Accordingly, keeping in view the above, the addition of ₹1,79,50,000/- is confirmed. The appellant company is entitled to a relief of ₹46,07,000/-, as discussed above."

5. Against the aforesaid order dated 20.3.2002 of the CIT (A), the assessee field an appeal before the Tribunal, the Revenue filed the cross-objection thereto objecting disallowance of ₹46,04,000/- of share capital, as the assessee had failed to prove identity/creditworthiness of the companies/parties who had invested in share capital. The Tribunal, while discussing the case, returned categorical findings and made clear-cut observations that the assessee was at fault in not furnishing details in spite of repeated opportunities given to him. After deprecating the conduct of the assessee, the Tribunal has still remanded the case back to the AO giving one more chance to the assessee to furnish requisite information/documents with directions to the AO to make afresh assessment.

6. It is under these circumstances, the present appeal is filed by the Department with the grievance that the conduct of

the assessee does not warrants any such leniency to be given to him when there was total non-corporation by the assessee on earlier occasions.

7. Notice in this appeal was issued, which could not be served upon the respondent by normal process. Accordingly, the Revenue was permitted to serve the assessee by publication in a newspaper, which was duly done in spite thereof nobody appeared. The respondent was proceeded *ex parte* and following substantial question of law was framed on 19.8.2011:

> "Whether the orders of remand as passed by the ITAT is justified under the pretext to meet end of justice or in the compliance of principle of natural justice?"

8. Matter was listed today for arguments. We have heard Mr. Sanjeev Sabharwal, learned counsel appearing for the Revenue. It is submitted that the order of the Tribunal in the facts and circumstances of the case, is not correct. Mr. Sabharawal highlights the following glaring aspects:

i) There is a detailed observation in Para 35 of the order of the Tribunal wherein the Tribunal has noticed conduct and negligence on the part of the assessee but wrongly allowed third innings in the interest of justice. The facts which prove negligence are:

1) The assessee intentionally did not produce the Director, Shri Sandeep Thappar.
2) Such presence was necessary so as to come to the conclusion regarding genuineness of the transaction and creditworthiness of the investor.
3) He was not produced during the original assessment proceedings.
4) He was also not produced even before the CIT (A) and/or evidence filed before the CIT (A), though the CIT(A) remanded the matter in the interest of justice.
5) In an appeal filed to the order of AO in remanding proceedings, CIT(A) clearly concluded that in spite of opportunities given by the AO in original proceedings followed by the CIT (A) in the first innings and further opportunities by the AO in remand proceedings in second innings and even before him in the second innings, there was, thus, a case of no evidence on record to investigate and come to the conclusion about genuineness and creditworthiness of transaction respectively the investor.

6) The aforesaid was noticed by the Tribunal and such behaviour was duly deprecated in Para 35 of the order, but somehow the matter was remanded for the third innings.

ii) He also submitted that another opportunity is not *bona fide* as the Tribunal considered the conduct of the assessee, but without going into or making any enquiry or investigation and/or considering the reasons for giving such opportunity for non-production of evidence either. The Tribunal is not clothe with jurisdiction to allow a negligent assessee to take as many opportunities and fill up any lacuna in evidence and/or production of evidence, it would amount to giving premium to the negligence.

9. We find substance in this submission of Mr. Sabharwal.

10. The perusal of the impugned order would show that after discussing the law on the subject, the Tribunal pointed out the burden which led on the assessee to prove, identity of the investors, genuineness of capital/share application money and the capacity of the investors to pay. The Tribunal also recorded that such a burden was not discharged by the assessee in spite of the fact that two

innings were given to the assessee and in both the innings, number of opportunities were given. Some of observations of the Tribunal, in this behalf, are as under:

> "In these circumstances, the assessee for one reason or the other failed to furnish the details required regarding the share capital and share application money to the Assessing Officer. As a result in the first round of the assessment, on account of sheer non-cooperation on the part of the assessee by projecting the investment companies to be unapproachable, the assessee showed incapacity in providing and filing the copies of bank accounts as well as the copies of the final accounts of both the investment companies……
>
> xxx xxx xxx
>
> …….As a result, the assessee completely succeeded in its attempt for providing the information which suited it but thwarted the attempt of the Assessing Officer in examination/establishing with cogent evidence the creditworthiness of the investing companies and the genuineness of the transaction…….
>
> xxx xxx xxx
>
> From the order of the CIT (A), it is evident that by sending the matter to the Assessing Officer, he laid emphasis that in the 2nd inning the Assessing Officer should thoroughly investigate the matter for examining the genuineness of the transaction and the creditworthiness and identity of the investing companies because the major investments it the share capital of the assessee i.e. to the extent of almost 90%, belonged to these two investing companies, namely M/s Alwar Finlease Pvt. Ltd. and m/s Mehar Capital & Finance Pvt. Ltd., having same address, which also had one common Director, Shri Vikas Puri and the other Director being Mr. Vishal Puri and Mr. Virender Puri, respectively, in each company……
>
> xxx xxx xxx

> Again, in the 2nd inning of the proceedings, in compliance with the directions of CIT (A), THE Assessing Office asked the assessee to first give the brief history regarding the business activity of the assessee company, names and addresses of the shareholders, break up of their share holding, their GIR and PAN Number if they are assessed to tax, nature and source of share capital, share application money, pending allotment, current liabilities, list of share holders and their complete addresses from which the investments have been received, mode of receipt of payment if received through bank the number of the cheques/drafts, to prove the identity and capacity of creditors/shareholders/share applicants alongwith documentary evidence in support thereof and, lastly, to prove the genuineness of transaction.
>
> xxx xxx xxx
>
> The above facts reveal the genuine attempt on the part of the Assessing Officer to allow opportunity to the assessee to prove the genuineness of the transaction and the capacity of the creditors/shareholders/share applicants was again frustrated by the assessee."

11. The conduct of the assessee has been beautifully summarized by the Tribunal itself in the following manner:

> "25. All this is again indicative of the fact that in fact the assessee from day one of initiation of initial assessment proceedings was in a position to exercise control on the investing companies and still it withheld all the necessary information called for by the Assessing Officer, which could enable the Assessing Officer to test the genuineness of the transaction and creditworthiness of the investing companies by verifying the genuineness of the claims made by the assessee before the CIT (A) on the basis of those documents which the assessee filed for the first time before the CIT (A) during the 2nd inning or the appellate proceedings.
>
> 26. Thus, it stands established that in fact the assessee produced only the

> information/documents/person for recording statement called for by the Assessing Officer which suited the interest of the assessee and intentionally withheld that information which did not suit the interest of the assessee. Even Shri Sandeep Thappar, Director, as directed by the CIT (A) in the 1st appellate order to be examined by the Assessing Officer for testing the genuineness of the transaction was never produced by the assessee before the Assessing Officer, though his active involvement in the affairs of assessee company as well as the investing companies cannot be ruled out from the facts appearing on record and also in view of the finding recorded by the CIT (A) in the first appellate order."

12. We fail to understand that when such a conduct of the assessee was noted by the Tribunal itself, where was the occasion to give another opportunity to the assessee. Interestingly, the Tribunal was conscious of this fact, which is clear from the reading of Para 35 of the impugned order. In this para, the Tribunal noticed that there were two coursed open to it. First course was to draw an adverse inference against the assessee and second course was to restore the matter back to the AO. It chose second course only on the ground that the quantum of amount involved was high, that is hardly a ground or justification for restoring and giving premium to the assessee for its negligence. In fact, it is a clear case where adverse inference should have been drawn. When the Tribunal itself concluded that the

assessee was non-cooperative, it can naturally be safely concluded that the assessee did not want to produce evidence, as it would have exposed that the transactions in question were not genuine and fraudulent. Therefore, we are of the opinion that there is a legal error committed by the Tribunal, as in a case like this, only one course of action is presumed, viz., to draw adverse inference.

13. In a similar case entitled ***CIT Vs. Jagdish Processors (P.) Ltd.***, 252 ITR 755, this Court in somewhat similar circumstances when no evidence was led before the Assessing officer or CIT (A) refused to remand the matter and held that as no evidence whatsoever has been led no useful will be served in remanding the matter in the following words:

> "So far as the submission made by Mr. Shah with regard to non consideration of the evidence is concerned, we do not agree with the said submission for the reason that no evidence was adduced by the assessee either before the Assessing Officer or before the Commissioner of Income Tax (Appeals) to substantiate the case of the Assessee Company. Had the Assessee been right in its submission, the Assessee would have adduced evidence before the Assessing Officer or before the Commissioner of Income tax (Appeals). The Assessee did not lead any evidence and did not place on record any material to show that he interest paid by the assessee to its agents was covered by Explanation (b)(vii) to section 40A(8) of the Act. In the circumstances, the assessee cannot claim any benefit under the above-stated Explanation.

> Learned counsel, Mr. Shah, has made a request that in view of the law laid down by the Supreme Court in the case of CIT Vs. Indian Malasses Co. P. Ltd. (1970) 79 ITR 474, the case should be remanded to the Tribunal so that additional evidence can be adduced before the Tribunal. In our opinion, this is not a fit case of remand the matter to the Tribunal because neither was evidence ever adduced by the Assessee before any of the authorities or any averment made to show that the case of the assessee was covered by Explanation (b)9vii) in section 40A(8) of the Act. On the contrary, there is a finding to the effect that interest was paid to sharafi accounts maintained by the agent with the Assessee company.
>
> For the reason stated hereinabove, we answer the question referred to us in favour of the Revenue and against the Revenue."

14. Even otherwise, in a case like this, remand is not going to serve any purpose, as the Assessment Years 1994-95 and 1995-96 have passed. We, thus, answer the question in favour of the Revenue and against the assessee. The consequence whereof would be to set aside the order of the Tribunal and sustain the addition made by the AO.

15. This appeal is allowed in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(INDERMEET KAUR)
JUDGE

SEPTEMBER 02, 2011/pmc