

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 18TH DAY OF FEBRUARY, 2010

PRESENT

THE HON'BLE MR. JUSTICE K.L.MANJUNATH

AND

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

I.T.A. NO.2907/2005

BETWEEN:

1. THE COMMISSIONER OF
INCOME TAX, C R BUILDING
QUEENS ROAD
BANGALORE-560 001.
2. THE DEPUTY COMMISSIONER OF
INCOME-TAX, CENTRAL CIRCLE-II,
C R BUILDING, QUEENS ROAD
BANGALORE.

... APPELLANTS

(By Sri: K. V. ARAVIND, ADV. FOR SRI M. V. SESHACHALA)

AND:

M/S ASK. BROTHERS LTD.,
NO.1/1, PALACE ROAD,
BANGALORE.

... RESPONDENT

(By Sri: S. PARTHASARATHI, ADV.)

This ITA filed u/S.260-A of I.T.Act, 1961 arising out of Order dated 31.3.05 passed in ITA No.25/Bang/2004 for the Assessment Years 1989-90, to 1999-2000, praying that for

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the reasons stated therein, this Hon'ble Court may be pleased to: i) formulate the substantial questions of law stated therein, etc.,

This ITA coming on for admission this day, *Nagarathna J.*, delivered the following

J U D G M E N T

This appeal is filed by the revenue challenging the order dated 31.3.2005 passed by the tribunal in ITA.No.25/Bang/2004.

2. The respondent-assessee is a hotel group running hotels in Bangalore. A search was conducted at the respondent's premises on 22.7.1998 and a seizure mahazar was drawn on 21.10.1998. During the course of search, certain material and documents were seized. On scrutiny of the same, the Assessing Officer found that the assessee had undisclosed income for the block period. The assessee filed return of income. Notice under Section 158BC was issued to which the assessee filed return of income for the block period on 14.1.1999 disclosing NIL income. The Assessing Officer by his order dated 28.7.2000 under Section 158BC read with Section 143(3) of the Act determined the undisclosed income for the said block period of

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Rs.1,52,82,756/- on three heads viz., (1) unexplained investment in share capital in the names of employees of the group and their relatives as sources not explained for Rs.1,17,88,000/-, (2) excess unexplained cash found on the day of search of Rs.5,79,170/- and (3) unexplained trade advances of Rs.29,15,586/-.

3. With regard to the first item, the Assessing Officer held that the original share capital of the companies floated by the assessee was quite nominal but all the companies were having heavy share application pending allotment. The said monies was introduced in the names of promoters, names of sister concerns and also in the names of several employees and other relatives and that these were bogus credits and he accordingly assessed the total income at Rs.1,52,82,756/-. With regard to the unexplained cash found on the date of search at item No.2 above, the Assessing Officer stated that the total cash found in the premises was Rs.14,19,583/- and he accepted the explanation Rs.26.00 lakh was given to three directors. That the total cash available with the assessee was Rs.29,07,983/- and on the basis of the details submitted by the assessee and on going through various trial balances, the cash available as per books on the date of

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search should be Rs.23,28,812/- and concluded that the said amount of Rs.14,19,583/- only was found and that there was a difference of Rs.5,79,170/- which was excess unexplained cash and brought the same to tax as undisclosed income. As far as the unexplained trade advances are concerned, according to the Assessing Officer, the assessee had explained that it had collected a sum of Rs.29,15,586/- relating to expenditure tax and luxury have from various customers of the assessee viz., the occupants of the hotel. But the said amounts had been noted differently in the books of accounts and the same was transferred to a reserve account in the balance sheet, so that it could be deposited with the government or returned to the customers. The aforesaid explanation given that there were trade advances was not accepted by the Assessing Officer and accordingly, the said amount was also brought to tax.

4. Being aggrieved by the order of the Assessing Officer, the matter was carried in appeal before the Commissioner of Appeals by the assessee which appeal came to be dismissed and being aggrieved by the said order the assessee had filed an appeal before the Income Tax Appellate Tribunal which however by its order dated 31.3.2005 allowed the appeal. As

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against the said order, this appeal has been filed by the revenue raising the following substantial questions of law:

- i) Whether the tribunal was correct in holding that a sum of Rs.1,17,00,000/- share application money found during search cannot be treated as undisclosed income of the assessee on the ground that the share applicants had been identified and some of them had admitted to the said payment.
- ii) Whether the tribunal was correct in not taking into consideration the various materials considered by the Assessing Officer and upheld by the Appellate Commissioner which disclosed that most of the share applicants were employees of the assessee company or sister concerns or the relatives of the employees who are drawing a meager salary of Rs.2,000/- to Rs.3,000/- and no source to purchase the shares and the bank accounts opened by them only transacted the share application money by introduction of cash and issue of cheques and consequently recorded a perverse finding.
- iii) Whether the tribunal was correct in holding that number of share applicants has been examined and they admitted who have contributed for purchase of shares without taking into consideration the fact that these persons did not have any funds to invest in purchase of these shares as the Assessing Officer had not only taken into account by income received by each of them, the expenditure incurred by them as well of the rental accommodation by which all of them were residing and consequently recorded a perverse finding.
- iv) Whether the tribunal was correct in not taking into consideration the specific instances where the Assessing Officer had noted cash introduction in bank accounts of employees of Rs.1,00,000/-, Rs.2,00,000/- and Rs.50,000/- and subsequent payments for purchase of shares when these employees could not

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establish making such payments through any source as the agricultural income, income from chits funds and small savings could not be established by adducing sufficient evidence.

- v) Whether the tribunal was correct in holding that a sum of Rs.5,79,170/- excess unexplained cash discovered which was treated as an undisclosed income in search proceedings could not be treated as undisclosed income of the assessee as the same had been worked out based on reconciliation of books by the Assessing Officer and not direct discovery during course of search.
- vi) Whether the Tribunal was correct in holding that a sum of Rs.29,15,585/- received as expenditure tax and luxury tax etc., which had been disallowed under Section 43B of the Act as the same had not been paid to the Government cannot be allowed as the same had been disclosed in the regular return, however under a different name as trade advances.
- vii) Whether the Assessing Officer has jurisdiction to treat trade advances declared by the assessee which was found to be expenditure tax and luxury tax etc., in search proceedings as undisclosed income as per section 158B of the Act since the expense claimed as trade advance was found to be false and the same was allowable under Section 43B of the Act.

5. It is submitted on behalf of the appellant that as far as these three items are concerned, the Assessing Officer was justified in bringing the same to tax on the basis of considering the same as undisclosed income which order was rightly upheld by the Commissioner of Income Tax, but the tribunal has not given any reason as to why the orders

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passed by the authorities below had to be reversed and thus, the orders of the tribunal has to be set aside. He further submits that the explanations offered by the assessee with regard to the each of the items, were untenable and the Assessing Officer had rightly brought the income ^{to tax.} and therefore, the order of the Assessing Officer and appellate order, by setting aside the order of the tribunal, has to be upheld in the instant case.

6. Per contra, learned counsel for the respondent relying upon the decision of the Apex Court in the case of *Commissioner of Income Tax V/s. Lovely Exports (P) Ltd.* (CTR (SC) 195) submits that as far as the share application money is concerned, if the same has been received by the assessee company from the alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company. As far as the other heads are concerned, he submits that the reason assigned by the Assessing Officer and the Commissioner of Income Tax are not just and proper. Therefore, the tribunal was justified in setting aside the said orders.

7. Having heard the learned counsel for the parties and on perusal of the material on record, particularly the impugned order of the Appellate Tribunal, we find that on the question of unexplained investment of share capital in the names of the employees of the assessee is concerned, the learned counsel for the appellant is not able to state as to whether any investigation was carried out with regard to the persons who had submitted the share application money. It is also to be noted that when the respondent had issued the shares, the amounts were collected in terms of the assessment made by the respondent and even in the evidence which had been let in, except three persons, all other persons had admitted that they were proposed shareholders who had paid the amounts on the shares that were to be allotted to them pursuant to the application which they had received. In this context, it would be relevant to refer to the decision of the Apex Court referred to supra, wherein it has been stated that if the share application money is received by the assessee company from the alleged bogus shareholders whose names have been given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in

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accordance with law, but it cannot be regarded as undisclosed income of assessee company. To the same effect is another decision of the Apex court in the case of CIT Vs. Stellar Investments Ltd (2001) 251 ITR 263(SC) In the instant case, except three persons all other persons have admitted that they have paid towards description of the shares. It therefore cannot be held that there has been no explanation offered with regard to the investment received by way of share capital taking into account the fact that the persons had admitted that payment of the share subscription money except three persons. Under the circumstances, we hold that the substantial questions of law raised by the revenue with regard to this aspect of the matter has to be answered in favour of the assessee and against the revenue.

8. As far as the other two items referred to above are concerned, we find that while considering the contentious issues raised on both sides the tribunal has not assigned any legal and valid reasons as to why the orders passed by the Assessing Officer as well as the Commissioner of Income Tax (Appeals) require any modification or reversal. In fact, the orders passed by the tribunal is bereft of any reasoning based on the material on record. Under the circumstances,



we deem it proper to remand the matter to the tribunal on the aforesaid two issues without answering the substantial questions of law raised by the appellant on the said issues.

9. For the aforesaid reasons, the appeal is allowed in part. The matter is remanded back to the tribunal to re-consider the second and third issue and pass orders in accordance with law.

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JUDGE

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