ITAT No. 263 of 2011

GA No. 2856 of 2011

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction (Income Tax)

ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-III Appellant

Versus

M/S. DATAWARE PRIVATE LIMITED Respondent

For Appellant : Ms. Asha G. Gutgutia, Advocate

For Respondent:

BEFORE:

The Hon'ble JUSTICE BHATTACHARYA

The Hon'ble JUSTICE DR. SAMBUDDHA CHAKRABARTI

Date : 21st September, 2011.

The Court : This appeal is at the instance of the Revenue and is directed against order dated 13th May, 2011, passed by the Income Tax Appellate Tribunal, `A' Bench, Kolkata, in ITA No.783/Kol./2010 relating to assessment year 2001-02, by which the Tribunal has dismissed the appeal preferred by the Revenue.

Being dissatisfied the Revenue has come up with the present appeal.

The facts leading to the filing of this appeal may be summed up thus.

During the previous year relevant to the assessment year under consideration the assessee company received share application money of Rs.1 Crore from M/s. Harrington Traders Pvt. Ltd. (hereinafter referred to as the creditor). During the assessment proceedings the assessee company submitted the confirmation letter of the creditor, details of the transaction, namely, its PAN etc. to the Assessing Officer during the second round of assessment proceeding. As per direction of the Tribunal below the Assessing Officer made enquiries from the creditor, who entered appearance and provided the details of their PAN, source of income, and confirmed the fact of giving the money to the Assessing Officer.

The Assessing Officer, however, instead of making enquiry from the Assessing Officer of the creditor as to whether the return submitted by the creditor has been accepted he himself arrived at the finding that the procurement of money by the creditor was not genuine and added the amount to the income of the assessee.

Being dissatisfied, the assessee preferred an appeal before the CIT(Appeal) and the said Appellate authority after taking into consideration the entire materials on record came to the conclusion that the identity of the creditor had been well

established, the creditworthiness of the creditor was also proved and he was also convinced about the genuineness of the transaction. The said Appellate authority specifically recorded that the creditor itself was a registered company who was assessed to tax and had been filing its Return regularly and the amount of Rs.1 Crore paid by such creditor was also reflected from the balance-sheet and profits and loss account of the said creditor. In such circumstances, the CIT(Appeal) was of the view that the assessment officer of the assessee in question cannot take any adverse view against the assessee on the basis of the transaction of the creditor. According to the CIT(Appeal), if the selling of share below market rate by the creditor had any implication from the income tax angle, the action had to be taken against the creditor and not against the assessee. The CIT(Appeal) thus dismissed the appeal.

Being dissatisfied the Revenue preferred an appeal before the Tribunal below and by the order impugned herein the said Tribunal has affirmed the order passed by the CIT(Appeal).

Being dissatisfied the Revenue has come up with the present appeal under Section 260A of the Income Tax Act.

After hearing the learned Advocate for the appellant and after going through the materials on record, we are of the view that no substantial question of law is involved in this appeal.

Both the Commissioner of Income Tax (Appeal) and the Tribunal below have in details considered the fact that the share application money was paid by account payee cheque, the creditor appeared before the Assessing Officer, disclosed its PAN number and also other details of the accounts but in spite of that the Assessing Officer did not enquire further from the assessing officer of the creditor but in stead, himself proceeded to consider the profit and loss account of the creditor and opined that he had some doubt about the genuineness of such account.

In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as

genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax(Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities.

The appeal is thus devoid of any substance and is summarily dismissed.

In view of dismissal of the appeal, the connected application has become infructuous and the same is disposed of accordingly.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(BHATTACHARYA, J.)

(DR. SAMBUDDHA CHAKRABARTI, J.)

SN.
Asst.Registrar(CR)

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

% Judgment delivered on: 02.09.2011

\+ **ITA No. 87/2007**

COMMISSIONER OF INCOME TAX
DELHI - II ..... APPELLANT

Vs

KINETIC CAPITAL FINANCE LTD. ..... RESPONDENT

Advocates who appeared in this case:
For the Appellant: Mr N.P. Sahni, Sr. Standing Counsel.
For the Respondent: None

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

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 envelops 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 ` 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 Ns 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 ` 1,08,54,463/-. Out of which a sum of ` 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;

(iv) 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;

(v) 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 ` 17 lacs. The entries pertaining to the remaining six (6) persons were not relevant in respect of the assessment year in issue;

(vi) 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;

(vii) 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 dialate upon the same in order to avoid prolixity.

(viii) 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 ` 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 ` 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 ` 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.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL,J

SEPTEMBER 02, 2011
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