

IN THE HIGH COURT OF DELHI

ITA No. 87/2007

COMMISSIONER OF INCOME TAX DELHI - II

Vs

KINETIC CAPITAL FINANCE LTD

Sanjay Kishan Kaul and Rajiv Shakdher, JJ

Dated: September 02, 2011

Appellant Rep by: Mr N P Sahni, Sr. Standing Counsel.

Respondent Rep by: None

Income Tax – Section 68 – Whether while making an addition u/s 68, the A.O. has to advert to each and every entry and he cannot pick up a couple of entries and label the entire set of deposits made during the assessment year as undisclosed income – Whether merely because certain application forms of depositors did not contain their PAN and GIR numbers, cheque numbers and draft numbers would make the forms invalid so as to make addition u/s 68 – Whether merely because of the reason that some investors had chosen not to respond to the notices, or the assessee had not been able to produce the investors, would render the addition u/s 68 as undisclosed income in the hands of the assessee.

The assessee filed his return of income on 30.11.1998, which was followed by a revised return filed on 28.12.1999. During the course of scrutiny, the AO discovered that the assessee had received deposits from eighty six (86) persons. The assessee was, in these circumstances, asked to explain the credits found qua these deposits in its books of accounts. The A.O. during the course of scrutiny also issued summons to the said eighty six (86) persons. Out of these eighty six (86) persons, sixteen (16) persons acknowledged the receipt of summons and admitted to the fact that they had deposited money with the assessee. The A.O., however, was not satisfied qua the remaining 70 depositors, that the assessee, had been able to discharge its onus that the amounts in issue, did not belong to the assessee. In this connection, the A.O. alluded to the following effect:

(i) the fixed deposit forms were filled up in a manner which was clumsy;

(ii) One depositor by the name of Ms Pamela Manmohan Singh, who had visited his office, had returned envelopes in respect of four other persons and made a statement on oath that the said four persons did not reside at the address given; which was her own address;

(iii) the said Pamela Manmohan Singh also adverted to the fact that she was unaware of any deposits made either by her husband, who had passed away on 02.06.1999, or those made in the name of her married daughter, residing in Mumbai as also her grandson living with his mother in Delhi. It was also stated that she was not in a position to categorically deny the factum of such deposits having been made at all. Ms Pamela Manmohan Singh went on to say that she will check the position with the chartered accountant engaged by her husband. It is a matter of record that no further information was received from Ms Pamela

Manmohan Singh;

(iv) 'A few' envelopes were returned by postal authorities with a noting that addressees were not available at the given address.

Based on the aforesaid discrepancies, including the statement of Ms Pamela Manmohan Singh, that the addresses of four depositors were fictitious, the A.O. refused to accept, as credible evidence, the confirmatory letters submitted by the assessee in respect of the deposits made.

The A.O. accepted, however, the submission made on behalf of the assessee that the addition could be made only in respect of fresh deposits made during the current year, and not those which were only renewed during the period in issue. Accordingly, the A.O. proceeded to make an addition amounting to Rs. 46,40,978/- as an unaccounted income of the assessee.

The CIT(A), deleted the additions made by the AO. The Tribunal recorded a finding of fact that the assessee had placed on record copies of applications, cheque numbers, name of banks, amount received, copies of confirmation of some of the investors. It further observed that merely because certain application forms of depositors did not contain their PAN and GIR number(s), cheque number(s) and draft number(s) would not make the forms invalid. The fact that notices had been issued to all eighty six (86) persons and that some of them did not respond to the same, could not result in an adverse finding being returned against the assessee. It also noted the fact that assessee was a public limited company and registered with the RBI as NBFC, and that its shares were quoted on major stock markets of the country.

Taking into account these factors the Tribunal came to the conclusion that the A.O had erred in coming to the conclusion which he did, merely because of the reason that some investors had chosen not to respond to the notices, or the assessee had not been able to produce the investors.

On further appeal by the Revenue, the High Court held that,

++ the discrepancy, if at all, out of the seventy (70) investors ultimately veered around to ten (10) investors. Even out of the ten (10) investors, six (6) entities/ persons had made deposits in the year prior to the AY in issue. The remaining four (4) persons, who had made deposits in the relevant AY, i.e., AY 1998-99, had furnished details with respect to the deposits, and also acknowledged the fact that since then, money had been returned to them. The fact that these investors had received interest, and that tax had been deducted at source, is also noted in the order of the CIT(A). As has been noted in CIT(A)'s order the exercise carried out by the A.O. was so ad hoc that in his enthusiasm he forgot to give credit even for those deposits which, according to him, were genuine. These were deposits pertaining to sixteen (16) persons who had responded to the summons issued by him. These deposits, as per the CIT(A)'s order amounted to Rs. 7,40,000/-, which the A.O. for some curious reason had thought fit to include in the total addition made in the income of the assessee amounting to Rs. 46,40,978/-;

++ in so far as the AY in issue is concerned, we are not made any wiser as to which specific entry the A.O. had found fault with, given the fact that names of the depositors were known. It has to be borne in mind that while making an addition u/s 68 of the Act, the A.O. has to advert to each and every entry and not pick up a couple of entries, as in the present case, and label the entire set of deposits made during the AY as undisclosed income of the

assessee. As noticed above, the discrepancy appeared qua four (4) credits, which were answered suitably to the satisfaction of the CIT(A); therefore, it is not understood how the A.O. could make an ad hoc addition of Rs. 46,40,978/-;

++ the Tribunal has correctly appreciated the position in law that when an unexplained credit is found in the books of account of an assessee the initial onus is placed on the assessee. The assessee is required to discharge this initial onus. Once that onus is discharged, it is for the revenue to prove that the credit found in the books of accounts of the assessee is the undisclosed income of the assessee. In the circumstances obtaining in the present case, the assessee has discharged that initial onus. The assessee is not required thereafter to prove the genuineness of the transactions as between its creditors and that of the creditors' source of income, i.e., the sub-creditors;

++ the Tribunal is the final fact finding authority. The Tribunal appears to have been satisfied with the quality of the evidence placed before it. There is no perversity in the findings, notwithstanding the stray sentence in its order pertaining to service of depositors. In these circumstances, the findings returned by the Tribunal cannot be interfered. No substantial question of law arises for consideration.

Revenue's appeal dismissed

JUDGEMENT

Per: Rajiv Shakhder:

1. At the outset, we may note that, in the captioned appeal, the Division Bench of this Court vide order dated 05.10.2007 had directed the revenue to confirm as to whether the order passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') for the assessment year 1997-98 in respect of the same issue, had been accepted by it. This information was not supplied till, the hearing held today. We have been informed by Mr Sahni, who appears for the revenue, that the order of the Tribunal for assessment year 1997- 98 was challenged by way of an appeal bearing ITA No. 938/2005. A Division Bench of this court vide order dated 05.10.2005 dismissed the said appeal on the ground that no substantial question of law arises for consideration.

2. There is yet another aspect of the matter, which is, that even though notice was issued to the assessee by an order dated 15.07.2009, despite several opportunities having been granted to the revenue, the service, has not been effected on the assessee. Even on the last date, i.e., 03.08.2011, a further opportunity had been granted to the revenue in that regard. It appears that the assessee remains unserved, as the revenue neither possesses particulars of the fresh address of the assessee nor has the assessee been filing its return for the past six-seven years, as per information received by Mr Sahni from the Dy. Commissioner, Income Tax vide letter dated 01.08.2011; a copy of which has been placed on record. In the aforesaid circumstances, we are forced to examine whether in the facts and the circumstances of the case, in the year in issue, i.e., assessment year 1998-99, any substantial question of law arises for consideration.

3. The brief facts, which are required to be noticed in this regard, are as follows:

3.1 The assessee filed his return of income on 30.11.1998, which was followed by a revised return filed on 28.12.1999. During the course of scrutiny it appears that that the Assessing Officer (in short 'A.O.') discovered that the assessee had received deposits from eighty six

(86) persons. The assessee was, in these circumstances, asked to explain the credits found qua these deposits in its books of accounts. The A.O. during the course of scrutiny also issued summons to the said eighty six (86) persons. Out of these eighty six (86) persons, sixteen (16) persons acknowledged the receipt of summons and admitted to the fact that they had deposited money with the assessee. The A.O., however, was not satisfied qua the remaining 70 depositors, that the assessee, had been able to discharge its onus that the amounts in issue, did not belong to the assessee. In this connection, the A.O. alluded to the following effect:

(i) the fixed deposit forms were filled up in a manner which was clumsy;

(ii) One depositor by the name of Ms Pamela Manmohan Singh, who had visited his office, had returned envelopes in respect of four other persons and made a statement on oath that the said four persons did not reside at the address given; which was her own address;

(iii) the said Pamela Manmohan Singh also adverted to the fact that she was unaware of any deposits made either by her husband, who had passed away on 02.06.1999, or those made in the name of her married daughter, residing in Mumbai as also her grandson living with his mother in Delhi. To be noted, the said Pamela Manmohan Singh, while adverting to the fact that she was unaware of the deposits made in the name of her family members referred to above, also stated that she was not in a position to categorically deny the factum of such deposits having been made at all. Ms Pamela Manmohan Singh went on to say that she will check the position with the chartered accountant engaged by her husband. It is a matter of record that no further information was received from Ms Pamela Manmohan Singh;

(iv) 'A few' envelopes were returned by postal authorities with a noting that addressees were not available at the given address. By way of example the A.O. referred to two returned envelopes addressed to one Runen Roy at two different addresses.

3.2 Based on the aforesaid discrepancies, including the statement of Ms Pamela Manmohan Singh, that the addresses of four depositors were fictitious, the A.O. refused to accept, as credible evidence, the confirmatory letters submitted by the assessee in respect of the deposits made.

3.3 The A.O. accepted, however, the submission made on behalf of the assessee that the addition could be made only in respect of fresh deposits made during the current year, and not those which were only renewed during the period in issue. Accordingly, the A.O. proceeded to make an addition amounting to Rs. 46,40,978/- as an unaccounted income of the assessee.

3.4 Aggrieved by the order of the A.O., the assessee preferred an appeal with the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'CIT(A)']. The CIT(A) examined the matter at great length. In paragraph 5 the CIT(A) recorded the errors which the A.O had made according to the assessee. These broadly were as follows:

(i) even though the A.O. had accepted that the deposits made by sixteen (16) persons were genuine, the same were included in the addition made by the A.O.;

(ii) in case of Mr Manmohan Singh, i.e., the husband of Ms Pamela Manmohan Singh, the deposits made had subsequently been repaid alongwith the interest, to Ms Pamela Manmohan Singh, thus establishing the identity of the depositor(s);

(iii) the returned envelopes of Runen Roy was a case of renewal of an earlier deposit and hence, no addition was called for in the relevant assessment year. This was also the circumstance obtaining vis-a-vis another investor, i.e., one Mr N.C. Desai. Thus, no additions were required to be made in that regard in the assessee's income;

(iv) in the relevant assessment year the assessee had deposits from eighty six (86) persons aggregating to Rs. 1,08,54,463/-. Out of which a sum of Rs. 62,13,485/- were deposits received in earlier years but renewed in the assessment year in issue, i.e., 1998-99. In these circumstances, the addition made by the A.O. qua fresh deposits was made on a completely ad hoc basis;

(v) the assessee is a quoted 'limited' company having five branches in different parts of the country. As a Non-Banking Financing Company (in short 'NBFC'), it is registered with the Reserve Bank of India (in short 'RBI'). The deposits in the earlier years had been invited from general public through advertisements;

(vi) as a matter of fact A.O. had zeroed down ultimately on ten (10) entities/ persons which, according to him, were not genuine. Out of these ten (10) entities only four (4) had made deposits with the assessee during the relevant assessment year. The amount attributable to the said four (4) entities was only Rs. 17 lacs. The entries pertaining to the remaining six (6) persons were not relevant in respect of the assessment year in issue;

(vii) as regards the four (4) entities, with respect to which issues had been raised by the A.O.; these issues did not survive as the said four (4) entities had accepted the factum of having made deposits with the assessee;

(viii) the deposits have been accepted through account payee cheques, and tax have been deducted by the assessee at source, which in turn, had been duly deposited with the government treasury. The deposits had also been further repaid to the said four (4) entities/ persons. None of the persons had given any statements contrary to what the assessee had stated. These four (4) entities/ persons being: Manmohan Singh, Manjit Malhotra, N.C. Desai and Runen Roy. To be noted the details pertaining to these four (4) entities/ persons are discussed in detail in paragraphs 5(ix) to (xiii), hence we do not propose to dilate upon the same in order to avoid prolixity.

(ix) and lastly, the assessee had supplied photocopies of fixed deposit(s) application forms which, contained full particulars of the depositors.

3.5 Based on the above material placed before the CIT(A), he concluded as follows:

"...I have considered the submissions very carefully. The AO's action does call for interference. First, there is no justifiable reason in making an addition in the cases of those 16 persons where the deposits had been accepted as per the AO's own admission. Second, there is no justification in making an addition on account of these deposits which were, merely the renewals of earlier year's deposits which had been accepted as genuine. Third, even in the balance four persons, since, the deposits had been accepted by a/c payee cheque and there is adequate information provided by the appellant, additionally, no case is

made out for any addition in the light of judgments supra and in view of the facts and circumstances in each case. The appellant appears to have discharged its primary onus by showing that it accepted the deposits bonafidely from the general public. Addition, which has been made without bringing any supportive material, is not sustainable. The same is deleted...."

3.6 The revenue being aggrieved preferred an appeal with the Tribunal. The Tribunal recorded a finding of fact in paragraph 7 that the assessee had placed on record copies of applications, cheque numbers, name of banks, amount received, copies of confirmation of some of the investors. It further observed that merely because certain application forms of depositors did not contain their PAN and GIR number(s), cheque number(s) and draft number(s) would not make the forms invalid. The fact that notices had been issued to all eighty six (86) persons and that some of them did not respond to the same, could not result in an adverse finding being returned against the assessee. It also noted the fact that assessee was a public limited company and registered with the RBI as NBFC, and that its shares were quoted on major stock markets of the country.

3.7 Taking into account these factors the Tribunal came to the conclusion that the A.O had erred in coming to the conclusion which he did, merely because of the reason that some investors had chosen not to respond to the notices, or the assessee had not been able to produce the investors.

4. Being aggrieved, as noted above, the revenue preferred the captioned appeal. In support of the appeal filed by the revenue, Mr Sahni, Advocate advanced arguments. Mr Sahni submitted that the findings of the Tribunal in paragraph 7 of the impugned judgment that none of the notices, issued to the investors, were received back was perverse as the A.O. had recorded in his order that some of the summons had been returned. Mr Sahni went on to submit that while the A.O. had not made any additions with respect to sixteen (16) persons, who had responded to the summons, the additions qua the remaining 70 persons ought to be sustained in view of the findings recorded by the Tribunal.

5. Having heard Mr Sahni, we are of the view that the appeal deserves to be dismissed. As noted above, the CIT(A) in his order has, it appears, examined the matter in detail. After examining matter in detail it is quite evident that the discrepancy, if at all, out of the seventy (70) investors ultimately veered around to ten (10) investors. Even out of the ten (10) investors, six (6) entities/ persons had made deposits in the year prior to the assessment year in issue. The remaining four (4) persons, who had made deposits in the relevant assessment year, i.e., assessment year 1998-99, had furnished details with respect to the deposits, and also acknowledged the fact that since then, money had been returned to them. The fact that these investors had received interest, and that tax had been deducted at source, is also noted in the order of the CIT(A). These findings of the CIT(A) have not been impugned before us. As has been noted in CIT(A)'s order the exercise carried out by the A.O. was so ad hoc that in his enthusiasm he forgot to give credit even for those deposits which, according to him, were genuine. These were deposits pertaining to sixteen (16) persons who had responded to the summons issued by him. These deposits, as per the CIT(A)'s order amounted to Rs. 7,40,000/-, which the A.O. for some curious reason had thought fit to include in the total addition made in the income of the assessee amounting to Rs. 46,40,978/-.

6. In so far as the assessment year in issue is concerned, we are not made any wiser as to which specific entry the A.O. had found fault with, given the fact that names of the depositors were known. It has to be borne in mind that while making an addition under

Section 68 of the Income Tax Act, 1961 (in short 'I.T. Act') the A.O. has to advert to each and every entry and not pick up a couple of entries, as in the present case, and label the entire set of deposits made during the assessment year as undisclosed income of the assessee. As noticed above, the discrepancy appeared qua four (4) credits, which were answered suitably to the satisfaction of the CIT(A); therefore, it is not understood how the A.O. could make an ad hoc addition of Rs. 46,40,978/-.

7. The Tribunal, in our view, has correctly appreciated the position in law which is that when an unexplained credit is found in the books of account of an assessee the initial onus is placed on the assessee. The assessee is required to discharge this initial onus. Once that onus is discharged, it is for the revenue to prove that the credit found in the books of accounts of the assessee is the undisclosed income of the assessee. In the circumstances obtaining in the present case, in our view, the assessee has discharged that initial onus. The assessee is not required thereafter to prove the genuineness of the transactions as between its creditors and that of the creditors' source of income, i.e., the sub-creditors [See *Nemi Chand Kothari vs CIT & Anr.* (2003) 264 ITR 254 and judgment of this court in ITA No. 1158/2007 *Mod Creations Pvt. Ltd. vs Income Tax Officer* decided on 29.08.2007].

8. The Tribunal is the final fact finding authority. The Tribunal appears to have been satisfied with the quality of the evidence placed before it. We find no perversity in the findings, notwithstanding the stray sentence in its order pertaining to service of depositors. In these circumstances, we are not persuaded to upset the findings returned by the Tribunal. In our view no substantial question of law arises for our consideration. The appeal is, accordingly, dismissed.