JUDGMENT

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

BEFORE:

THE HON'BLE JUSTICE ANIRUDDHA BOSE

THE HON'BLE JUSTICE ARINDAM SINHA

ITAT 178 of 2016

GA 997 of 2016

GA 998 of 2016

M/s. Pragati Financial Management Pvt. Ltd.

Vs.

The Commissioner of Income Tax Officer – II

GA 93 of 2017

GA 94 of 2017

ITAT 14 of 2017

Valley Towers Pvt. Ltd.

Vs.

The Commissioner of Income Tax Kolkata III, Kolkata

GA 3907 of 2015

With

ITAT 187 of 2015

Axis Shoppers Pvt. Ltd.

Vs.

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The Commissioner of Income Tax Officer – III

GA 3909 of 2015

With

ITAT 188 of 2015

Capetown Merchandise Pvt. Ltd.

Vs.

The Commissioner of Income Tax Officer – II

GA 276 of 2016

With

ITAT 73 of 2016

Sangini Vyapaar Pvt. Ltd.

Vs.

Commissioner of Income Tax – 3, Kolkata

GA 540 of 2016

With

ITAT 115 of 2016

Orbit Traders Pvt. Ltd.

Vs.

The Commissioner of Income Tax Officer-2, Kolkata

GA 601 of 2016

With

ITAT 120 of 2016

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Trinetra Vincom Pvt. Ltd. & Anr.

Vs.

Income Tax Officer, Ward-9(1) Kolkata & Anr.

GA 607 of 2016

With

ITAT 123 of 2016

Daniel Commotrade Pvt. Ltd. & Anr.

Vs.

Income Tax Officer, Ward 9(1), Kolkata & Anr.

GA 3166 of 2016

With

ITAT 389 of 2016

Kunj Behari Tie-up Pvt. Ltd.

Vs.

The Commissioner of Income Tax Officer-I

GA 3177 of 2016

With

ITAT 394 of 2016

Mangalgouri Vanijya Pvt. Ltd.

Vs.

The Commissioner of Income Tax Officer-III

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Advocates for the Appellants:	Mr. Abhratosh Majumdar, Sr. Adv. Mr. Avra Mazumder, Mr. Santanu Chatterjee, Mr. Akhilesh Gupta, Mr. Sujoy Sen, Mrs. Sudeshna Mazumder.
Advocates for the Respondents:	MD. Nizamuddin, Mr. Soumitra Mukherjee, Mr. Ranjan Sinha, Mr. S.N. Dutta, Mr. Vipul Kundalia, Mr. Tapas Kr. Chatterjee.
Advocate for the Revenue:	Mr. Debasish Chaudhuri
Judgement On:	7th March, 2017.
Heard On:	11.01.17, 17.02.17, 07.02.17 & 07.03.17

Aniruddha Bose. J.:-

1. These ten appeals involve identical questions of law for adjudication and the factual basis of these appeals are also broadly similar. For this reason, in this judgment, we do not consider it necessary to narrate the facts relating to each particular appeal. To appreciate the scope of these appeals, however, we shall refer to the factual context of the appeal registered as I.T.A.T No.178 of 2016 only.

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With each of these appeals, applications have been taken out seeking stay of operation of the Tribunal's Judgment, against which the appeal has been preferred. So far as, I.T.A.T No.178 of 2016 is concerned, the stay petition is registered as G.A No.998 of 2016. There are two applications for condonation of delay in filing the appeals, being ITAT 178 of 2016 and ITAT 14 of 2017. These applications for condonation of delay have been registered as G.A. 997 of 2016 and G.A. 93 of 2017 respectively and on going through the averments made in these applications, we are satisfied that the appellants were prevented by sufficient cause in filing their appeals within prescribed time. We accordingly condone the delay in filing both these appeals.

2. The assessment year involved in I.T.A.T. No. 178 of 2016 is 2008–09. All the other appeals pertain to the assessment years 2008-09 and 2009-10. From the stay petition, we find that the appellant, Pragati Financial Management Pvt. Ltd. (Pragati) is engaged in investment activities. In the concerned accounting year, being 2007-08, the appellant had filed return declaring loss of Rs.24,805/-. After submission of return, the assessee had sent a letter to the assessing officer, indicating therein that the company had earned consultancy fees to the tune of Rs.75,000/-, which was not offered for tax in its return of income. On receiving such letter, the assessing officer issued notice under Section 148 of the Income Tax Act, 1961. On 31st May, 2010, the assessing officer passed an order under Section 147/143(3)

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of the Act on 31st March, 2010 determining the assessee's total income to be Rs.60,800/-.

3. The Commissioner of Income Tax : Kolkata III (C.I.T.), in exercise of his power under Section 263 of the Act issued a show-cause notice dated 1st March 2013, to which the assessee filed written submission. In the stay petition, it has been alleged that no show-cause notice was issued and the order under Section 263 of the Act was passed ex-parte. This point, however, was not pressed before us at the time of hearing of this appeal. From the Grounds on which the Tribunal heard the appeal (annexed at page 27 of the stay petition), we do not find that this point was urged before the Tribunal either. The reason for issue of the said notice appears from the order of the C.I.T., which the assessee seeks to invalidate. In the order, which was passed on 12/21 March, 2013, it was, inter alia, recorded:-

> *"Subsequently, a show-cause notice u/s.263 of the Act was issued vide letter dated 01.02.2013. In this show cause it has stated that on examination of records it was found that 2,50,625 shares were issued by the said company at face value of Rs.10/- at a premium of Rs.190/- per share. In other*

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words, the assessee company raised a paid up share capital of Rs.25.06 lacs with premium of Rs.4.76 crores. It was further stated that on perusal of the assessment records it was found that requisite inquiries were not conducted regarding the issue as to what prompted the subscribers to the shares to pay such substantial premium on shares of a little known company having no or insignificant business activities. It was also observed that it was apparent that the order was passed without application of mind.

The show cause notice also stated that proper inquiry was not conducted regarding the identity and creditworthiness of the shareholders. It was stated that the order was passed mechanically which was liable to turn the assessment erroneous and cause prejudice to the interest of revenue. In view of these facts, the assessee was asked to explain as to why the assessment should not be set aside u/s.263."

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4. We also find from the order of the C.I.T. that notices under Section 133(6) of the Act had been sent. The C.I.T. observed in his order that on perusal of replies it was seen that the bank statements of the companies which subscribed to the shares on premium were for a very limited period and not for the whole year. Analysis of those statements did not throw any light on the source of funds of the subscriber companies, as recorded in the said order of the C.I.T. The stand of the assessee before the C.I.T. was that the assessing officer had conducted proper inquiry regarding the identity and creditworthiness of the shareholders and their confirmation letters along with PAN Cards, copies of the bank statements and balance sheets of the subscribing companies had also been furnished. No further inquiry ought to have been directed, it was the contention of the assessee. The Commissioner, however, issued the order upon coming to a finding that the assessing officer had not pursued the inquiries to their logical end and had made an order prejudicial to the interest of the Revenue. The C.I.T. in his order held and directed:-

> *"I have considered the facts of the case and the decisions of the superior Courts cited above. I am of the opinion that the A.O. by not pursuing the inquiries to their logical end has made the order erroneous and*

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prejudicial to the interest of revenue. The order is, therefore, set aside and the A.O is directed to carry out through & detailed enquiries in the case. He should carry out inquiries about the various layers through which the share capital has been rotated. The A.O. is also directed to summon the present & past Directors of the assessee company and the subscriber companies and examine them. The A.O. should also examine as to when this company was sold. At that point of time the fictitious assets such as shares in other companies or loans given to other companies is converted back into cash by credit in the assessee company's bank account. The source of this money also needs to be examined. Further, information should be sent to the A.Os of the subscriber companies and to the other companies through which the capital has been rotated regarding the findings of the A.O. Subsequent to the inquiries & verification of all relevant aspects of the case, the A.O should pass a speaking order after providing adequate opportunity to the assessee."

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5. The direction for inquiry, as contained in the order of the C.I.T., is essentially a step towards charging the receipts reflected as share capital issued at premium to income tax as income of the assessee of that previous year in the event the assessing officer remained unsatisfied with explanation of the assessee given after conducting the inquiry in the manner provided in the order of the C.I.T. The assessee preferred an appeal before the Income Tax Appellate Tribunal against this order of the Commissioner issued under Section 263 of the Act. It was contended before the Tribunal that the order of the assessing officer was neither erroneous nor prejudicial to the interest of the Revenue, and sufficient inquiry was made by the assessing officer. The Tribunal dealt with several appeals pertaining to the assessment years 2008–09 and 2009–10 relating to different assessees and the appeal of Pragati was dismissed by a common order passed on 4th November, 2015. Orders in respect of other appellants were passed on different dates, but as we have already observed, reasoning in all the orders of the Tribunal has been substantially the same. The Tribunal, while dismissing the appeals followed an earlier order by which a large number of cases on similar issues were dismissed. The lead case on which reliance was placed by the Tribunal was its own decision in the case of ***Subhalakshmi Vanijya Pvt. Ltd. Vs. C.I.T.*** *(I.T.A No.1104/Kol/2014),* which was decided on 30th July

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2015, pertaining to the assessment year 2009–10. In the case of ***Subhalakshmi*** (supra), the Tribunal examined the question as to whether such an inquiry was permissible or not. While addressing this question, the Tribunal examined as to whether the assessing officer could examine genuineness of transactions of receipt of share capital with premium or not. If such a course was permissible, and upon completion of the inquiry the assessee failed to satisfy the assessing officer on the identity and capacity of the subscribers and genuineness of transactions, then, the Tribunal opined, addition under Section 68 of the Act would have been called for. That would be the ultimate outcome of the inquiry directed by the C.I.T., provided of course, the assessing officer remained unsatisfied with the explanation furnished by the assessees. Section 68 of the Act permits adding the sum credited to the income of an assessee in situations specified under that provision. For the assessment years concerned, Section 68 of the Act read:-

> *"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,*

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satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

6. There was amendment to the aforesaid Section and following provisos were added to Section 68 by the Finance Act, 2012, with effect from 1st April, 2013:-

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee- company shall be deemed to be not satisfactory, unless –

(a) The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

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(b) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

7. Along with this provision, Section 56(2) (viib) and Sections and 92BA and 92C were also amended by the Finance Act, 2012. These amended provisions were incorporated in the statute book primarily to introduce the concept of arm's length pricing in share transactions particularly in relation to closely held companies. For the purpose of adjudication of these appeals, however, reproduction of these provisions is not necessary. Since in course of hearing Mr. Abhratosh Majumdar, learned counsel for the appellants brought to our notice these amendments, we are referring to these provisions in this judgment. In the decision of ***Subhalakshmi Vanijya Pvt. Ltd.*** (supra), the Tribunal rejected the appeal of the assessee, inter alia, holding that the amended provision of Section 68 of the Act was retrospective in operation. The Tribunal specifically observed:-

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"We, therefore, hold that though amendment to section 56 (2) (viib) is prospective, but to section 68 is retrospective. If that is the position, then the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the A.O, failure of which calls for addition U/S.69."

8. The Tribunal rejected the appeal of Pragati as well as the appeals of other appellants before us, relying on the aforesaid decision, and sustained the order of the C.I.T. directing inquiries, as we have referred to earlier.

9. Main thrust of the appellant's case is that the provisions of Section 68 of the Act as amended could not be given retrospective operation and if that position of law was accepted, then it was not open to the C.I.T. to direct an enquiry to ascertain the source and genuineness of the sums being projected by the appellants as capital receipts. Mr. Majumdar wants us to reject the finding of the Tribunal that Section 68 of the Act, as amended, has retrospective operation. In support of his submissions on this

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point, he has relied on a Constitution Bench judgment of Supreme Court delivered in the case of the ***Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd.*** [(2015) 1 SCC 1]. Argument of the appellant is that in the event the amendment made to section 56 (2) of the Act is given prospective effect along with provisos to Section 68, then sums received as share capital or share premium would not be taxable in the light of particulars already disclosed by each appellant, and the exercise directed by the C.I.T. would be a futile or redundant exercise. Mr. Majumdar wants the appeal to be admitted on formulating the following question, which, according to him, would involve substantial question of law:-

> *"Whether in the facts and circumstances of the case and in law, the learned Tribunal erred in holding that the proviso to Section 68 inserted by the Finance Act, 2012 with effect from April 1, 2013 would be applicable to Assessment Year 2008 – 09?"*

10. A Coordinate Bench of this Court in dealing with an almost identically worded order of the C.I.T. in the case of ***Rajmandir***

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Estates Private Limited Vs. Principal Commissioner of Income Tax, Kolkata – III, Kolkata, [G.A No.509 of 2016 with I.T.A.T No.113 of 2016] found such order to be sustainable in law. In the judgment, Their Lordships construed the provisions of section 68 as it was before the aforesaid amendment being the law which prevailed in the relevant previous year in that proceeding, and held, inter alia:-

> *"We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts*

and did not prove that the transaction was genuine as was held in the case of CIT –Vs– Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of CIT –Vs– Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues."

12. This judgment was carried up in appeal by the assessee before the Hon'ble Supreme Court by filing a petition for special leave to appeal (Petition(s) for Special Leave to Appeal (c) … cc No

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(s) 22566-22567/2016). On 9th January, 2017, the Hon'ble Supreme Court was pleased to dismiss the special leave petition finding no reason to entertain the same. A copy of the order of the Hon'ble Supreme Court has been made available to us by Mr. Nizamuddin, learned counsel representing the Revenue.

13. In that judgment, the Coordinate Bench had referred to particulars of the assessee's account in detail. Reference was made specifically to its subsisting share capital, quantum rise in share capital and reserve and surplus on issue of share capital with high premium during the relevant previous year. In this judgment, we do not consider it necessary either to reproduce the particulars of accounts of individual assessees or to refer to the manner in which the capital receipts were realised. The factual background of these cases are more or less similar to the facts involved in the case of ***Rajmandir Estates Private Ltd.*** (supra), and learned counsel for the parties have also confined their submissions to points of law only. The capital receipts in respect of which inquires have been ordered by the C.I.T. have similar features, being fresh share capital issued at high premium. Mr. Majumdar, however, drew his strength to urge the point that it was only after the aforesaid amendments such inquiries would have relevance. He sought to take cue from the observation of the Coordinate Bench that the question as to whether proviso to

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Section 68 of Income Tax Act is retrospective in nature or not was being kept open. He also cited the judgment of the Hon'ble Supreme Court in the case of ***Sneh Vs. Commissioner of Customs*** [(2006)7 SCC 714] to contend that a judgment is the authority on the proposition which it decides and not what can logically be deduced from, and sought to distinguish the case of ***Rajmandir Estates Pvt. Ltd.*** (supra) on that basis. Submission of the appellants is that the points of law urged in these appeals were not raised before the Coordinate Bench. Main argument of the appellants before us has been that the amendment to Section 68 does not have retrospective operation. According to the appellants, if it is found that the amended provisions of Section 68 of the Act do not have retrospective operation, then having regard to what has been held by the Tribunal in the case of ***Subhalakshmi Vanija Pvt. Ltd.*** (supra), the inquiry, as directed would be impermissible.

14. We have already observed that the judgment in the case of ***Rajmandir Estates Private Ltd.*** (supra) was delivered considering the unamended provision of Section 68 of the Act. In the case of the assessees before us, there is no differing feature so far as applicability of the said statutory provision is concerned, even though the Tribunal in ***Subhalakshmi Vanijya Pvt. Ltd.*** (supra) had held that the provisos to Section 68 of the

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Act are retrospective in their operation, and delivered the decision against the assessee in that case that reasoning. In the appeal of ***Rajmandir Estates Private Ltd.*** (supra), the Coordinate Bench did not consider it necessary to examine the question of retroactivity of the aforesaid provision. The Coordinate Bench found the order of the C.I.T. to be valid examining the order applying the unamended provision of Section 68 of the Act only. We do not find any other distinguishing element in these appeals which would require addressing the question as to whether the amendment to Section 68 of the Act was retrospective in operation or not. Neither do we need to address the issue that if the inquiries, as directed, revealed that share capital infused were actually unaccounted money, whether the same could be taxed in accordance with Section 56(2) (vii b) or not. The ratio of the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Vedika Township Private Ltd.*** (supra) does not apply in the legal context in which we are deciding these appeals. It is not necessary in these appeals to deal with the question of retroactivity of the aforesaid provisions, for which that authority was cited.

15. Arguments in all these appeals have been advanced in the same line, and for that reason we have not recorded in this

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judgment the submissions made individually in each appeal. Another decision of a Coordinate Bench in ITA No. 723 of 2008 in the case of ***Commissioner of Income Tax, Central II, Kolkata Vs. Shyam Sel Ltd.*** decided on 28th June 2016 was referred to on behalf of the appellants. This decision was cited to contend that the assessee cannot be asked to discharge the onus of proving the genuineness of transaction relating to the source of its source of share application. But in the decision of ***Rajmandir Estate Pvt. Ltd.*** (supra), the Coordinate Bench had directly addressed this issue and observed that source of source can be relevant inquiry.

16. The points sought to be raised before us in these appeals stand covered by the aforesaid judgment of the Coordinate Bench. The Special Leave Petition against that judgment has been dismissed. We accordingly dismiss these appeals, finding that there is no substantial question of law involved in them.

(Aniruddha Bose, J.)

(Arindam Sinha, J.)

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