IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 12TH DAY OF JULY 2018 / 21ST ASHADHA, 1940

WA.No. 1297 of 2018 IN WPC. 3485/2018

AGAINST THE JUDGMENT IN WP(C) NO.3485/2018 OF THE HIGH COURT OF KERALA DATED 22-05-2018

APPELLANT/PETITIONER:

SUNRISE ACADEMY OF MEDICAL SPECIALITIES (INDIA) PRIVATE LIMITED,
VII/528C, SEA PORT AIRPORT ROAD, KOCHI - 682 030
REPRESENTED BY ITS MANAGING DIRECTOR, SMT.PARVEEN HAFEEZ.

BY ADVS.SRI.ANIL D. NAIR
SRI.R.SREEJITH
KUM.MEKHALA M.BENNY

RESPONDENT/RESPONDENT:

INCOME TAX OFFICER,
CORPORATE WARD 2(1), RANGE-2, KOCHI-682 018.

BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 12-07-2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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C.R.

K. VINOD CHANDRAN & ASHOK MENON, JJ.

W.A. No.1297 of 2018

Dated this the 12th day of July, 2018

JUDGMENT

K. Vinod Chandran, J.

The appellant impugn the judgment of the learned Single Judge in a writ petition, which was filed without availing the appellate remedy as available in the statute. Suffice it to notice on facts that the appellant, a private limited Company, incorporated under the Companies Act, and in which the public are not substantially interested, issued shares at a premium above the face value. The appellant did not offer any amount so received as income for the purpose of taxation under the Income-tax Act. A notice under Section 143(2) was issued and the appellant is said to have

disclosed the genuineness of the persons, who purchased the said shares on a premium. The Assessing Officer then attempted to tax the amounts so received under Section 56(2)(viib) of the Income Tax Act, 1961 [for brevity, the Act].

2. The appellant/assessee contended before the learned Single Judge that the notice issued was only with respect to the source from which the funds were received and the same having been disclosed, there was no scope for a further proceeding, especially under Section 56(2)(viib) of the Act. The provision would not be applicable unless the test under Section 68 of the Act is satisfied, is the further argument.

3. The learned Single Judge extracted the notice, which we also deem fit to extract here as evident in Ext.P1 as follows:

"Whether the funds received in the form of share premium are from disclosed sources

and have been correctly offered for tax."

4. The learned Single Judge found that there are two limbs to the notice; one as to the source and the other as to the amounts being correctly offered for tax. The attempt to tax the premium received was under the second limb was the finding. We do not think that there is any other reasonable view possible or a valid cause to have a different opinion on the words employed in the notice and there is no reason to interfere with the said finding.

5. We then notice Section 68 of the Act, which reads as follows:

> *"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:*

> *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*
>
> *(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."*

6. Section 68 of the Act as it stood before 2013 required treatment of any sum credited in the books of an assessee, when no explanation is offered or the explanation offered is not

satisfactory, as charged to income-tax. The proviso above extracted was inserted by Finance Act, 2012, with effect from 01.04.2013 to Section 68, along with the insertion of clause (viib) of Section 56. We deem it fit that Section 56(2)(viib) also be extracted hereunder:

> *"56(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*
>
> *Provided that this clause shall not apply where the consideration for issue of shares is received-*
>
> *(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or*
>
> *(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.*
>
> *Explanation-For the purposes of this clause-*
>
> *(a) the fair market value of the shares shall be the value-*

> *(i) as may be determined in accordance with such method as may be prescribed; or*
>
> *(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;*
>
> *(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of section 10."*

7. Section 68 of the Act as it earlier stood enabled the assessee to offer an explanation for any sum credited in the books of accounts which if found unsatisfactory will be charged to income tax. By the introduction of the proviso the explanation offered for the amounts received, *inter alia* as share application money, by a Company, not

being one in which the public are substantially interested, would not be deemed to be satisfactory unless (a) & (b) of the proviso are satisfied. If (a) & (b) are not satisfied, then charge of income tax can be effectuated on the entire sum so credited, the explanation being not satisfactory.

8. We have to notice the contention of the learned Standing Counsel for Government of India (Taxes) that if Section 68 is taken as governing Section 56; the charge created with respect to income from other sources; then the provisions would have to be re-written. Section 56 comes under the Chapter : “Computation of Income”. Section 68 under : “Aggregation of Income and Set Off or Carry Forward of Loss”. The provision for computation was also amended to bring within the ambit of taxable income, any premium paid for purchase of shares; of companies in which the public are not substantially

interested.

9. Any premium received by a Company on sale of shares, in excess of its face value; if the Company is not one in which the public has substantial interest, would be treated as income from other sources, as seen from Section 56(2) (viib) of the Act, which we do not think can be controlled by the provisions of Section 68 of the Act. Section 68 on the other hand, as substituted with the provisos, treats any credit in the books of accounts, even by way of allotment of shares; for which no satisfactory explanation is offered, to be liable to income-tax. Clause (viib) of Section 56(2) is triggered at the stage of computation of income itself when the share application money received, from a resident, by a Company, in which the public are not substantially interested; is above the face value. Then the

aggregate consideration received for the shares as exceeds the fair market value will be included as income from other sources. However, when the resident investor is not able to explain the nature and source for the credit seen in the books of accounts of the Company or the explanation offered is not satisfactory then the entire credit would be charged to income tax for that previous year. That is the entire amounts credited in the books of accounts, styled as, for allotment of shares or application money, including the fair market value determined will be charged to tax. However if an explanation is offered and if it is satisfactory in the case of a Company in which the public are not substantially interested, then the charge to tax will only be to that portion exceeding the fair market value determined; which anyway has to occur under Section 56(2)(viib).

10. If Section 68 is applicable, and the proviso is not satisfied, then the entire amounts credited to the books would be treated as income. If satisfactory explanation is offered as to the source, then the premium paid as revealed from the books will be brought to tax as income from other sources. The contentions raised are to be negatived.

11. The learned Counsel then would submit that the assessee would definitely approach the Appellate Authority, but the adjudication be untrammeled by the observations made by the learned Single Judge. We are not inclined to so efface the declaration made by the learned Single Judge; when this Court has also laboured on the contentions raised and found the findings to be above board and without fault and perfectly in accordance with the provisions. The judicial time spent by the learned

Single Judge and this Bench cannot be lightly ignored, to merely set aside the observations while relegating the matter to the Appellate Authority; thus permitting the Appellate Authority to enter into a finding contrary to that of this Court. This would in fact egregiously meddle, impede and obtrude upon the well recognised hierarchy of Courts and adjudicatory authorities and would not be a proper exercise to be carried out by a Division Bench in appeal. The appellate powers, according to us, is not a weapon to obliterate a perfectly legal and reasonable construction given to the provisions in a statute by a learned Single Judge. The assessee sought to by-pass the statutory remedies, to approach this Court under Article 226; the jurisdiction under which is circumscribed as held in ***([M/s.State of H.P. v. Gujarat Ambuja Cement Ltd. (2005) 6 SCC 499)]***. Having opted to challenge the

order on the ground raised of a proceeding totally without jurisdiction; when it is answered against the assessee, then they cannot seek the luxury of a fresh consideration on the very same aspect by the subordinate authority. That would be waste of judicial time and an abuse of process; especially in the present times of escalating litigation and undue backlog of cases.

The appeal is dismissed, leaving the parties to suffer their respective costs. The assessee could approach the appellate authority only on the quantum.

Sd/-
K. VINOD CHANDRAN,
JUDGE.

Sd/-
ASHOK MENON,
JUDGE.

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P.A. To Judge

sp/12/07/18