



IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

M.A. no.29/Mum./2017
(Arising out of ITA no. 6165/Mum./2014)
(Assessment Year : 2007-08)

Income Tax Officer
Ward-15(2)(1), Mumbai

..... Appellant

v/s

M/s. Iraisaa Hotels Pvt. Ltd.
D/2 Big Splash, Sector-17
Vashi, Navi Mumbai 400 705
PAN - AABCI5332H

..... Respondent

Revenue by : Shri Ram Tiwari
Assessee by : Shri Pradeep Kapasi

Date of Hearing - 15.06.2018

Date of Order - 10.09.2018

ORDER

PER SAKTIJIT DEY, J.M.

The Revenue has filed this application, purportedly, under section 254(2) of the Income Tax Act, 1961 (for short "*the Act*") seeking recall of the order dated 29th April 2016, passed in ITA no.6165/Mum./2014.

2. The learned Departmental Representative submitted, at the time of disposal of appeal by the Tribunal, though, the final order dated 31.03.2015, passed by the Member, Securities Exchange Board of

India (SEBI) was available, however, it was not brought to the notice of the Tribunal while deciding the issue relating to the additions made under section 68 of the Act by the Assessing Officer in respect of the unsecured loan and share capital amounting to ₹ 1,69,94,882. The learned Departmental Representative submitted, had the observations of the SEBI in the final order would have been considered, the issue relating to the disputed addition made by the Assessing Officer could have been decided in a different manner i.e., in favour of the Department. Thus, he submitted, the appeal order passed by the Tribunal may be recalled and the appeal may be heard and decided afresh after considering the final report of the SEBI.

3. The learned Authorised Representative vehemently opposing the contention of the Departmental Authorities submitted that the Tribunal having decided the issues raised before it on the basis of facts and material available on record, only because the final order of the SEBI was not brought to the notice of the Tribunal, the appeal order cannot be considered to be erroneous as per section 254(2) of the Act. He submitted, the order passed by the SEBI if was available and in the knowledge of the Department it should have been referred to at the time of hearing of appeal before the Tribunal. He submitted, since the final order of the SEBI now relied upon by the Department was never brought to the notice of the Tribunal it cannot be said that by non-

<http://itatonline.org>

consideration of the said order of the SEBI there is mistake apparent in the order passed by the Tribunal. The learned Authorised Representative submitted, the final order of the SEBI was not passed in case of the assessee, therefore, the assessee had no knowledge of the said order. He submitted, even at this stage also the Department has failed to demonstrate in what way the final order of the SEBI affects the case of the assessee or could have had an impact on the decision taken by the Tribunal while deciding the appeal. The learned Authorised Representative submitted, in course of the appeal proceedings before the first appellate authority on the basis of submissions made by the assessee the learned Commissioner (Appeals) had directed the Assessing Officer to enquire into the issue of unsecured loan and share application money afresh and submit a report vis-a-vis the claim of the assessee. He submitted, in response to the directions of the learned Commissioner (Appeals) the Assessing Officer after conducting enquiry had submitted a report without any adverse finding on the genuineness of the unsecured loan and share capital investment. He submitted, on the basis of such report of the Assessing Officer and other material available on record, the learned Commissioner (Appeals) deleted the addition made by the Assessing Officer. He submitted, even at the time of hearing before the Tribunal, there was no change in factual position relating to the disputed issue

and the Department did not bring any further material on record to controvert the observations of the Assessing Officer in the remand report and the finding of the learned Commissioner (Appeals) on the disputed issue. He submitted, when there was no adverse material on record to hold that the transaction relating to unsecured loan and share capital investment were not genuine, the Tribunal could not have done anything else but to uphold the order of the learned Commissioner (Appeals). The learned Authorised Representative submitted, the Tribunal upon consideration of facts and materials on record having decided the issue and there being no perversity in the order of the Tribunal because of non-consideration of material fact available before it, the appeal order passed cannot be recalled as there is no mistake apparent on record as envisaged under section 254 of the Act.

4. We have considered rival submissions and perused materials on record. The averments made in the misc. application filed by the Income Tax Officer, Ward-15(2)(1), Mumbai, who happens to be the Assessing Officer, are as under:-

"This Miscellaneous Application Arising out of ITAT, 'I' Bench, Mumbai's order ITA no.6165/Mum./2014 dtd. 29.04.2016 in which the Hon'ble ITAT has dismissed Revenue appeal.

It seems that there is a mistake in the order of Hon'ble ITAT. The facts of the case are narrated in the Authorization memo issued by the Pr Commissioner Of Income Tax – 15, Mumbai.

In view of the above, it is prayed that, in the interest of justice, the Hon'ble ITAT may kindly recall its order dated 29th April 2016 under section 254(2) of the Act and hear the appeal afresh and pass appropriate order for ensuring that proper investigation is carried out and correct facts are brought on record."

5. As could be seen from the averments made in the misc. application, they are general in nature and the Assessing Officer has not referred to any specific mistake or error appearing in the order dated 29th April 2016, passed by the Tribunal. Interestingly, the Assessing Officer, in turn, has referred to the authorization memo issued by the Principal Commissioner of Income-tax-15, Mumbai, a copy of which has been annexed to the misc. application. On carefully going through the said authorization memo dated 16th January 2017, it is noticed that the basic reason for which the Department considers the appeal order to be erroneous is, the final report of the SEBI with regard to certain persons/entities who allegedly are involved in rigging and manipulation of share prices of a company, namely, Pyramid Saimera Theater Ltd. was not considered by the Tribunal. It is stated, only on the basis of documents filed by the assessee, Assessing Officer has casually filed his report virtually giving a clean chit to the assessee. It has been stated in the authorization memo that due to insufficient enquiry by the learned Commissioner (Appeals) and

Assessing Officer correct facts were not brought before the Tribunal. Thus, on the aforesaid basis the Department seeks the recall of the order of the Tribunal. As could be seen from the narration of facts in the authorization memo of the learned PCIT, he admits that proper enquiry was not done by the learned Commissioner (Appeals) and by the Assessing Officer at the stage of remand which resulted in not bringing certain facts to the notice of the Tribunal. Thus, it is crystal clear that the Tribunal has proceeded on the basis of facts and material on record and as were placed before it at the time of hearing by the learned Counsels appearing for the parties. It must be understood that the role of the Tribunal as a second appellate authority is of an adjudicator and not an investigator. The Tribunal under the provisions of the Act has to decide the grounds raised in an appeal filed either by the assessee or by the Department on the basis of the facts and materials available on record or brought to its notice at the time of hearing of appeal. Keeping in view the aforesaid legal position, if we examine the facts of the present case it can be seen that in the previous year relevant to the assessment year under dispute, the assessee had received certain unsecured loan and share capital investment which were examined by the Assessing Officer during the assessment proceedings. The Assessing Officer has observed in the assessment order that funds by way of unsecured loan

and share capital have been credited to assessee's bank account, subscribers are identifiable and transactions are through banking channel. What the Assessing Officer has doubted is the creditworthiness and genuineness, that too, primarily relying upon the interim order of the SEBI. Accordingly, he has added them back under section 68 of the Act. The assessee challenged the addition before the learned Commissioner (Appeals). In course of hearing of appeal before the first appellate authority the assessee made submissions and furnished documentary evidences to prove the genuineness of the unsecured loans and share capital investment and creditworthiness of the parties. The learned Commissioner (Appeals) after taking note of the submissions made by the assessee and the evidences filed before him including affidavits of the lenders and their income tax returns, forwarded them to the Assessing Officer for making necessary enquiry to ascertain the genuineness of the transactions. In pursuance to the directions of the learned Commissioner (Appeals) the Assessing Officer examined the documentary evidences and found the unsecured loans to be genuine, hence, made no adverse comment in his report. As regards receipt of share application money, the Assessing Officer after examining the affidavits, bank statement and return of income of the share applicants as well as the information received in pursuance to the notices issue under section 133(6) of the Act found them to be in

order. Undisputedly, on the basis of the aforesaid report of the Assessing Officer, the learned Commissioner (Appeals) deleted the additions since, there was no adverse material brought on record by the Department to prove the transactions as non-genuine. The factual position remained the same before the Tribunal as well. When the Assessing Officer after making enquiry during the remand proceedings has reported the transactions to be in order or no suspicion was raised by him with regard to such transactions, there was no occasion for the appellate authorities to hold a different view as they have to rely upon the investigation / enquiry conducted by the Assessing Officer. In fact, in course of hearing of appeal before the Tribunal also no new material / information was brought on record by the Department to controvert the finding of the Assessing Officer in the remand report or finding of the learned Commissioner (Appeals). Therefore, in the absence of any adverse material brought on record by the department to controvert the finding of the first appellate authority on facts, the Tribunal had to accept the decision of the learned Commissioner (Appeals). After the passing of the order of the Tribunal the Department has come forward with the final order of the SEBI by stating that, though, it was available at the time of hearing of appeal but it could not be brought to the notice of the Tribunal. Thus, as could be seen whatever negligence or laches for not bringing the final order of SEBI to the

notice of the Tribunal lies with the Department and for such negligence or laches of the Department, the appeal order passed by the Tribunal cannot be termed as erroneous to bring it within the ambit of section 254(2) of the Act. After disposal of appeal by the Tribunal if the Department comes with fresh evidence certainly it cannot be entertained, much less, by taking recourse to section 254(2) of the Act. Therefore, the present application filed by the department is not maintainable.

6. Having held so, it will be relevant to examine whether the final order of SEBI dated 31.03.2015, could have had any impact on the issues involved in the present appeal? The learned Departmental Representative has failed to demonstrate how it would have helped the cause of the department. As could be seen, the seven subscribers who have invested in assessee's shares are the following: –

<i>Sr. no.</i>	<i>Name of Subscriber</i>	<i>Name of the Authorised Signatory / Director</i>
1.	<i>Lexus Infotech Ltd.</i>	<i>Rose Paravidri</i>
2.	<i>Real Gold Trading Pvt. Ltd.</i>	<i>Shobha Verma</i>
3.	<i>Javda Indian Impex Ltd.</i>	<i>Ramesh M. Javda</i>
4.	<i>Kush Industan Entertainment Ltd.</i>	<i>Ramesh M. Javda</i>
5.	<i>Yash V. Jewels Ltd.</i>	<i>Uma Jayant Kansara</i>
6.	<i>Vanguard Jewels Ltd.</i>	<i>Uma Jayant Kansara</i>
7.	<i>Alka Diamond Industries Ltd.</i>	<i>Gopal M. Javda</i>

7. These seven entities appeared in the list of 230 entities mentioned in the interim order of SEBI referred to in the assessment order. Aforesaid list of 230 entities was downsized to 217 as appearing in Table-A of final order dated 31.03.2015 of SEBI. However, assessee's seven subscribers also appear in this list of 217 entities. It will be interesting to note the observations of the SEBI with regard to these entities in the final order, which are as under:-

"11. Since these suspicious banking transactions relating to the entities as discussed earlier were alleged to be linked to potential money laundering activities that could be detrimental to the genuine investors at large, a copy of the interim order was sent to the Director, Financial Intelligence Unit (hereinafter referred to as "FIU"). A copy of the same was also forwarded to Reserve Bank of India (hereinafter referred to as "RBI") for examination at its end for assessing the possibility of detecting the trail of financial transactions with respect to the bank account of the entities / persons as referred to Table-A. It is observed that pursuant to the receipt of reference from SEBI, RBI ordered a special audit of boA of these entities in 9 banks and in this context examined the accounts of these persons / entities held with the respective banks for forensic audit. Vide letter dated May 16, 2012, RBI, noted that the deficiencies pertain only to non-compliance with the procedures for opening of teh bank accounts and non-reporting of each transactions to FIU. As regards the trail of movement of funds, RBI in its report observed that on its verification of transactions in the above accounts, there was no prima facie evidence of all or some of the transactions having been orchestrated by the list of 230 persons listed in SEBI orders with a view to camouflage their sole beneficial ownership of the funds and the income by their deployment through the intermediate sham accounts. RBI also stated that this was mainly due to the fact that details of source of funds in these accounts were not available for their verification.

X X X X X

14. The findings of the audit report of RBI indicate the role of the entities/ persons mentioned in the Table A is being restricted to suspicious banking transactions. I also note that

no adverse comments have been received from FIU. Apart from the observations recorded in the preceding paragraphs, I note that the investigation did not reveal any trading in securities market by these entities, particularly in the scrip of PSTL. The primary allegation against them is with regard to transferring funds amongst themselves without any explanation about the purpose of the same. It is also noted that the entities have undergone debarment since the passing of the interim order.

15. Under the facts and circumstances detailed above and also considering that the entities have undergone various periods of prohibition since April 23, 2009 (ranging from two-and a-half to more than five years) I am of the view that the prohibition against these 217 entities listed in Table A of para 5 above, need not continue.

16. Accordingly, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11B and 11(4) thereof, do hereby dispose of the proceedings against the 217 entities mentioned in Table A without any further orders."

8. Thus, as could be seen from the aforesaid observations of SEBI, nothing serious was found against these entities, except, raising some doubt with regard to the transaction in their bank accounts, hence, prohibition order against them was discontinued. Thus, the final order of SEBI in no manner will be helpful to the department to prove that funds received by the assessee through unsecured loan and share subscription is non genuine or the subscribers have no creditworthiness. Apart from relying upon the final order of SEBI the department has failed to bring any material through independent enquiry to establish that the transactions are not genuine or creditors do not have creditworthiness. What was required to be examined by the Tribunal while deciding the appeal is, whether the assessee has

proved the genuineness of the transaction at its hands by proving the identity, creditworthiness and genuineness of the creditors? Since, neither the Assessing Officer at the time of remand or the learned Commissioner (Appeals) while deciding the appeals have doubted the identity, creditworthiness and genuineness of the transaction, assessee's claim had to be accepted, more so, when the creditors have confirmed the credits appearing in their name. Moreover, the SEBI report is not in the case of the assessee but in case of persons some of whom are share applicants of the assessee. The assessee is required to prove the source of fund at its hands and cannot be called upon to prove the source of source. Since, the Department has failed to demonstrate any mistake of the nature as contemplated under section 254(2) of the Act the present application is bound to fail.

9. What the Department wants by filing this application is a review of the earlier decision of the Tribunal which is not permissible under the provision of section 254(2) of the Act which is very limited in its scope and ambit and only applies to rectification of mistake apparent on the face of record. With the aforesaid observations, we decline to entertain the misc. application filed by the Revenue.

10. In the result, misc. application is dismissed.

Order pronounced in the open Court on 10.09.2018

**Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 10.09.2018

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai