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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 04.09.2023

+ **ITA 503/2023**

PR. COMMISSIONER OF INCOME TAX Appellant
Through: Mr Sanjeev Menon, Standing
Counsel.

versus

M/S. AZURE RETREAT PVT LTD Respondent
Through: Mr Sachit Jolly, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM No.45552/2023 [*Application filed on behalf of the appellant/revenue seeking condonation of delay of 5 days in filing the appeal*]

CM No.45553/2023 [*Application filed on behalf of the appellant/revenue seeking condonation of delay of 347 days in re-filing the appeal*]

1. These are the applications moved on behalf of the appellant/revenue, seeking condonation of delay in filing and re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of five (5) days in filing, and three hundred and forty-seven (347) days in re-filing the appeal.

2. As noted above, the delay in filing is short. However, the delay in re-filing is substantial.



3. Mr Sachit Jolly, who appears on behalf of the respondent/assessee, has pointed out that the explanation given in the application for condonation of delay in re-filing is, *prima facie*, inaccurate.

3.1 It is contended that the reason trotted out for seeking condonation of delay in re-filing is that the appellant/revenue had to re-type certain documents. Mr Jolly points out that none of the documents that have been placed before the court are re-typed.

3.2 Furthermore, Mr Jolly says that contrary to what has been stated in the application, no administrative approval was required for seeking condonation of delay in re-filing the appeal.

4. Clearly, the reasons furnished do not align with the record. However, having regard to the fact that the delay is in re-filing, we are inclined to condone the delay, as we wish to deal with the appeal on merits.

5. Consequently, the delay in filing and re-filing the appeal is condoned.

6. The applications are, accordingly, disposed of.

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7. This is an appeal concerning Assessment Year (AY) 2012-13.

8. The record shows that the Assessing Officer (AO), while framing the assessment order dated 10.07.2015 under Section 143(3) read with Section 153 and 153B of the Income Tax Act, 1961 [in short, “the Act”] had made the following additions/disallowances:

(i) Rs.16,67,89,253/- was added to the respondent/assessee’s income under Section 68 of the Act.

(ii) Travelling expense claimed by the respondent/assessee to the extent of Rs.8,30,748/- was disallowed. This amount constituted 70% of the travelling expenses claimed by the respondent/assessee.



9. The respondent/assessee, being aggrieved, preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”]. The CIT(A), *via* order dated 23.12.2016, allowed the appeal and deleted the additions made by the AO.

9.1 The appeal preferred by the appellant/revenue against the CIT(A) decision before the Income Tax Appellate Tribunal [in short, “Tribunal”] failed. It is in this background that the appellant/revenue has preferred the instant appeal before us under Section 260A of the Act, against the order dated 23.02.2022, passed by the Tribunal.

10. The record shows that insofar as the first addition is concerned, it constituted an investment made by a company going by the name Blue Bay Hospitality Pvt. Ltd. [in short, “BBHL”]. BBHL is incorporated in Mauritius as per the laws prevalent in that country. BBHL was issued 15,04,978 equity shares, *albeit* at a premium. The face value of the shares was Rs. 10. The premium paid by BBHL was Rs. 110. It is also relevant to note that the record discloses that in and about the same time, investment in the respondent/assessee’s share capital had also been made by certain domestic investors, the details of which are given in a tabular form in paragraph 4 of the assessment order. For the sake of convenience, the same is extracted hereafter:

<u>Equity shares issued at par @ Rs 10 each</u>	<u>Total amount received</u>	<u>Name of person/entity</u>
65,00,000	Rs 6,50,00,000	M/S Blue Ocean Resorts Pvt. Ltd. (Mr. Rishal Sawhney & Ms. Rohini Sawhney hold 50 % shares each)
40,00,000	Rs 4,00,00,000	Mr Rajive Sawhney



40,05,000

Rs 4,00,50,000

Mr Rishal Sawhney

11. Given the aforesaid circumstances, Mr Sanjeev Menon, learned standing counsel who appears on behalf of the appellant/revenue, says that both additions were wrongly deleted by the Tribunal.

11.1 According to Mr Menon, insofar as the investment made by BBHL was concerned, the amount received by the respondent/assessee was rightly added to its income, having regard to the fact that the respondent/assessee had failed to demonstrate the creditworthiness of the source of source.

12. In this case, the source of source was a person going by the name Mr Joseph Thomas, a resident of the United Arab Emirates [UAE].

13. In sum, Mr Menon contended that the transaction concerning investment made by BBHL was not genuine. Insofar as the other addition qua travelling expenses was concerned, Mr Menon once again relied upon the assessment order.

13.1 In support of his submission that the expenses incurred for or on behalf of the directors of the company were personal, it was submitted that no material has been placed on record by the respondent/assessee to demonstrate that the expenses incurred on hotels and hiring of vehicles had any nexus with the business of the respondent/assessee.

14. On the other hand, Mr Jolly drew our attention to the order passed by the CIT(A) concerning both additions. Based on the findings of fact returned by the CIT(A), which were accepted by the Tribunal, Mr Jolly says that no case for interference was made out.

14.1 According to Mr Jolly, this was not a case where a substantial question of law arises for consideration by this Court.



15. Having heard the learned counsel for the parties and perused the record, what emerged is the following:

- (i) 15,04,978 shares were issued by the respondent/assessee to BBHL. The face value of these shares was Rs.10. The total face value was thus Rs. 1,50,49,780/-. Furthermore, the shares were issued to BBHL at a premium of Rs. 110/-. The respondent/assessee thus received a total amount of Rs.16,55,47,646/- from investment made by BBHL in its share capital.
- (ii) Insofar as the domestic investors were concerned, which comprise two individuals and a company, i.e., Rajiv Sawhney and Rishal Sawhney and Blue Ocean Resorts Pvt. Ltd., they were issued shares at face value, i.e., Rs.10 each. Rajiv Sawhney and Rishal Sawhney were issued 40,00,000 and 40,05,000 equity shares respectively, while Blue Ocean Resorts Pvt. Ltd. was issued 65,00,000 equity shares.
- (iii) The allotment of shares to BBHL, i.e., the foreign investor, was made at a rate that included the premium, in consonance with the guidelines issued by the Reserve Bank of India (RBI) as embedded in notification no. FEMA 20/2000-RB dated 03.05.2000, as amended from time to time, and in accordance with the master circular no. 15/2011-12 dated 01.07.2011.
- (iv) The price of the shares was calculated by taking recourse to Discounted Free Cash Flow (DCF) technology applicable to an unlisted company.
- (v) As per the DCF method, the value of each share was Rs. 95.07.
- (vi) The investment made by BBHL was funded *via* an individual going by the name, as noted above, Mr Joseph Thomas, a resident of UAE.
- (vii) Mr Joseph Thomas held 100% shares of BBHL.
- (viii) The FT & TR-II division of Central Board of Direct Taxation had



approached its counterparts in Mauritius, i.e., Mauritius Revenue Authority. The concerned Mauritius authority gave details as to the persons who were directors of BBHL and indicated in their response, that the directors were residents of Mauritius. Furthermore, the very same authority also clarified that Mr Joseph Thomas was the beneficial owner of the BBHL.

(ix) Besides this, the concerned authority of Mauritius also provided the financial statements concerning BBHL for the period spanning between 04.05.2011 to 31.12.2011 and 01.01.2012 to 31.12.2012.

(x) The Mauritius Revenue Authority had also forwarded the bank statement of BBHL maintained with AFR Asia Bank for the period spread between 05.05.2012 and June 2012. This statement demonstrated that Rs. 40,00,060/- had been transferred to India for investing in the respondent/assessee.

(xi) The amount invested by BBHL was received in the respondent/assessee's account maintained with the Lajpat Nagar Branch of Axis Bank.

16. Having regard to the aforesaid facts, both the CIT(A) and the Tribunal deleted the additions made by the AO regarding share application money and premium amounting to Rs. 16,55,47,646/-.

17. Mr Menon's contention that the triple test evolved by Courts for making additions under Section 68 of the Act is not satisfied, is untenable.

17.1 For the reasons set forth hereafter, the identity of the investor, which is BBHL, is not in dispute. As a matter of fact, the source of source was also identified, which in this case, is one Mr Joseph Thomas, a permanent resident of UAE. The creditworthiness of the investor, i.e., BBHL, is demonstrated by the fact that the amount invested in India was sourced from



a personal loan given by Mr Joseph Thomas. BBHL is an investment company and therefore, its creditworthiness can only be ascertained from the availability of funds and not by having regard to the period for which it has been in existence and earned its revenue.

18. As far as the genuineness of the transaction is concerned, the respondent/assessee has adverted to the relevant material which was placed before the concerned statutory authorities, which included permission accorded by RBI and the methodology used for calculating the premium.

19. Mr Jolly has correctly argued before us, that insofar as the foreign investor is concerned, i.e., BBHL, the respondent/assessee could not have allotted shares below the floor price, which was Rs. 95.07 per share. This, to our mind, explains the difference between the price per share collected by the respondent/assessee from BBHL as against domestic investors.

20. It is also relevant to note that the domestic investors, i.e., the two individuals, are promotor directors of the respondent/assessee, which is why perhaps, they were allotted shares at face value. The third domestic investor, i.e., Blue Ocean Resorts Pvt. Ltd. is controlled by Rishal Sawhney and Rohini Sawhney. As noticed hereinabove, both persons hold 50% shares in the said company.

20.1 Thus, the argument advanced by Mr Menon, that the onus was on the respondent/company to further demonstrate creditworthiness of the source of source, i.e., Mr Joseph Thomas, is flawed for two reasons:

(i) First, the amendment in law with regard to the identifying source of source was inserted by way of a proviso to Section 68 of the Act with effect from 01.04.2013. Therefore, this obligation in law could not be cast on the respondent/assessee, although it did identify the source of source.



In this context, we may note that Mr Menon has conceded that although steps were envisaged to make enquiries with competent authorities in UAE, this process did not fructify. This, to our mind, establishes that at some stage, the appellant/revenue recognized the fact that they had to place material on record to show that the investment was dubious.

(ii) Second, insofar as Mr Joseph Thomas is concerned, the CIT(A) found that he furnished a personal loan to BBHL. Therefore, insofar as BBHL was concerned, the fund flow was disclosed to the statutory authority. Beyond that, in the AY in issue, nothing further was required to be shown.

21. The onus, if at all, at this stage, in our view, shifted to the appellant/revenue. The appellant/revenue has not alluded to any material that would even faintly disclose that this was a case of round-tripping.

21.1 Therefore, the deletion ordered by the CIT(A) which was confirmed by the Tribunal, was, in our view, the correct call, in the facts and circumstances obtaining in the case.

22. This brings us to the other aspect, i.e., disallowance of 70% of the expenses incurred by the respondent/assessee for arranging hotel accommodation, air passage and vehicles for its directors. The record shows that the directors of the respondent/assessee had travelled to Goa, Mumbai, Bangalore, Zurich, and Kuala Lumpur. As noted by the CIT(A), the AO, without examining the material, concluded that the expenses incurred were personal in nature and thus, proceeded to disallow 70% of Rs. 11,86,783/- (expenses incurred by the respondent/assessee), which was a figure amounting to Rs. 8,30,748.

23. Notably, the CIT(A) records in his order, that he examined the invoices and other material and thereafter concluded, that the expenses



claimed by the respondent/assessee indeed had a nexus with its business interest. The CIT(A) records in the order that the AO had called for an explanation with regard to the purpose of the visits which had led to the directors incurring the expenses towards accommodation and travel. The CIT(A) also records that the appellant/revenue brought nothing on record to show that the expenses given were false/incorrect. The expenditure was disallowed, as it appears on the ground that it was expended for personal use as against business use, and not on the ground that it was expended on accommodation or travel. This aspect comes to the fore on the perusal of the following observations made by CIT(A):

“However, Assessing Officer decapitalized the 70% of the said expenditure to the tune of Rs. 8,30,748/- on the ground that these expenses were incurred by the Directors and their relatives for personal purposes. The appellant has filed explanation in respect of visits alongwith the purpose of the visit in its written submissions during the course of assessment proceedings vide letter dated 09.07.2015, 07.07.2015 and 06.07.2015. These explanations are filed at page 58 to 69 of the paper book. The travelling expenses were incurred by the Directors for business purposes of the appellant company and for putting up the hotel in Goa. There is no information brought on record by the AO which can prove that these expenses were of personal nature, therefore, the Assessing Officer was not justified in disallowing the travelling expenses of Rs. 8,30,748/- and decapitalizing the same. Hence, the disallowance / decapitalization is deleted. The appellant is allowed to capitalize the entire travelling expenses of Rs 11,86,783/-. Hence, this ground of appeal is allowed.”

[Emphasis is ours]

24. Having regard to the aforesaid discussion, we are of the view that the CIT(A) and the Tribunal came to the correct conclusion that the expenses incurred had a nexus with the business interest of the respondent/assessee.

25. We may also note that the appellant/revenue has not proposed any



question of law which would suggest of the finding returned by the CIT(A) and/or the Tribunal is perverse.

26. No interference is called for with the impugned order passed by the Tribunal. According to us, no substantial question of law arises for our consideration.

27. The appeal is accordingly closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 4, 2023 / tr