

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

+ **ITA NO. 981 OF 2008**
WITH
ITA NO.1123 OF 2008
ITA NO. 1062 OF 2008

% **RESERVED ON: JANUARY 27, 2011**
PRONOUNCED ON: JANUARY 31, 2011.

1) ITA NO.981 OF 2008

COMMISSIONER OF INCOME TAX, DELHI II . . . Appellant

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

VERSUS

MAHINDRA FINLEASE P. LTD. . . .Respondent

through: Mr. Vishwendra Verma, Advocate
for the Respondent.

2) ITA NO.1123 OF 2008

COMMISSIONER OF INCOME TAX, DELHI II . . . Appellant

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

VERSUS

MAHINDRA TRADERS P. LTD. . . .Respondent

through: Mr. Vishwendra Verma, Advocate
for the Respondent.

3) ITA NO.1062 OF 2008

COMMISSIONER OF INCOME TAX, DELHI II . . . Appellant

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

VERSUS

MAHINDRA FINLEASE P. LTD. . . .Respondent

through: Mr. Vishwendra Verma, Advocate
for the Respondent.

CORAM :-

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA**

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.

1. These appeals were admitted on the following substantial question of law and immediately thereafter heard finally:

“Whether the protective assessment can be framed in the proceedings under Section 158BC/158BD?”

2. Since question of law is common and arise out of same transactions, the question formulated is being answered by this singular judgment.

3. The facts of the matter do not need a wide canvass and briefly stated herein below.

A search and seizure operation under Section 132 of the Income Tax Act (hereinafter referred to as 'the Act') was conducted on 20.06.2000 at the residential and business premises of Shri P.K. Sood who is the Director in the assessee companies. During the said operation, certain documents were found in his possession wherein it was recorded that during the block assessment period, Shri Sood was indulging in giving accommodation entries to various parties on commission basis. Some of such accommodation entries were represented under the head introduction of share capital by Shri P.K. Sood in the assessee companies. During the block assessment period in the case of Shri P.K. Sood, he could not explain the source of aforesaid

income and the amount of ₹66 lacs was added back to his income as undisclosed income by the Assessing Officer (AO).

4. We may also record at this stage that the basis for making the aforesaid addition in the block assessment of Shri P.K. Sood was that along with the documents seized, statement of Shri P.K. Sood was also recorded wherein he had *inter alia* stated as under:

“The factual position is that my known people used to come to me for financial matter advice. Since I know that Sh. S.K. Jain deals in such type of activities I used to refer people to him for getting their work done. Sh. S.K. Jain used to give me services charges @ .50 to .75 paise per hundred rupees depending on needs of the client. I do not have knowledge of total quantum of transactions my referred cases had with Sh. S.K. Jain nor have any details of such clients. The total amount of entries given through Sh. S.K. Jain may be as stated by you & shown to me of ₹2,23,86,554/- as I do not have the precise figures with me. This I am stating after seeing Annexure A-8, A-10, A-12, A-13 and A-18 of the documents seized from the premises of Sh. S.K. Jain. The shares of capital amount of ₹66,00,000/- are also accommodation entries and no actual transaction of share capital introduction took place. **The cash available with me for these unaccounted transactions was advanced to Sh. S.K. Jain for obtaining** cheques of equal amount in the form of share capital introduction in the companies as under:

M/s Mahindra Finance Pvt. Ltd. - Receipt amount of ₹31,00,000/- shares allotted for ₹21,00,000/- balance ₹10,00,000/- refunded.

M/s Mahindra Finance Pvt. Ltd. – Receipt of ₹23,00,000/- share allotted of ₹22,50,000/-
Refunded - ₹50,000/-.

M/s Mahindra Traders – Receipt of ₹10,00,000/- share allotment of ₹10,00,000/-.

xxx xxx xxx

The Share of capital amount of ₹66,00,000/- are also accommodation entries and no actual transaction of share capital introduction took place. The cash available with me for these unaccounted transactions was advanced to Sh. S.K. Jain in their obtaining cheques of equal amount in the form of share capital introduction in the companies as under:

M/s Mahindra Finlease Pvt. Ltd – Receipt amount of ₹31,00,000/- share allotted for ₹21,00,000/- balance ₹10,00,000/- refunded.

M/s Mahindra Finance Pvt. Ltd. – Receipt of ₹23,00,000/- shares allotment of ₹22,50,000/- Refunded ₹50,000/-.

M/s Mahindra Traders – Receipt of ₹10,00,000/- shares allotment of ₹10,00,000/-.”

5. Since search had taken place at the premises of Sh. P.K. Sood and documents were found in his possession, in the case of Sh. P.K. Sood the addition was made under Section 68 of the Act on substantive basis. At the same time, the AO had also issued notice under Section 158BD of the Act to these three assessee companies as their names surfaced, Sh. P.K. Sood was the Managing Director of these companies through whom he was allegedly doing the passing of providing accommodation entries.
6. On the basis of the aforesaid facts, these assessees were required to prove the introduction of share capital within the parameters of Section 68 of the Act, i.e., the identity, genuineness and creditworthiness. According to the AO, the assessees were not able to prove the same. Since addition of substantive basis was made in the block assessment of Sh. P.K. Sood, in the case of these assessees, the AO completed the assessment by making additions of income of the assessee on protective basis for the Assessment Year 2000-01.
7. The assessees went in appeals before the CIT (A) challenging the assessment order passed by the AO making additions on protective basis as aforesaid. The appeals were allowed and additions were deleted by the CIT (A).
8. The Revenue feeling aggrieved by the order of the CIT (A) preferred appeals before the Income Tax Appellate Tribunal (hereinafter referred to as ‘the Tribunal’). The Tribunal has

maintained the deletion on the ground that there cannot be protective assessment under Section 158BD of the Act. The entire discussion of the Tribunal on this aspect is located in para 4 of the impugned orders dated 26.10.2007, which reads as under:

“4. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that similar issue relating to protective assessment made u/s 158BD had arisen for consideration before the Madras Bench of ITAT in the case of L. Saroja Vs. ACIT – 76 ITD 344 wherein it was held by the Tribunal that protective assessment qua the person sought to be covered u/s 158BD cannot be sustained. To the similar effect is the decision of Ahmedabad Bench of ITAT in the case of Smt. Farzana Farooq Desai Vs. DCIT – 74 TTJ 507 wherein it was held that there cannot be a protective assessment u/s 158BD. Since no contrary decision of Tribunal or any High Court on this issue has been brought to our notice by the learned DR, we respectfully follow the aforesaid decisions of the Tribunal in the case of L. Saroja (supra) and Smt. Farzana Farooq Desai (supra) and uphold the impugned orders of the learned CIT (A) deleting the additions made by the AO u/s 68 on protective basis in the assessments completed u/s 158BC/158BD.”

9. It is in this conspectus that the issue has arisen as to whether the protective assessment can be framed in the proceedings under Section 158BC/158BD of the Act.

10. Before we proceed to answer to the question, it would be necessary to point out that the substantive addition made in Shri P.K. Sood was deleted by the CIT (A) and that order of the CIT (A) has been upheld by the Tribunal. The reason for deletion was that even as per the statement of Shri P.K. Sood, on the basis of which the AO made the addition, Mr. Sood was engaged in providing accommodation entries in commission with Shri S.K. Jain in his own companies through loans, advance, gifts etc. Therefore, the issue was in respect of quantification of commission charges for such accommodation entries. The AO had estimated the

commission @ 3%, but brought no basis and material in support of the same. On the contrary, the claim of Sh. P.K. Sood that commission charges to the extent of 0.5% to 0.75% was supported and corroborated from the seized records. The correctness of which was not in dispute. It was, thus, opined that when there was seized record with the AO and the same was used for computing undisclosed income, as per that record the commission receipt could be computed by applying 0.75% and no addition on account of unexplained investment under Section 69 of the Act could be made.

11. We may clarify at this stage itself that the basis of the deletion made by the CIT (A) as well as the Tribunal in the case of Shri P.K. Sood is noted above as a fact and we have not commented upon the correctness or otherwise of the said decision of the Tribunal as that was not the issue before us. The reason for taking note of this fact was that the learned counsel for the Revenue justified the protective assessment in the case of these assessees as his plea was that when it was not clearly ascertainable as to whether the addition should be made in the case of sood or these assessees, it was very well within the powers of the AO to make substantive addition in the case of Shri P.K. Sood and protective addition in these cases.
12. Coming to the powers of the AO to make addition on protective basis, the learned counsel referred to the judgment of the Supreme Court in the case of **Lalji Haridas Vs. Income Tax Officer & Another and Chhotalal Haridas Vs. M.D. Karnik and Another [43 ITR 387]** wherein the Court delineated the

following principle justifying the reason for making protective addition:

“In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No. 1 in pursuance of the impugned notice issued by him against the appellant.”

13. Following the aforesaid judgment, Gauhati High Court in the case of ***Jagannath Bawri and Others Vs. Commissioner of Income Tax and Others*** [234 ITR 464] has explained the concept of protective assessment in the following manner:

“As regards the contention of Ms. Hazarika, learned counsel for the petitioners about income-tax returns, on perusal of annexure-A series it can only be said that those documents are only intimation which is sent to the assessee specifying the sum so payable under section 143(1)(a). At any rate, the assessments made are only protective assessments. Under the law it is open to the department to make assessments on two persons in respect of the same income, where there is some ambiguity as to the liability to charge, Such assessments are made to protect the interest of the revenue so much so, unless such protective or alternate assessment is made, assessment proceedings against the party finally found to be liable may become barred by time. It has now become an established practice that in the case of doubt as to the person who will be and deemed to be in receipt of the income, it is open to the department to make protective or alternative assessment. “

14. What clearly emerges from the discussion in the aforesaid judgments is that even when there is no specific provision in the Income Tax Act for protective assessment, power lies with the AO to make such an assessment on protective basis under certain

circumstances. When there is such a power to make the protective assessment while carrying out the normal assessment proceedings even in the absence of specific provision, we fail to understand how the absence of provision should be a ground to preclude the AO for making protective assessment in block assessment proceedings under Section 158BC/BD of the Act. Principle of law laid down by the Supreme Court holding that the AO has power to make protective assessment even when there is no specific provision under the Act would equally apply to the block assessment also.

15. We, therefore, are not in agreement with the approach of the Tribunal. We answer the question of law as formulated in the affirmative, i.e., in favour of the Revenue and against the assessee. As a result, these appeals are allowed and the impugned order passed by the Tribunal is set aside. Since the appeals were not disposed on merits, the matters are remitted back to the Tribunal for deciding the appeals on merits.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JANUARY 31, 2011
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