



**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD**

**BEFORE SHRI. A. D. JAIN, VICE PRESIDENT
AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.60/ALLD/2019
Assessment Year: 2008-09

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|---|----|----------------------------------|
| Harakh Chand Glass Pvt. Ltd. 77, Subhash Marg Johnstonganj, Allahabad | v. | Dy. CIT Circle 2 Allahabad |
| TAN/PAN:AACCH0049M | | |
| (Appellant) | | (Respondent) |

S.A. No.01/Alld/2019
[In ITA No.60/ALLD/2019]
Assessment Year: 2008-09

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|---|----|----------------------------------|
| Harakh Chand Glass Pvt. Ltd. 77, Subhash Marg Johnstonganj, Allahabad | v. | Dy. CIT Circle 2 Allahabad |
| TAN/PAN:AACCH0049M | | |
| (Applicant) | | (Respondent) |

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|------------------------|---------------------------------|----|------|
| Assessee by: | Shri Abhinav Mehrotra, Advocate | | |
| Department by: | Shri S. K. Madhuk, CIT (DR) | | |
| Date of hearing: | 13 | 02 | 2020 |
| Date of pronouncement: | 14 | 02 | 2020 |

ORDER

PER A. D. JAIN, V.P.:

This is assessee's appeal against the order of the ld. CIT(A), Allahabad, dated 7/2/2019 for assessment year 2008-09, taking the following grounds:

1. BECAUSE, on the facts and in the circumstances of the case, the impugned order of Assessment as also that of Commissioner of Income Tax (Appeals) confirming such order, is both bad in law and on facts and is liable to be quashed since the objections of the assessee to the reasons recorded for reopening assessment were not disposed-off,

thus violating the law of the land as laid down by the Hon'ble Apex Court in the case of GKN Driveshaft [259 ITR 19]. The Hon'ble Bombay High Court in similar circumstances has recently in the case of Bayer Metal Science Pvt. Ltd. V/s DCIT set-aside the Assessment Order and held it to be without jurisdiction.

2. BECAUSE, on the facts and in the circumstances of the case, the impugned order of Assessment as also that of Commissioner of Income Tax (Appeals) confirming such order, is both bad in law and on facts and is liable to be quashed since the reasons for reopening assessment were supplied at the very fag end of limitation and the time gap between date of supply of reason to reopen assessment and the date of framing of reassessment order is less than one month which is impermissible in law as held by various courts.

3. BECAUSE, on the facts and in the circumstances of the case, re-opening of Assessment is bad in law since the alleged notice U/s 148 was not issued with limitation and it is submitted with deep anguish and regret that Revenue has resorted to fabrication of documents, interfered with evidence and has tempered the record of proceedings and is guilty of perjury on the facts as would be demonstrated during the course of hearing.

4. BECAUSE, on the facts and in the circumstances of the case, no addition could be made in the case of a company u/s 68 of the Act when it is an admitted position that the same has not commenced any business as duly admitted by the Ld. Assessing Officer in the body of the Assessment Order.

5. BECAUSE, on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in making an addition of Rs.21,60,000/- which the appellant company had received from subscribers of 24,000 equity shares of face value of Rs. 10/- a/w premium of Rs. 90/-. The addition is unwarranted u/s 68 since the identity, credit worthiness and genuineness of the transaction, stood duly established. Further, the transaction is between existing active companies and through banking channel.

6. BECAUSE, wholly without prejudice to the aforementioned Grounds of Appeal and as an alternative, the impugned order is unsustainable in law since the Assessing Officer in Statement of Reasons Recorded has opined/concluded, that as per the trail of transactions, it is the undisclosed money of some other person. It was therefore incumbent for the Assessing Officer to have caused addition in the hands of such person and not the instant assessee which is a company. The ratio of the judgment of the Hon'ble Apex Court in the case of Divine Leasing and Lovely Exports is squarely applicable. The reasons recorded and the additions made are de-hors to each other and hence as per the judgments, [Ranbaxy, Jet Airways & KLM Royal Dutch Airline etc.] no valid order of re-assessment is made.

7. BECAUSE, on the facts and in the circumstances of the case, the order of assessment is bad in law being barred by limitation and hence deserves to be quashed. The sanction U/s 151 of the Act is also bad in law merely saying I am satisfied on the reason is no sanction.

8. BECAUSE, on the facts and in the circumstances of the case the learned Commissioner of Income Tax (Appeals) has erred in confirming an illegal order of assessment and the order has been passed on surmises and conjectures.

2. The ld. Counsel for the assessee has pointed out, referring to pages 120 to 128 of the paper book, that a letter dated 29/3/2016 was filed before the Assessing Officer, wherein, specific objections against the reasons recorded had been raised; that however, in violation of 'GKN Driveshafts Pvt. Ltd. vs. ITO and Others', 259 ITR 19 (SC), the Assessing Officer not only failed to decide the objections raised by the assessee by a separate speaking order before entering upon the assessment proceedings, he did not pass any order on the objections at all; and that the objections have been dealt with by the Assessing Officer in the assessment order itself, which, again, is not as per

the law laid down in 'GKN Driveshafts Pvt. Ltd. vs. ITO and Others' (supra) and 'Bayer Material Science (P.) Ltd. vs. DCIT', in writ petition no.2502 of 2015, order dated 27/1/2016.

3. On the other hand, the ld. D.R. has contended that a perusal of the letter dated 29/3/2016 shows that it is, in fact, as also observed by the Assessing Officer, is a reply to the questionnaire issued by the Assessing Officer to the assessee and that it is on merits of the case, that the submissions have been made in this letter/reply; that therefore, as correctly held by the ld. CIT(A), the Assessing Officer was correct in observing that no particular objection had specifically been raised against the reasons recorded, that belief of escapement of income, and there was nothing before him to decide as the objections raised by the assessee.

4. Heard. A perusal of the aforesaid letter/reply dated 29/3/2016 [APB:120-128] shows that therein, the assessee, no doubt, has dealt with the questions raised by the Assessing Officer, but he has specifically raised objections against the reasons recorded by the Assessing Officer for formation of belief of escapement of income. The following relevant portion of the letter evinces so:

“Subject-Assessee-company's comments on reasons recorded u/s 148(2) for initiating proceedings u/s 147 and reply to Notices issued under section 143(2) r/w section 148 and section 142(1).

Re.: M/s. Harakh Chand Glass Private Limited for the Assessment Year 2008-09

Hon'ble Sir,

Further to our reply dated 29/04/2015, the assessee-company would like to categorically assert the following

aspects of the matter that are imperative in taking the discussion any further: -

- That, the assessee-company was in receipt of notice No 1450 dated 31/03/2015 issued under Section 148 of the Income Tax Act, 1961, on 06/04/2015 which was booked by your honour on 04/04/2015 vide speed post number RU063629795IN. By virtue of this notice, your honour had proposed to assess/reassess the income for the Assessment Year 2008-09 and required us to deliver a return of income in the prescribed form for the said assessment year. This notice was duly replied on 29/04/2015.
- That, the assessee company had duly replied the notice no. F.No. CIT/Ald./133(6)/RAC/2013-14/286 dated 23rd May, 2014 which was acknowledged by the department on 13/06/2014 vide ASK No. 105130614001632, wherein the assessee company had disclosed all the particulars inter-alia the name and address of each such subscribers to the shares of the assessee-company to prove the identity and existence of those subscribers including those as named in the reason i.e. M/s, Peekay Credit Services Private Limited and M/s. Jeweirock Barter Private Limited (Copy of the reply annexed as Annexure-A Page No. 1 to 4). It is pertinent to re-iterate the fact that the subscribers to the shares of the assessee-company as named in the reason recorded, get legal birth by virtue of getting themselves incorporated under the Companies Act, 1956 and their identity and existence could be verified on website of Ministry of Corporate Affairs as well as through PAN furnished in the reply, Further, the share application money from those subscriber-companies were collected through nationalized banks by way of cheques as evident from the bank statement annexed herewith (Annexure-B Page No.1). Thus, the real ownership of

such shares i.e. 14000 shares and 10000 shares were with M/s. Peekay Credit Services Private Limited and M/s. Jewelrock Barter Private Limited respectively during the year under consideration to whom the assessee-company had allotted shares.

That, few queries were further raised vide notice no. CIT/Alld/133(6)RAC/2014-15 dated 23rd March, 2015 which was received by the assessee company at the fag end of its financial closing, fixing date of compliance, 2015. The assessee-company sought adjournment vide speed post no. EU485857999IN dated 26/03/2015 but could not receive the status of its application for said adjournment. (Copy of application annexed as Annexure-C Page No, 1 to).

Inspite of the facts portrayed above, notice No. 1450 dated 31/03/2015 was issued under Section 148 of the Income Tax Act, 1961. In reply to the aforesaid notice, a proper submission was made which was duly acknowledged by the department vide ASK No. 105290415000728 on 29/04/2015. Through such submission, the assessee had solicited the reasons recorded for assess/reassess the income of M/s. Harakh Chand Glass Private Limited for the assessment year 2008-09 u/s 147 of the Income Tax, 1961 along with the copy of satisfaction obtained by your honour from the Joint Commissioner of Income Tax, Range-2, Allahabad.

The reasons and copy of satisfaction asked for vide aforesaid submission were provided by the esteemed department at the fag end of the financial year through e-mail i.e. on 27th March, 2016. The extract of the same is as under, for ready reference:

Reasons for the belief that income has escaped assessment:-

Information was gathered that the assessee company had during the F. Y.2007-08 (A. Y.2008-09) issued 24000 shares at Rs.100/- (i.e. Rs.10 Face Value and Rs.90/- premium). It

was also seen that the said company was a newly formed company i.e. came into being only in the F.Y 2007-08. These 24000 shares were issued to two companies.

- (i) Peekay Credit Services Pvt. Ltd. Kolkata 14000/-*
- (ii) Javelrock Barter Pvt. Ltd. Kolkata 10,000/-*

The company had also issued 15,000 shares to the Directors of the company and/or their family members @ Rs.10/- only.

2. The assessee vide notice under section 133(6) was requested to furnish copies of share application forms submitted by above two companies and also details of payments received. The company was also requested to provide reasons for charging premium of Rs.90/- per share especially when no business activities were existing during the year. No details were submitted even till the morning of 31st March, 2015. Further, it is seen that the assessee has issued 6,05,250/- number of shares during the F.Y. 2009-10 @ only Rs.16/- (i.e. Rs.10/- F.Y. + Rs.6/- premium) to the Directors/relatives.

3. It is also seen that the shares issued to these two companies @ Rs 10/- had been finally purchased by one Mr Arjun Kochar of Allahabad (known to be a business associate of the company/its directors) at only Rs.10/- in the F.Y.2009-10. This is a typical way in which unaccounted money is brought into the company whose shares are issued to totally unrelated companies (generally located in Kolkata) at a hefty and unrealistic premium and then in a year or two, those shares are purchased by the directors/relatives/ friends at hugely discounted price. This is exactly what has been done here.

4. Looking to the facts and circumstances of the case, I have reasons to believe that the assessee company has introduced its own unaccounted money through the issue of 24000 shares at hefty and unrealistic premium of Rs. 90/- and

accordingly income of the assessee to this extent has escaped assessment. Thus, it is a fit case for issue of notice u/s 147/148 of the Act. The amount that has escaped assessment in this case is likely to be more than Rs.1,00,000/-".

On perusal of the aforesaid reason, which caused your honour to believe that the quantum of income i.e. Rs.21,60,000/- (24000 shares @ 90/-) had escaped assessment, it is noticed that your honour is proceeding to treat this amount as assessee-company's income . Whereas the factual matrix in this regard is that the assessee-company had received this amount from the subscribers to shares of the company i.e. from the two companies whose legal birth has been established under the Companies Act , 1956 [M/s. Peekay Credit Services Private Limited came into existence on 16/03/1990 and M/s. Jeweirock Barter Private Limited came into existence on 14/12/1994] and whose identities were established before your honour date back on 13th June, 2014 in response your honour notice dated 23rd May, 2014 issued under section 133(6) of the Income tax Act, 1961. Copy of the same is annexed herewith [Please refer Annexure A Supra].

The management of the assessee company strongly refutes your honour belief that "the assessee company has introduced its own unaccounted money through the issue of 24000 shares at hefty and unrealistic premium of Rs.90/- and accordingly income of the assessee to this extent has escaped assessment. In this regard the management of the company wishes to inform your honour that the shareholders are still identified and they had invested their money in the purchase of shares through account payee cheques which was collected by the assessee-company through nationalized bank. Thus, the amount of Rs.21,60,000/-, as shown in the reason and which the assessee-company had received from the subscribers of shares, was a capital receipt of the

company during the year under consideration and was duly accounted for in the books of account of the company. This amount was subscriber's money which they contributed while subscribing or applying for shares to be issued by the assessee-company and under no circumstances the amount of Rs.21,60,000/- be regarded as unaccounted money of the assessee-company.

M/s. Harakh Chand Glass Private limited- Assessee-company, is a company incorporated under the Companies Act, 1956. The company is unlisted company and hence not registered with SEBI. Depending on future prospects etc., and to have a proper mix of capital and reserves to strengthen the capital base of the company, promoters / directors of the company had decided to issue shares at premium. The company had decided to issue shares at premium with a view to keep authorized and paid-up capital low, book value of share high, EPS high and incidentally to reduce cash outflow on account of dividend, if paid (which is paid as a percentage of paid up share capital) and also on account of filing fees for higher authorized capital.

It is pertinent to mention here that during the financial year 2007-08 relevant to the assessment year 2008-09 i.e. the assessment year under consideration, the company had issued 15,000 shares to the directors of the company @10/- because of the fact that they were subscribers to the Memorandum of Association and Articles of Association (Refer Annexure D page no.1). After assessing the goodwill of the promoters of the assessee-company in the market particularly in glass trade, the directors of the company decided to issue shares at premium. The above two companies namely M/s. Peekay Credit Services Private Limited and M/s. Jewelrock Barter Private Limited showed interest and had subscribed for shares at the premium of Rs.90/= per share. Copy of their share applications forms, resolutions, PAN and past/current address proof is annexed

herewith for your kind perusal. After receiving the share application forms and full consideration as mentioned in the share application form from the subscriber companies, directors of the assessee-company in its board meeting allotted shares to them.

In order to substantiate its stand that Rs.21,60,000/- is subscriber's money and is not the assessee-company's money, assessee-company annexes herewith the following documents/evidences, in addition to what has been asked for vide notices dated 22/03/2016 issued under section 143(2) and section 142(1) through e-mails , which sanctifies its version:-

- 1. Copy of Extract of the minutes of the meeting of the Board of Directors of M/s Peekay Credit Services Private Limited. [Annexure-E Page No.1]*
- 2. Copy of Extract of the minutes of the meeting of the Board of Directors of M/s. Jewelrock Barter Private Limited. [Annexure-F Page No. 1]*
- 3. Copy of Extract of the minutes of the meeting of the Board of Directors of M/s. Harakh Chand Glass Private Limited along with copy of Form 2 submitted to Ministry of Corporate Affairs. [Annexure-G Page No. 1 to 5]*

Further, the assessee-company is submitting the following documents which was asked for vide notice dated 22/03/2016 issued under section 142(1) through e-mails:-

- 1. Copy of ledger account of "Securities Premium" and copy of ledger account of M/s. Peekay Credit Securities Private Limited and M/s. Jewelrock Barter Private Limited for the accounting year 2007-08. [Annexure- H Page No, 1 to 3].*
- 2. Copies of share application forms applying for shares.[Annexure-I Page No. 1 to 2].*

3. Documents regarding their identity and credit-worthiness and genuineness of transaction. [Annexure- 3 Page No.1 to 8]

4. Copies of bank account statement in which the money received from the subscribers of shares were deposited. [Annexure-K Page No.1]

5. Details of shares issued to Mr. Arjun Kochhar. [Please refer annexure -F of reply dated 13/06/2014- Annexure-A supra]. It is pertinent to mention here that Mr. Arjun Kochhar is neither related to assessee-company nor to the directors of the assessee-company, either directly or indirectly.

6. Reasons for charging premium of Rs. 90/- per share. [Annexure- L Page No. 1 to 2].

7. Copies of ledger accounts of M/s. Peekay Credit Securities Private Limited and M/s. Jewelrock Barter Private Limited for the accounting year in which their accounts were squared-up.

In view of the aforesaid submissions, the directors of the assessee company hereby request your honour to drop the proceedings as the amount of Rs.21,60,000/- mentioned in the reasons is not the assessee-company's money rather share subscribers money to whom the assessee-company had allotted shares.

PRAYER

In view of our aforesaid submissions, with folded hands the directors of the assessee-company prays your honour :

Not to treat the subscriber's money, who had applied for shares in the assessee-company as assessee-company's unaccounted money.

In case any further information is required, the undersigned shall be more than obliged to supply the same.”

5. Now in 'Bayer Material Science (P.) Ltd. vs. DCIT' (supra), it has been held, following 'GKN Driveshafts Pvt. Ltd.' (supra), that it is incumbent on the Assessing Officer, when objections against the reasons recorded by the Assessing Officer for formation of belief of escapement of income, have been raised by the assessee, that the Assessing Officer needs must decided such objections by a specific separate order, disposing of the said objections. In case, the Assessing Officer rejects the objections raised by the assessee, such a separate order would enable, following the principles of natural justice, an opportunity to the assessee, to challenge the said separate order before the competent Court.

6. In 'General Motors (India) (P.) Ltd. vs. DCIT', 354 ITR 244 (Guj), it has been held that where no order has been passed by the AO deciding the objections filed by the assessee against notice issued under section 148 of the Act, or where such objections have been decided alongwith the assessment order, the notice issued u/s 148 of the Act deserves to be quashed. Their Lordships further observed as follows:

"The Assessing Officer is mandated to decide the objection to the notice under section 148 and supply or communicate it to the assessee. The assessee gets an opportunity to challenge the order in a writ petition. Thereafter, the Assessing Officer may pass the reassessment order. We hold that it was not open to the Assessing Officer to decide the objection to notice under section 148 by a composite assessment order. The Assessing Officer was required to first decide the objection of the assessee filed under section 148 and serve a copy of the order on assessee. And after giving some reasonable time to the assessee for challenging

his order, it was open to him to pass an assessment order. This was not done by the Assessing Officer therefore, the order on the objection to the notice under section 148 and the assessment order passed under the Act deserves to be quashed.”

7. ‘General Motors (India) (P.) Ltd. vs. DCIT’ (supra), inter alia, has been followed in ‘Ram Prakash Agarwal vs. Income Tax Officer’, passed in ITA No.159/Agra/2016 for assessment year 2003-04 (copy placed on record), vide order dated 14/12/2016.

8. In view of the above, finding the grievance of the assessee by way of ground No.1 to be justified, the same is accepted. Accordingly, the assessment order passed by the Assessing Officer is reversed as null and void in the absence of separate specific order disposing of the assessee’s objections against the reasons recorded.

9. In view of the above decision on ground No.1, nothing further survives for adjudication, nor was anything else argued before us.

10. In the result, the appeal is allowed. The stay application no longer survives and it is rejected as infructuous.

Order pronounced in the open Court on 14/02/2020.

Sd/-
[T. S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-
[A. D. JAIN]
VICE PRESIDENT

DATED:14/02/2020

JJ:1302

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar