

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1231 OF 2017

Pr. Commissioner of Income Tax -1 .. Appellant

Versus

M/s. Ami Industries (India) P Ltd .. Respondent

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- Mr. Suresh Kumar a/w Ms. Sumandevi Yadav & Ms. Priyanka Tiwari for the Appellant
 - Mr. Riyaz Padvekar a/w Mr. Tanzil Padvekar for the Respondent
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CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : JANUARY 29, 2020.

P.C.:

1. Heard Mr. Suresh Kumar, learned standing counsel, revenue for the appellant and Mr. Padvekar, learned counsel for the respondent - assessee.

2. This appeal under Section 260A of the Income Tax Act, 1961 ("**the Act**" for short) is preferred by the revenue against the order dated 26.8.2016 passed by the Income Tax Appellate Tribunal, Mumbai "A" Bench, Mumbai ("**Tribunal**" for short) in Income Tax Appeal No. 5181/Mum/2014 for the assessment year 2010-11.

3. The appeal has been preferred on the following three questions stated to be substantial questions of law:-

- (i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in directing the deletion of sum brought to tax by the Assessing Officer as unexplained income under Section 68 of the Act in respect of moneys credited in the books as share application money of Rs. 34,00,00,000/-?
- (ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that the assessee proved identity, credit worthiness and genuineness of moneys credited in the books as share application money of Rs. 34,00,00,000/- just by submitting PAN, acknowledgment of income tax returns filed and bank statements?
- (iii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.34,00,00,000/- ignoring the facts brought out by the Assessing Officer that return of the investing company shows no credit worthiness and that investing company merely transferred share application money received from other parties to assessee company?

4. From the above, it is evident that the issue involved in this appeal is the addition of share application money by the Assessing Officer to the income of the assessee under Section 68 of the Act which additions have been deleted by the first appellate authority and confirmed by the Tribunal.

5. In the assessment proceedings, Assessing Officer noted that assessee had disclosed funds from three Kolkata based companies as share application money. The details were as under:-

Parasmani Merchandise Pvt Ltd	Rs. 13.50 Crores
Ratanmani Vanijya Pvt Ltd	Rs. 2.00 Crores
Rosberry Merchants Pvt Ltd	Rs. 18.50 Crores

Total	Rs. 34.00 Crores
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5.1. Assessing Officer issued notice to the assessee on the ground that whereabouts of the above companies were doubtful and their identity could not be authenticated. Thus, genuineness of the companies' became questionable. Assessing Officer accordingly proposed to treat the share application money as unexplained cash credit in the hands of the assessee under Section 68 of the Act and issued notice to the assessee.

6. After considering the reply submitted by the assessee, Assessing Officer vide the assessment order dated 28.3.2013 passed under Section 143(3) of the Act treated the aforesaid amount of Rs. 34 crores as money from unexplained sources and added the same to the income of

the assessee as unexplained cash credit under Section 68 of the Act.

7. Aggrieved by the aforesaid order, assessee preferred appeal before the Commissioner of Income Tax (Appeals)-1, Mumbai i.e the first appellate authority. In the appeal proceedings, the assessee sought leave of the first appellate authority to produce additional evidence which was granted by the first appellate authority. After hearing the matter, the first appellate authority vide the order dated 18.6.2014 held that assessee had discharged its burden under Section 68 of the Act by proving the identity of the creditors; genuineness of the transactions; and credit worthiness of the creditors. Consequently, the first appellate authority set aside the addition made by the Assessing Officer.

8. In appeal before the Tribunal by the revenue, Tribunal vide the order dated 26.8.2016 confirmed the order passed by the first appellate authority by holding that no addition could be made under Section 68 of the Act and that

factual findings of the first appellate authority required no interference.

9. It is against this order of the Tribunal that revenue is in appeal before us.

10. Mr. Suresh Kumar, learned standing counsel, revenue has taken us through the assessment order and submits therefrom that it cannot be said that assessee had discharged the burden to prove credit worthiness of the creditors. His further contention is that the assessee is also required to prove the source of the source. In this connection, he has placed reliance on a decision of the Supreme Court in **Pr. CIT Vs. NRA Iron & Steel Pvt Ltd**¹. He, therefore, submits that the finding returned by the Tribunal is wholly erroneous and requires to be interfered with by this Court.

11. Per contra, Mr. Padvekar, learned counsel for the respondent submits that from the facts and circumstances of the case, it is quite evident that assessee had discharged its

¹ (2019) 103 taxmann.com 48

burden to prove identity of the creditors, genuineness of the transactions and credit worthiness of the creditors. He submits that the legal position is very clear in as much as assessee is only required to explain the source and not source of the source. Decision of the Supreme Court in NRA Iron & Steel P Ltd (supra) is not the case law for the aforesaid proposition. In fact, the said decision nowhere states that assessee is required to prove source of the source.

11.1. Referring to the orders passed by the authorities below, Mr. Padvekar submits that in the present case, the investigation wing of the department had carried out detailed investigation at Kolkata and found the source of the credit to be genuine. This report of the investigation wing was not taken into consideration by the Assessing Officer. Therefore, lower appellate authorities were justified in deleting the additions made by the Assessing Officer. Being a finding of fact, no substantial question of law arises in the appeal. Therefore, the appeal should be dismissed.

12. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

13. Section 68 of the Act deals with cash credits. As per Section 68, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income tax for the corresponding assessment year.

14. Section 68 of the Act has received considerable judicial attention through various pronouncements of the Courts. It is now well settled that under Section 68 of the Act, the assessee is required to prove identity of the creditor; genuineness of the transaction; and credit worthiness of the creditor. In fact, in NRA Iron & Steel (P) Ltd (supra), Supreme Court surveyed the relevant judgments and culled out the following principles:-

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor / subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.
- iii. If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the

primary onus contemplated by Section 68 of the Act."

15. It is also a settled proposition that assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in **Gaurav Triyugi Singh Vs. Income Tax Officer-24(3)(1)**²

16. Having noted the above, we may now advert to the orders passed by the authorities below.

17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under

² Income Tax Appeal No. 1750 of 2017 decided on 22.1.2020

Section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under Section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that non-responding to notice would not *ipso facto* mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and credit-worthiness of the creditors were available, without any infirmity in such evidence and the explanation required under Section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors:-

- a) PAN number of the companies;
- b) Copies of Income Tax return filed by these three companies for assessment year 2010-11;
- c) Confirmation Letter in respect of share application money paid by them; and
- d) Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under:-

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following-

- (a) Identity of the creditor
- (b) Genuineness of the transaction
- (c) Credit-worthiness of the party

(i) In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.

(ii) Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii) Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv) Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v) Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources.

Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRA Iron & Steel (P) Ltd (supra), the Assessing Officer had made independent and detailed inquiry including

survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

21. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and credit-worthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

22. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of

law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]