

Delhi High Court

Haldiram Foods Ltd. vs Asstt. Cit on 22 August, 2000

Equivalent citations: 2001 79 ITD 425 Delhi

ORDER Per Chaturvedi, J.M.

This appeal by the assessee is directed against the order of the Commissioner (Appeals)-VIII, New Delhi, and relates to the assessment year 1994-95.

2. The solitary issue raised in this appeal relates to the addition of Rs. 22,00,000 by resorting to the provisions of section 69B of the Income Tax Act, 1961 (hereinafter referred to as the Act) being part of the amount of investment not fully disclosed in the books of account.

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3. Briefly the facts :

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The assessee-company was incorporated on 29-10-1993. The authorised capital of the company as per the balance sheet as on 31-3-1994 (paper book page No. 76) was Rs. 5,00,00,000. The issued, subscribed and paid up capital was Rs. 40,12,700. Details of shareholders were furnished at page 25 of the paper book. Broadly the capital was contributed as under :

Rs.

Rs.

Rs.

1.

1. Shri Manohar Lal Agarwal and his family members Shri Manohar Lal Agarwal and his family members 9,50,200 9,50,200

2.

2. Shri Madhu Sudan Agarwal Shri Madhu Sudan Agarwal 10,12,200 10,12,200

3.

### 3. Employees Employees

4.

4. Three companies Three companies 20,50,000 20,50,000 40,12,700 40,12,700

4. The assessee-company purchased a plot of land measuring 32 canals 18 marlas situated at Village Kher Ki Daula, Teh. Sohna, Distt. Gurgaon, Haryana. This land was purchased from S/shri Om Prakash Sachdeva, Ashwani Kumar Sachdeva and Dharmender Kumar Sachdeva, all residents of Gurgaon. The consideration said to have been paid for the purchase of the said land was stated to be Rs. 50,00,000. A certificate under section 269UL(3) of the Act was also obtained from the appropriate authority.

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5. A search under section 132(1) was carried out on 9-8-1994 at the business premises of companies belonging to Haldi Ram Group as well as at the residential premises of their Directors, S/shri Manohar Lal Agarwal and Shri Madhu Sudan Agarwal. During the course of search at the residence of these Directors, lot of papers were found reflecting the acquisition of various properties by this group. This included land purchased in the name of assessee-company also as discussed hereinbefore.

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6. On getting this information, a consequential search was conducted at the residence of the sellers, namely, S/shri Om Prakash Sachdeva and his nephews Ashwani Kumar Sachdeva and Dharmender Kumar Sachdeva on 10-8-1994.

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7. Shri Om Prakash Sachdeva deposed during the course of search that he had sold the land to the assessee-company along with his brother Shri Daya Nand Sachdeva in the month of March 1994 for

a sum of Rs. 72,00,000. The consideration of Rs. 50,00,000 was received through cheque. The balance amount of Rs. 22,00,000 was received by them in cash from time to time i.e. partly at the time of finalisation of the deal, partly at the time of sale and partly at the time of execution of the sale deed. He also deposed that he had half share in the ownership of land and the other half belonged to his brother and sons. The amount received from Haldi Ram Foods Ltd., was shared by them equally. It was also stated that the deal was finalized through a property dealer, namely, M/s. Krishna Properties. Commission of Rs. 72,000 worth at the rate of 1 per cent of the consideration was paid to the property dealer by Shri Sachdeva.

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8. The assessee-company was confronted with the statement of Shri Om Prakash Sachdeva. It was required to explain the source of investment of Rs. 22,00,000 over and above the disclosed purchase price of land. The assessee vide letter dated 18-1-1996 stated that seller had given wrong statement due to some vested interest. He asked for the copy of the statement of the seller and broker. He also asked for the cross examination of Mr. Sachdeva and broker. Copy of the statements were made available to the assessee. Summon under section 131 of the Act was issued to Shri Om Prakash Sachdeva. He appeared and explained about the details and mode of payment in respect of property sold to Haldi Ram Foods Ltd. It was also intimated to the assessee that Mr. Sachdeva was available for cross examination. Shri P.K. Aggarwal, C.A. was present on behalf of the assessee when Shri Sachdeva was examined. Mr. Aggarwal cross examined Mr. Sachdeva. It was stated by Shri Sachdeva that as mutually decided earlier the sale price of the land in agreement was stated at Rs. 50,00,000 only and there was no mention of payment received in cash. It was also stated by Mr. Sachdeva that he signed blank Form 37-I. Rest of the work was done by the property dealer. It was within his knowledge that the sale consideration would be shown at Rs. 50,00,000 only.

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9. Shri Manohar Lal Agarwal, Director of the company was called by the Addl. Director of Income Tax, investigation Unit-IV, New Delhi, on 24-8-1994 to explain further about the acquisition of land in question. Shri Manohar Lal Agarwal had admitted that he had purchased the property measuring about 4.5 acres on behalf of Haldi Ram Foods Ltd. from Shri Ashwani Kumar Sachdeva and Shri Om Prakash Sachdeva for a total consideration of Rs. 50,00,000 as evidenced from the sale deed. However, when the provisions of section 132(4) read with explanation (5) to section 271(1)(c) of the Act were explained to Shri Manohar Lal Aggarwal, he voluntarily surrendered Rs. 25,00,000. It was contended that extra consideration of Rs. 22,00,000 may be considered as investment in the land by Shri Manohar Lal Aggarwal out of surrender of Rs. 25,00,000 made on 24-8-1994.

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10. The assessing officer did not accept the surrender of Rs. 22,00,000 of Shri Manohar Lal Aggarwal as investment for the purchase of the land by the company for the following reasons :

10. The assessing officer did not accept the surrender of Rs. 22,00,000 of Shri Manohar Lal Aggarwal as investment for the purchase of the land by the company for the following reasons :

(i) The ownership of the land in question vested with the appellant company and not with Shri Manohar Lal Aggarwal in his individual capacity. The assessing officer opined that the investment made for acquiring the asset of the company was to be examined in the hands of the company and not in the hands of the Director of the company, who was simply an agent and not the owner of the asset;

(ii) If it is claimed that Shri Manohar Lal Aggarwal made investment in cash towards the purchase of the said property, then Shri Aggarwal should have been shown as a creditor in the books of account of the appellant company.

The certificate from the appropriate authority regarding the land does not establish that the declared value of the land was correct. It simply showed that the department did not propose to

acquire the said property. Given the industrialisation of Delhi and the prime location of the land the declared sale price of the land cannot be accepted as correct particularly when the sellers have admitted that they received more than what was declared in the sale deed.

11. In view of the above the assessing officer held that the assessee company purchased the land for a consideration of Rs. 72,00,000 out of which the recorded price in the books of account was Rs. 50,00,000 only and the balance amount of Rs. 22,00,000 was invested from undisclosed sources. Accordingly, the sum of Rs. 22,00,000 was treated as income of the company from undisclosed sources under section 69B of the Act. The Commissioner (Appeals) confirmed the order of the assessing officer, hence this appeal.

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12. Shri Anand Prakash, learned counsel for the assessee appeared before us. It was vehemently argued that company did not make any extra payment for the purchase of land in question. The land was purchased during the pre-commissioning period. The assessee did not start business. It just obtained the certificate of incorporation. Shri Manohar Lal Aggarwal was the Director of the company. It was a- group concern. Shri Manohar Lal Aggarwal paid Rs. 22,00,000 to Mr. Sachdeva for the purchase of this property over and above the apparent consideration. This amount was duly disclosed in terms of the provisions of section 132(4) read with Explanation (5) to section 271(1)(c) of the Act.

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13. Shri Anand Prakash further submitted that section 69B is extension of section 69. Section 69B comes into operation where the assessing officer finds that the value of the acquisition of bullion, jewellery etc. is not fully, but is partially recorded. If the omission is not explained the income is treated as assessee's own for the financial year concerned. He placed reliance on the decision of the Apex Court rendered in the case of CIT v. Smt. RK. Noorjahan (1999) 237 ITR 570 (SC). In this case the Apex Court has held that the phraseology of section 69, in creating the legal fiction, employs the word "may" and not "shall". Thus, the un-satisfactoriness of the explanation does not, and need not, automatically result in deeming the value of the investment to be the income of the assessee. That is

still a matter within the discretion of the officer and, therefore, of the Tribunal. In other words, a discretion has been conferred on the Income Tax Officer under section 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case. The Income Tax Officer is not obliged to treat the value of investment as income in every case where the explanation offered by the assessee is found to be unsatisfactory.

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14. Shri Anand Prakash further relied on the decision of the Apex Court rendered in the case of CIT v. Bharat Engineering & Construction Co. (1972) 83 ITR 187 (SC). In this case the assessee was an engineering construction company. It commenced its business in May, 1943. In its accounts there were several cash credit entries in the first year of its business totalling Rs. 2,50,000. Though the explanation regarding the cash credit entries was found to be false, the Appellate Tribunal held that these cash credits could not represent the income or profits of the assessee as they were all made very soon after the company commenced its activities. Hon'ble Supreme Court has held that the inference drawn from the facts proved was a question of fact and the Tribunal's finding on that question was final. The construction company took time to earn profits and it could not have earned a huge profit within a few days after the commencement of its business. Hence, it was reasonable to assume that the cash credit entries represented capital receipts though for one reason or another the assessee had not come out with the true story as regards the sources of the receipts.

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a huge profit within a few days after the commencement of its business. Hence, it was reasonable to assume that the cash credit entries represented capital receipts though for one reason or another the assessee had not come out with the true story as regards the sources of the receipts.

On the basis of the aforesaid judgment the learned counsel argued that in the present case also earning of income on the part of the company was impossibility because it did not commence its business. Construction was going on. There is absolutely no evidence on record to indicate that the assessee company was in a position to earn the profits.

It was further stated that the source of Rs. 22,00,000 was disclosed by Shri Manohar Lal Aggarwal, the Director of the company. He made a disclosure of this amount. As such, further addition of this amount in the hands of the company would amount to double taxation. In his reply to the argument raised by the learned Departmental Representative, Shri Anand Prakash submitted that the case of Jamna prasad Kanhaiyalal v. CIT (1981) 130 ITR 244 (SC) as relied by the learned Departmental Representative is not applicable in the facts and circumstances of the present case. He placed reliance on the decision of the Apex Court rendered in the case of CIT v. Sun Engineering Works (P) Ltd. (1992) 198 ITR 297 (SC) wherein the Hon'ble Supreme Court has held as under :

".....It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Supreme Court diverted from the context of the question under consideration and treat it to be the complete 'law' declared by the court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the court. A decision of the Supreme Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, courts must carefully try to ascertain the true principle laid down by the decision."

15. Shri Rajneesh Kumar, learned Departmental Representative, who appeared before us invited our attention on clause (A) - 3 of the Memorandum of Association dealing with the main objects of the company. This reads as under :

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"To carry out on the business of commission agents, brokers, consultants, representatives and middlemen of all types of food products and food grains as mentioned in sub-clauses (1) and (2) above."

It was submitted that the assessee admitted that consideration paid for the purchase of land was Rs. 72,00,000 and not Rs. 50,00,000 as disclosed in the books. The amount of Rs. 22,00,000 was said to be paid by the Director of the company in his personal capacity. This is not believable. Why should Director make such payment when he is not the absolute owner of the company. The question is why he should make payment on behalf of others. This amount was not credited in his name by the company.

16. The learned Departmental Representative invited our attention to the provisions of section 69B of the Act. The section reads as under :

16. The learned Departmental Representative invited our attention to the provisions of section 69B of the Act. The section reads as under :

"69B. Amount of investments, etc. not fully disclosed in books of account. Where in any financial year the assessee has made investment or is found to be the owner of any bullion, jewellery or other valuable article, and the (assessing) officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the assessing officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year."

It was submitted that the decision of the Apex Court rendered in the case of Smt. P.K. Noorjahan (supra) was not in the context of section 69B.

17. The learned Departmental Representative vehemently argued that the case of the assessee is not covered by the disclosure made by the Director of the company. It was argued that the disclosure cannot be used for the benefit of the third party. It is not possible for a Director to make disclosure for the benefit of the company. Reference was made to the decision of the Apex Court rendered in the case of Jamna prasad Kanhaiyalal (supra). In this case the Apex Court has held that if a person made a false declaration with respect to an amount which was not his income, but was the income of somebody else then there was nothing to prevent an investigation into the true source of the amount. Adverting to clause (A-3) as referred to above, it was submitted that earning of income on the part of the company was not an impossibility. Admittedly, an amount of Rs. 22,00,000 was paid extra for acquiring the property. As such disclosure ought to have been made by the company only. Director in his personal capacity cannot make disclosure on behalf of the company. Had the disclosure been made in the name of company, the other provisions of the Companies Act would also have been attracted. There was less payment of the Stamp Duty on the registration of the documents. It is not open for the Director to make disclosure on behalf of the company to cover up the deficiencies.

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18. Coming to the aspect of double taxation our attention was invited in the case of Jamna prasad Kanhaiyalal (supra) wherein the Apex Court has held as under :

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"The last question that remains is whether the same income cannot be taxed twice, once in the hands of the creditors and again in the hands of the assessee. In a case of this description, there is no question of double taxation. The situation is of the assessee's own making in getting false declaration filed in the names of the creditors with a view to avoid a higher slab of taxation. Once it was found that the income declared by the creditors did not belong to them, there was nothing to prevent the same being taxed in the hands of the assessee to which it actually belonged."

19. Commenting on the decision of the Apex Court rendered in the case of Bharat Engineering Construction Co. (supra), the learned Departmental Representative submitted that in view of clause (A) - 3 of the Memorandum of Association reproduced at para 15, it was possible on the part of the company to earn that profit. The very fact that it invested Rs. 22,00,000 extra for the purchase price of the property indicates that it had earning. As such the facts of the present case are different and the decision of Bharat Engineering Company is not applicable in the facts of the present case.

19. Commenting on the decision of the Apex Court rendered in the case of Bharat Engineering Construction Co. (supra), the learned Departmental Representative submitted that in view of clause (A) - 3 of the Memorandum of Association reproduced at para 15, it was possible on the part of the company to earn that profit. The very fact that it invested Rs. 22,00,000 extra for the purchase price of the property indicates that it had earning. As such the facts of the present case are different and the decision of Bharat Engineering Company is not applicable in the facts of the present case.

20. It was further stated that the company is a separate entity different from its Directors. Reliance was placed on the decision rendered in the case of Soloman v. Soloman & Co. (1897) AC 22 (HL).

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21. We have heard the rival submissions in the light of material placed before us and precedents relied upon. The provisions of section 69B can be invoked if it is found that the assessee has made investment or the assessee is found to be the owner of any bullion, jewellery or other valuable articles and it is found that the amount expended in making such investment or in acquiring such bullion, jewellery or other valuable articles exceeds the amount recorded on that behalf in the books

of account maintained by the assessee, and either the assessee offers no explanation about such excess amount or the explanation offered by him is not satisfactory. In the present case we find that the assessee made investment for the purchase of land. The amount expended on making such investment exceeded the amount recorded in the books by Rs. 22,00,000. The assessee offered explanation that the extra amount of Rs. 22,00,000 was disclosed by the Director of the company, Shri Manohar Lal Aggarwal.

21. We have heard the rival submissions in the light of material placed before us and precedents relied upon. The provisions of section 69B can be invoked if it is found that the assessee has made investment or the assessee is found to be the owner of any bullion, jewellery or other valuable articles and it is found that the amount expended in making such investment or in acquiring such bullion, jewellery or other valuable articles exceeds the amount recorded on that behalf in the books of account maintained by the assessee, and either the assessee offers no explanation about such excess amount or the explanation offered by him is not satisfactory. In the present case we find that the assessee made investment for the purchase of land. The amount expended on making such investment exceeded the amount recorded in the books by Rs. 22,00,000. The assessee offered explanation that the extra amount of Rs. 22,00,000 was disclosed by the Director of the company, Shri Manohar Lal Aggarwal.

22. Now the question arise that whether Director can make disclosure for the benefit of the company. To examine this issue, we will make recourse to the provisions of Explanation (5) to section 271(1)(c) of the Act.

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23. As per the prescription of Explanation (5) only the owner of any money etc. found in the course of search under section 132 can make the disclosure. Indisputably in the present case owner of the property was the assessee-company and not the Director.

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24. A company is, under the general law, a juristic person eligible to own property and to sue or be sued, in its name. A company is separate and distinct from its shareholders. In the eye of law company is its own master and is answerable like any other person. It is to be noted that a share in a company is the expression of a proprietary relationship. The shareholder is the proportionate owner of the company. His liability is limited to the extent of his shareholding. He can be construed to be the proportionate owner of the company, but he does not own the company's assets which belong to the company as a separate and independent entity. As such, the Director cannot be construed to be the legal owner of the company. It follows that he cannot make disclosure for the benefit of the company. Therefore, the assessing officer was correct in holding that the investment made for

acquiring the asset of the company was to be examined in the hands of company and not in the hands of the Director of the company, who was simply an agent and not the owner of the asset. We have also noted that Shri M.L. Aggarwal, did not make investment towards the purchase of the said property. The investment as disclosed by Shri M.L. Aggarwal to the tune of Rs. 22,00,000 was not reflected in the balance sheet of the company. What prompted Shri M.L. Aggarwal for making this investment when the company was not solely owned by his group is a riddle, wrapped in a mystery inside an enigma.

24. A company is, under the general law, a juristic person eligible to own property and to sue or be sued, in its name. A company is separate and distinct from its shareholders. In the eye of law company is its own master and is answerable like any other person. It is to be noted that a share in a company is the expression of a proprietary relationship. The shareholder is the proportionate owner of the company. His liability is limited to the extent of his shareholding. He can be construed to be the proportionate owner of the company, but he does not own the company's assets which belong to the company as a separate and independent entity. As such, the Director cannot be construed to be the legal owner of the company. It follows that he cannot make disclosure for the benefit of the company. Therefore, the assessing officer was correct in holding that the investment made for acquiring the asset of the company was to be examined in the hands of company and not in the hands of the Director of the company, who was simply an agent and not the owner of the asset. We have also noted that Shri M.L. Aggarwal, did not make investment towards the purchase of the said property. The investment as disclosed by Shri M.L. Aggarwal to the tune of Rs. 22,00,000 was not reflected in the balance sheet of the company. What prompted Shri M.L. Aggarwal for making this investment when the company was not solely owned by his group is a riddle, wrapped in a mystery inside an enigma.

25. Coming now to the decision in the case of Smt. P.K. Noorjahan (supra) we find that Smt. Noorjahan was a Muslim lady aged about 20 years during the relevant year of assessment. She purchased land in Ernakulam. Total investment was Rs. 25,902. It was explained that the purchase was made out of the savings from the incomes of the properties which were left by her mother's first husband. This explanation was rejected except to the extent of Rs. 2,000 by the assessing officer. The Appellate Assistant Commissioner affirmed the order. The Tribunal held that though the explanation about the nature and sources of the purchase money was not satisfactory, but in the facts and circumstances of the case, it was not possible for the assessee to earn the amount invested in the properties and that by no stretch of imagination could the assessee be credited with having earned this income in the course of the assessment year or was even in a position to earn it for a decade or more. The Tribunal took the view that although the explanation of the assessee was liable to be rejected, section 69 of the Act conferred only a discretion on the assessing officer to deal with the investment as income of the assessee and that it did not make it mandatory on his part to deal with the investment as income of the assessee as soon as the seller's explanation happened to be rejected. On that view the Tribunal allowed the appeal and cancelled the assessment made by the assessing officer. High Court agreed with the view taken by the Tribunal. On appeal the Apex Court held that the question whether the source of the investment should be treated as income or not under section 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the assessing officer under section 69 to treat the source of

investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised, keeping in view the facts and circumstances of the particular case. In our opinion, on the factual back drop of the present case, the ratio of the Apex Court decision cannot be applied.

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The use of the word "may" does not imply that the discretion conferred on the assessing officer will always go in favour of the assessee.

26. In the present case, the vendor in clear and unequivocal terms admitted the receipt of "on money" to the extent of Rs. 22,00,000. As the assessee did not have any explanation to offer, Director made the disclosure. The possibility of earning made by the company cannot be rooted out altogether. In view of clause (A) - 3 of the memorandum of Association, it was possible for the assessee to carry on business of commission agents, brokers, consultants, representatives and middlemen of all types of food products and food-grains .....

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Besides, the decision in the case of Smt. P.K. Noorjahan (supra) was rendered in the context of section 69 whereas in the present case the addition was made under section 69B. In our opinion, the decision in the case of Smt. P.K. Noorjahan (supra) is not applicable in the facts and circumstances of the present case. Similarly, the ratio laid down in the case of Bharat Engineering & Construction Co. (supra) is not applicable as because possibility of earning profit was found to be there in the facts of the present case.

27. The correctness of the declared value of the property cannot be ascertained merely on the basis of certificate issued by the appropriate authority. It simply indicates that the department is not interested in acquiring the property. The fact of "on money" payment was admitted by the Director. It was cross verified with the vendors. Now it does not lie in the mouth of the assessee to change the version. In our opinion, the factum of "on money" payment was established beyond the shadow of doubt.

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28. It is a trite law that the disclosure must relate to income actually earned by the declarant. Immunity could only be granted to the declarant alone and not to other persons. Right to make disclosure is a concession provided to the assessee under the statute. In order to avail the benefit of disclosure, it is sine qua non, that the assessee must comply all the conditions contained in the Act. One of the conditions contained is that the assessee must be the owner of the asset, found during the course of the search. In the present case, declarant was not the owner. He was the only Director of the company. He did not have authority from the company to make such disclosure. Even the books of the company did not reflect the factum of disclosure. It is pertinent to point out that the books of the company did not reflect the value of investment made by the Director either in the year under consideration or in the subsequent year(s). Also at no stage the Director was shown as a creditor for a sum of Rs. 22,00,000. In such circumstances, disclosure made by the Director, qua, the undisclosed assets of the company was, non est.

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29. It is a well accepted principle of law canonized in the Roman Law dictum :

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"Nemo debet bis vexari pro eadem causea (No man ought to be twice vexed for the same cause)."

But in the facts and circumstances of the present case, this dictum cannot be used by the assessee, as the disclosure was not made by the assessee company. The Apex Court in the case of Jamuna Prasad Kanhaiya Lals (supra), has held :

"Once it was found that the income declared by the creditors did not belong to them, there was nothing to prevent the same being taxed in the hands of the assessee to which it actually belonged."

It is a condition precedent for availing the benefit of the disclosure that the declaration made must relate to the income actually earned by the declarant. Immunity under the Act are available only to the declarant alone and not to other persons to whom the income really belonged. In the present case, income was declared by the Director whereas the amount of investment was made by the assessee-company. The assessee-company is a different entity from its directors. As such, the benefit of disclosure cannot be extended to the assessee-company. We, therefore, uphold the impugned order.

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