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

\+ **ITA No.2094 of 2010, ITA No.2095 of 2010, ITA No.539 of 2008, ITA No.514 of 2007**

RESERVED ON: JANUARY 04, 2011

% **PRONOUNCED ON: JANUARY 31, 2011**

1) ITA No. 2094 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

UP BONE MILLS INDIA LTD. . . .Respondent

through: Mr. Salil Kapoor with Mr. Ankit Gupta, Advocate and Mr. Sanat Kapoor, Advocate.

2) ITA No. 2095 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

OASIS HOSPITALITIES (PVT.) LTD. . . .Respondent

through: Mr. Udaibir Singh Kochar, Advocate

RESERVED ON: JANUARY 10, 2011
PRONOUNCED ON: JANUARY 31, 2011

3) ITA No. 539 of 2008

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Suruchi Aggarwal, Advocate

VERSUS

VIJAY POWER GENERATORS LTD. . . .Respondent

through: Mr. Salil Kapoor, Advocate

4) ITA No. 514 of 2007

VIJAY POWER GENERATORS LTD. . . . Appellant

through : Mr. Salil Kapoor, Advocate

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VERSUS

DIRECTOR OF INCOME TAX & ANR. . . .Respondents

through: Ms. Suruchi Aggarwal, Advocate

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For Orders, see ITA No.2093 of 2010.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JANUARY 31, 2010
pmc

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CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
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1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In all these appeals, issue relates to the addition made by the Assessing Officer (AO) under Section 68 of the Income Tax Act (hereinafter referred to as 'the Act') on account of unexplained share application money. Though the background of the facts in which these additions were made in respect of different assessees may not be identical, but there is lot of similarity. In any case, since principle of law which is to be applied in all these cases is common, by way of this singular judgment all these appeals can be decided. However, in the process we would intend to dispose of these appeals by this common judgment. We would proceed to

discuss the position of law in first instance and thereafter, on the application of that law, we shall answer the question which arises in different appeals.

2. Section 68 of the Act deals with unexplained incomes and is couched in the following language:

> "**Section 68**
>
> **CASH CREDITS.**
>
> Where any sum is found credited in the books of an assessee maintained for any previous year, and 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."

3. As per the provisions of this Section, in case the assessee has not been able to give satisfactory explanation in respect of certain expenditure or where any sum is found credited in the books of accounts, the AO can treat the same as undisclosed income and add to the income of the assessee. The assessee is required to give satisfactory explanation about the "nature and source" of such sum found credited in the books of accounts.

4. It is a common knowledge that insofar as the companies incorporated under the Indian Companies Act are concerned, whether private limited or public limited companies, they raise their capital through shares, though the manner of raising the share capital in the private limited companies on the one hand and public limited companies on the other hand, would be different. In the case of private limited companies, normally, the shares are subscribed by family members or persons known/close

to the promoters. Public limited companies, on the other hand, generally raise public issue inviting general public at large for subscription of these shares. Yet, it is also possible that in case of public limited companies, the share capital is issued in a close circuit.

5. When the companies incorporated under the Companies Act raise their capital through shares, various persons would apply for shares and thus give share application money. These amounts received from such shareholders would, naturally, be the sums credited in the books of account of the assessee. If the AO doubts the genuineness of the investors, who had purportedly subscribed to the share capital, the AO may ask the assessee to explain the nature and source of those sums received by the assessee on account of share capital. It is in this scenario, the question arises about the genuineness of transactions. The plain language of Section 68 of the Act suggests that when the assessee is to give satisfactory explanation, burden of proof is on the assessee to provide nature and source of those receipts.

6. What kind of proof is to be furnished by the assessee, is the question. It has come up for discussion in various judgments rendered by this Court, other Courts as well as the Supreme Court. The law was discussed by a Division Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Divine Leasing and Finance Ltd.*** [299 ITR 268]. Since the entire gamut of case law as on that date was visited in the said judgment, we may initiate our discussion by taking note of this case. In this case, the Court highlighted the menace of conversion of unaccounted money

through the masquerade or such channels of investment in the share capital of a company and thus stressed upon the duty of the Revenue to firmly curb the same. It was also observed that, in the process, the innocent assessee should not be unnecessary harassed. A delicate balance must be maintained. It was, thus, stressed:

> "15. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessed it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the AO for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Section 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessed; if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company."

7. Taking note of the earlier judgment of Full Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Sophia Finance Ltd.*** **[(1994) 205 ITR 98]**, the Court observed that the Full Bench had enunciated that Section 68 reposes in the Income-tax Officer or AO the jurisdiction to inquire from the assessed the nature and source of the sum found credited in its Books of Accounts. If the Explanation preffered by the assessed is found not to be satisfactory, further enquiries can be made by the Income-tax Officer himself, both in regard to the nature and the

source of the sum credited by the assessed in its Books of Accounts, since the wording of Section 68 is very wide. The Full Bench opined that if the shareholders exist then, possibly, no further enquiry need be made. But if the Income-tax Officer finds that the alleged shareholders do not exist then, in effect, it would mean that there is no valid issuance of share capital. Shares cannot be issued in the name of non-existing persons. If the shareholders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regarded as a capital receipt but if the assessed offers no Explanation at all or the Explanation offered is not satisfactory then, the provisions of Section 68 may be invoked.

8. The Court also referred to the earlier Division Bench judgment in the case of ***Commissioner of Income Tax*** Vs. ***Dolphin Canpack Ltd.*** **[(2006) 283 ITR 190]** and quoted the following observation:

> ". . . credit entry relates to the issue of share capital, the ITO is also entitled to examine whether the alleged shareholders do in fact exist or not. Such an inquiry was conducted by the AO in the present case. In the course of the said inquiry, the assessed had disclosed to the AO not only the names and the particulars of the subscribers of the shares but also their bank accounts and the PAN issued by the IT Department. Super added to all this was the fact that the amount received by the company was all by way of cheques. This material was, in the opinion of the Tribunal, sufficient to discharge the onus that lay upon the assessed."

9. The Court took note of many other judgments of different High Courts and on the analysis of those judgments formulated the following propositions, which emerged as under:

> "18. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessed has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Shared Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable Explanation by the assessed. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessed nor should the AO take such repudiation at face value and construe it, without more, against the assessed. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

10. By this common judgment, the Division Bench decided these appeals of which one appeal related to ***Lovely Exports P. Ltd.***. Against the said judgment, Special Leave Petition was preferred, which was dismissed by the Supreme Court vide orders dated 11.01.2008 and is reported as ***Commissioner of Income Tax*** Vs. ***Lovely Exports (P) Ltd.*** **[216 CTR 195 (SC)]**. The Court while dismissing the SLP recorded some reasons as well *albeit* in brief, which is as under:

> "2. Can the amount of share money be regarded as undisclosed income under s.68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment....."

11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application

money received by the assessee. In order to discharge this burden, the assessee is required to prove:

(a) Identity of shareholder;

(b) Genuineness of transaction; and

(c) Credit worthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the AO to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.

13. Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the credit/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharge the onus cast upon him. Thereafter, it is for the AO to

scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the AO and he cannot go into the realm of suspicion.

15. At this stage, we would like to refer to the judgment of the Bombay High Court in the case of ***CIT*** Vs. ***M/s Creative World Telefilms Ltd.*** (in ITA No.2182 of 2009 decided on 12.10.2009). The relevant portion of this order is reproduced below:

> "In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PA/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. **The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement 'not traceable'. In our considered view, the Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer.** In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal.
>
> In the result, the appeal is dismissed *in limini* with no order as to costs.
>
> (emphasis supplied)"

16. The Court thus clearly held that once documents like PAN Card, bank account details or details from the bankers were given by the assessee, onus shifts upon the Assessing Officer and it is on him to reach the shareholders and the Assessing Officer cannot burden the assessee merely on the ground that summons issues to the investors were returned back with the endorsement 'not traceable'. Same view is taken by the Karnataka High Court in

Madhuri Investments Pvt. Ltd. Vs. ***ACIT*** (in ITA No.110 of 2004, decided on 18.02.2006). In this case also, some of share applicants did not appear and notices sent to them were returned with remarks 'with no such person'. Addition was made on that basis which was turned down by the High Court in the following words:

> "6. Having heard the learned counsel for the parties, we notice that whenever a company invites applications for allotment of shares from different applicants, there is no procedure contemplated to find out the genuineness of the address or the genuinety of the applicants before allotting the shares. If for any reason the address given in the application were to be incorrect or for any reason if the said applicants have changes their residence or the notices sent by the assessing officer has not been received by such applicants, the assessee company cannot be blamed. Therefore, we are of the view that the Tribunal was not justified in allowing the appeal of the revenue only relying upon the statement of Sri Anil Raj Mehta, a Chartered Accountant."

17. However, in ***Commissioner of Income Tax*** Vs. ***Arunananda Textiles Pvt. Ltd.*** (in ITA No.1515 of 2005, decided on 02.03.2010), the Karnataka High Court went to the extent of observing that it was not for the assessee to place material before the Assessing Officer in regard to creditworthiness of the shareholders. Once the company had given the addresses of the shareholders and their identity was not in dispute, it was for the Assessing Officer to make further inquiry. It was borne by the following discussion in the said judgment:

> "6. The question raised in this appeal are squarely covered by several judgments of the Supreme Court and also the judgment of this Court passed in ***ASK Brothers Ltd.*** Vs. ***Commissioner of Income Tax***, wherein this Court following the judgments of the Supreme Court in the case of ***Commissioner of Income Tax*** Vs. ***Lovely Exports (P) Ltd.*** reported in (20089) 216 CTR (SC 195) and also in the case of ***Commissioner of Income Tax*** Vs. ***Steller Investment Ltd.*** reported in (2001) 251 ITR 263 (SC) has ruled that it not for the assessee to place material before the Assessing Officer in regard to creditworthiness of the

shareholders. If the company has given the addresses of the shareholders and their identity is not in dispute, where they were capable of investing, the assessing officer shall investigate. It is not for the assessee company to establish but it is for the department to enquire with the investor about their capacity to invest the amount in the shares. Therefore, we are of the view that the substantial questions of law framed in this appeal are to be answered against the revenue and in favour of the assessee. Accordingly, this appeal is dismissed."

18. Rajasthan High Court had an occasion to deal with the submission of the Revenue predicated on Benami transactions in the case of ***Commissioner of Income Tax*** Vs. ***AKJ Granites (P) Ltd.*** reported as 301 ITR 298 (Raj.) and the arguments were dealt with in the following manner:

"3. So far as question No. 1 is concerned, it is stated by learned counsel for the appellant that the issue embedded in the said question has already been decided by this Court and governed by the ratio laid down in ***Barkha Synthetics Ltd.*** Vs. ***Asst. CIT (2005) 197 CTR (Raj.) 432***. It has been pointed out that share applications are made by number of persons, may be in their own names or benami, but the fact that share applications received from different places accompanied with share application money, no presumption can be drawn that same belong to the assessee and cannot be assessee in his hands as his undisclosed income unless some nexus is established that share application money for augmenting the investment in business has flown from asssessee's own money. In coming to this conclusion, the Court relied on ***CIT*** Vs. ***Steller Investment Ltd. (1991) 99 CTR (Del.) 40***, which has since been affirmed by the Supreme Court in ***CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287***. In view thereof, this question need not be decided again."

19. This very aspect came up for consideration before different Courts on number of occasion and was dealt with in favour of the assessee.

20. The observations of the Supreme Court in the case of ***Lovely Exports (supra)*** go to suggest that the Department is free to proceed to reopen the individual assessment in case of alleged

bogus shareholders in accordance with law and, thus, not remediless. It is, thus, for the AO to make further inquiries with regard to the status of these parties to bring on record any adverse findings regarding their creditworthiness. This would be moreso where the assessee is a public limited company and has issued the share capital to the public at large, as in such cases the company cannot be expected to know every detail pertaining to the identity and the financial worth of the subscribers. Further initial burden on the assessee would be somewhat heavy in case the assessee is a private limited company where the shareholders are family friends/close acquaintances, etc. It is because of the reason that in such circumstance, the assessee cannot feign ignorance about the status of these parties.

21. We may also usefully refer to the judgment of the Supreme Court in the case of ***Commissioner of Income Tax*** Vs. ***P. Mohanakala*** **[(2007) 291 ITR 278 (SC)]**. In that case, the assessee had received foreign gifts from one common donor. The payments were made to them by instruments issued by foreign banks and credited to the respective accounts of the assessees by negotiations through bank in India. The evidence indicated that the donor was to receive suitable compensation from the assessees. The AO held that the gifts though apparent were not real and accordingly treated all those amounts which were credited in the books of account of the assessee, as their income applying Section 68 of the Act. The assessee did not contend that even if their explanation was not satisfactory the amounts were not of the nature of income. The CIT (A) confirmed the assessment. On further appeal, there was a difference of opinion

between the two Members of the Appellate Tribunal and the matter was referred to the Vice President who concurred with the findings and conclusions of the AO and the CIT (A). On appeal, the High Court re-appreciated the evidence and substituted its own findings and came to the conclusion that the reasons assigned by the Tribunal were in the realm of surmises, conjecture and suspicion. On appeal to the Supreme Court, the Court while reversing the decision of the High Court held that the findings of the AO, CIT (A) and the Tribunal were based on the material on record and not on any conjectures and surmises. That the money came by way of bank cheques and was paid through the process of banking transaction as not by itself of any consequence. The High Court misdirected itself and erred in disturbing the concurrent findings of fact. While doing so, the legal position contained in Section 68 of the Act was explained by the Supreme Court by assessing that a bare reading of Section 68 of the Act suggests that (i) there has to be credit of amounts in the books maintained by the assessee; (ii) such credit has to be a sum of money during the previous year; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the AO, is not satisfactory. It is only then that the sum so credited may be charged to income tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation

of material and other attending circumstances available on the record. The opinion of the AO is required to be formed objectively with reference to the material on record. Application of mind is the *sine qua non* for forming the opinion. In cases where the explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory there is, *prima facie*, evidence against the assessee, viz., the receipt of money. The burden is on the assessee to rebut the same, and, if he fails to rebut it, it can be held against the assessee that it was a receipt of an income nature. The burden is on the assessee to take the plea that even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature.

22. We would like to refer to another judgment of the Division Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Value Capital Services P. Ltd.*** **[(2008) 307 ITR 334 (Delhi)]**. The Court in that case held that the additional burden was on the Department to show that even if share application did not have the means to make investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. In the absence of such findings, addition could not be made in the income of the assessee under Section 68 of the Act.

23. It is also of relevance to point out that in ***Commissioner of Income Tax*** Vs. ***Stellar Investment Ltd.*** **[(1991) ITR 287 (Del.)]** where the increase in subscribed capital of the respondent

company accepted by the ITRO and rejected by the CIT on the ground that a detailed investigation was required regarding the genuineness of subscribers to share capital, as there was a device of converting black money by issuing shares with the help of formation of an investment which was reversed by the Tribunal, this Court held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company. This view was confirmed by the Apex Court in ***CIT*** Vs. ***Stellar Investment Ltd.*** **[(2001) 251 ITR 263 (SC)].**

24. Having taken note of the legal position in detail, we now proceed to decide each appeal on the application of aforesaid principles.

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25. In both these appeals, the assessee is the same. Since these appeals pertain to two assessment years, viz., Assessment Year 2003-04 and Assessment Year 2004-05, that is the reason for two appeals though common issue is based on identical facts.

26. While making the assessment in respect of return filed for Assessment Year 2004-05, the AO noticed that the assessee had received share application money of ₹3 lacs each from six private limited companies during the year relevant Assessment Year 2003-04. It is for this reason notice under Section 148 of the Act was issued in respect of Assessment Year 2003-04 and reassessment done. The AO made addition of ₹18 lacs to the income of the assessee on protective basis in the Assessment

Year 2004-05 as well. It is for this reason we say that the transaction involved in both the appeals is same.

27. The order of the AO would reveal that it had received an information from the Investigation Wing which had made various enquiries/investigations on the basis of which it was found that these six investors belong to one Mahesh Garg Group who were not carrying on any real business activity and were rather engaged in the business of providing accommodations entries. They were, thus, entry operators of which the assessee was the beneficiary. According to the AO, the *modus operandi* involved in such type of activity was like this: an entry operator operates a number of accounts in the same bank/branch or in different branches in the name of companies, firms, proprietary concerns and individuals and for the operation of these bank accounts, filing income tax returns etc., persons are hired. Most of these persons work on part-time basis and are called upon to sign documents, cheque books, etc. whenever required. Whenever any beneficiary is interested in taking an entry, he would approach the entry operator and handover the cash alongwith commission and take cheques, Demand Draft, Postal Order. The cash is deposited by the Entry Operator in a bank account either in his name or in the name of relative/friends or other person hired by him for the purposes of opening the bank account. After the deposit of cash when there is sufficient balance, the Entry Operator issues Demand Draft, Postal Orders, cheques in the name of beneficiary. Most of these concerns/individuals also have obtained PAN from the Department and are filing income tax

returns, but what is shown in the return is not actual state of affairs.

28. The assessees filed copies of PAN, acknowledgement of filing income tax returns of the companies, their bank account statements for the relevant period, i.e., for the period when the cheques were cleared. However, the parties were not produced in spite of specific direction of the AO instead of taking opportunities in this behalf. Since the so-called Directors of these companies were not produced on this ground coupled with the outcome of the detailed inquiry made by the Investigating Wing of the Department, the AO made the addition. This addition could not be sustained as the primary onus was discharged by the assessee by producing PAN number, bank account, copies of income tax returns of the share applicants, etc. We also find that the Assessing Officer was influenced by the information received by the Investigating Wing and on that basis generally *modus operandi* by such Entry Operators is discussed in detail. However, whether such *modus operandi* existed in the present case or not was not investigated by the AO. The assessee was not confronted with the investigation carried out by the Investigating Wing or was given an opportunity to cross-examine the persons whose statements were recorded by the Investigating Wing.

29. As regards discrepancies found by the AO in the bank statement, suffice is to mention that the bank statements that were filed by the assessee were provided by the shareholders and were computer printed on the bank stationery. The same were filed by the assessee during the assessment proceedings without any

suspicion of their being incorrect. During the assessment proceedings, the assessee was never confronted by the AO that there are discrepancies between the bank statements filed and the statements directly called by the A.O. However, even after considering the alleged discrepancies, it does not follow that the amount of share capital was the undisclosed income of the assessee. Even the correct Bank statements as claimed by the AO reveal that the assessee has received cheques from the shareholders. In this backdrop, the following observations of this Court in the case of ***Commissioner of Income Tax*** Vs. ***K.C. Fibers Ltd.*** (2010) 187 TAXMAN 53 (Del.) are reproduced:

> "It is strange that when the Assessing Officer is questioning the *bona fides* of M/s Diamond Protein Ltd. for collecting money to subscribe to the share to the capital of the assessee, but it is the assessee who is fastened with the liability. The Assessing Officer did not question M/s Diamond Protein Ltd. in this behalf. Insofar as Assessing Company is concerned, it is not disputed that money was paid to its towards the aforesaid share application money, by means of cheques. It is not for the Assessing Company to probe as to the source from where M/s Diamond Protein Ltd. collected the aforesaid money. It was for the Assessing Officer, in these circumstances to inquire into the affairs of M/s Diamond Protein Ltd. which is an independent company inasmuch as no finding is arrived at by the Assessing Officer that the two companies are umbrella companies or have any relationship with each other."

30. We are, therefore, of the opinion that there is no merit in these two appeals, which are accordingly dismissed at the admission stage itself.

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31. In this case, the assessee had shown receipt of ₹99.18 lacs on account of share application money. In order to prove the genuineness of the transactions and identity of the share

applicants and their creditworthiness, the assessee had filed confirmation from these parties, which were 30 in number. The assessee had also supplied income tax particulars of these share applicants. The AO issued notices under Section 133(6) of the Act, which remained unserved on 22 out of 30 parties. Even remaining 08 persons did not respond. Local inquiry made through Inspector revealed that the parties did not exist at the given addresses. On inquiries from bank, the AO found various discrepancies in the statement sent by the bank and the statement produced by the assessee. Even some of the names given by the assessee were not the same as in the bank records. The AO confronted entire material to the assessee and allowed various opportunities. However, the assessee did not produce even a single party. Accordingly, the AO made an addition of ₹99.18 lacs to the income of assessee on account of unexplained share capital under Section 68 of the Act. Similarly, the AO also made addition of ₹3.10 lacs on account of unexplained credit under Section 68 of the Act.

32. The CIT (A) allowed the appeal and deleted the addition. After recording the findings that necessary documents to prove the identity of investors, creditworthiness and genuineness of the transactions were produced by the assessee, he was of the opinion that even when some discrepancies were found in the bank statement of these investors produced by the assessee, facts remain that the AO had himself obtained the copies of the bank statement of some of the share applicants and the perusal of those statements reveals that there was a debit entry in support of demand draft purchased by the share applicant. The assessee

had also filed copies of the confirmations in acknowledgement of income tax returns filed by the share applicants from which it was clear that the tax payers were the existing assessees and they had filed the return of income in Delhi itself. On this evidence, it was concluded that the shareholders were identifiable who were assessed to income tax and therefore under no circumstances, the share capital could be treated as undisclosed income of the company.

33. The Tribunal while confirming the aforesaid view of the CIT (A) has summarized the discussion as under:

> "9. We have carefully considered the rival submissions in the light of the material placed before us. The necessary details were filed by the assessee with the AO to show the identity of the person who had applied for the shares. The shares also been allotted to respective persons in respect of which intimation was given to Registrar of Companies and necessary evidence has also been placed on record in the paper book which found place at page 23 and 24 of the paper book. The assessee also had placed on record the evidence as well as copy of income-tax returns of the share applicants. Keeping in view all these evidences it cannot be held that the assessee did not establish the identity of the share applicants. If it is so, then the law as pronounced by the Hon'ble Supreme Court in the case of CIT vs. Lovely Exports Pvt. Ltd. (supra) is clear that if the share application money is received b the assessee company from alleged bogus shareholders whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but the same cannot be regarded as undisclosed income of the assessee. In this view of the situation, we find no infirmity in the order of the CIT (A) vide which addition made on account of share application money has been deleted."

34. Having regard to the decisions noted above, we are of the view that the addition was rightly deleted by the CIT (A) and the Tribunal. Requisite documents were furnished showing the existence of the shareholders from bank accounts and even their income tax details. From bank accounts of these shareholders, it

was found that they had deposed certain cash and source thereof was questionable. The AO should have made further probe which he failed to do. Moreover, remedy with the Department lies in reopening the case of these investors and the addition cannot be made in the hands of assessee.

35. We accordingly dismiss this appeal.

ITA No.514 of 2007

36. This appeal was admitted on the following question of law:

> "Whether on the facts and in the circumstances of the case, the ITAT has erred in law in sustaining the addition of ₹25,23,500 on account of receipt of share application money?"

37. The facts leading to the admission of the aforesaid question of law are as follows:

The assessee in the income tax return for the Assessment Year 1997-98 had shown receipts in the form of share money subscribed of 15% to whom the shares were later on allocated. Total money on this account received by the assessee was ₹25,23,500. The investment in these shares was ranging from ₹ 1 lac to ₹ 2.5 lacs. In order to verify the genuineness of these transactions, the AO issued summons to these parties which were received back either with the remarks "incomplete address" or "in spite of best efforts the address not found" or "not met" or "no such person" or "not found", etc. The AO thereafter asked the assessee to produce these persons who had introduced the share capital in the company. The assessee was also asked to furnish cheque numbers/draft numbers for payment of share application money along with the names of the drawee bank and branch of

the bank. However, no details were furnished despite various opportunities. The assessee could not even identify the entries in the bank account regarding the receipts of the share application money nor could he produce the relevant ledger for verifying the receipts, according to the AO. Ultimately, the assessee produced five persons whose statements were recorded. The assessee did not cross-examine these persons. They did not furnish any proof of their identity in the form of ration card, election card or passport despite request by the AO. The AO after analyzing the statements of these persons observed that these five persons were small agriculturists and had no means to make investment n the company.

38. In these circumstances, the entire receipts of ₹25,23,500 in respect of these five persons was treated as unexplained investment and made the addition under Section 68 of the Act.

39. The CIT (A), in appeal, reexamined the entire issue analyzing the evidence in the light of the judgment in the case of ***Stellar Investment Ltd. (supra)*** and ***Sophia Finance Ltd. (supra)*** relied upon by the assessee. He confirmed the order of the AO and concluded that the assessee had merely given names of the parties and had not proved that they had necessary income to invest in the shares as also the creditworthiness of these persons.

40. The Tribunal has also affirmed the aforesaid decision of the CIT (A) in the following manner:

"15. Having carefully examined the material available on record and the orders of the lower authorities, we find that shares were not quoted on stock exchange and it was subscribed by the persons who were known to the assessee but during the course of hearing despite various opportunities the assessee could not produce them for verification nor any evidence was filed with regard to their financial status. Out of 15 subscribers, 5 subscribers were produced before the A.O. and during the course of the examination it was admitted that they were small agriculturists and were cultivating the agricultural land after taking it on lease from other agriculturists. No evidence regarding the agricultural holdings were produced before the A.O. nor have they filed any evidence with regard to their financial soundness whereas the investment in shares were made between Rs.1 lakh to Rs.2.5 lakhs. Copy of the statement are (sic. is) placed on record and from its perusal one would find that all these 5 persons are of ordinary status and they have no means to invest a huge sum in shares with the assessee.

16. So far as the legal position and the judgment of the Apex Court in the case of Steller Investment Ltd. is concerned, we are of the view that the ratio laid down in the Steller Investment Ltd. is applicable only in those cases where the assessee is a limited company and the shares were quoted in stock exchange. Once the shares are quoted in stock exchange and the subscription is open to public at large, assessee cannot have control over the subscription and also cannot make a verification of the subscribers as subscription can be done by any person. But whenever the issue is subscribed without quoting it on stock exchange by limited or private limited company, the presumption is very strong against the assessee that subscription is available only to the closely connected persons of the assessee. Once the inference is against the assessee that the issue is subscribed by its closely connected persons, the onus is upon the assessee to prove the identify (sic. identification) of the subscribers and their creditworthiness. Their Lordships of the Hon'ble Calcutta High Court in the case of Bola Shankar Cold Storage ..Vs.. JCIT have examined the judgment of the Apex Court in the case of Steller Investment Ltd. and that of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd. and have held that in the case of Steller Investment Ltd. the ratio laid down by the Full Bench of the Delhi High Court was not overruled and it still holds the field. Whenever the issue was subscribed by closely connected persons of the assessee and the assessee has failed to prove the identity and creditworthiness, the addition u/s 68 can be made in the hands of the assessee. In the instant case, the assessee could not place any evidence on record to prove the identity and the credit worthiness of the so called subscribers and the A.O. was justified in treating this investment as unexplained and made the addition u/s 68 of the I.T. Act. We, therefore, find no infirmity in the order of the CIT (A). Accordingly, we confirm the same."

41. The learned counsel for the assessee argued that even when five persons were produced which established the identity and they

had categorically stated that they had invested in the shares with their own money, there was no reason to make addition in respect of these persons as well. He also submitted that bank details, etc. in respect of all 15 shareholders were furnished to the CIT (A), even qua for the remand report, but this additional evidence was totally ignored. He referred to the judgment in the case of ***Steller Investment Ltd. (supra)*** as well as ***Lovely Exports P. Ltd. (supra)***. To buttress his submission that on the facts of this case, the assessee had discharged the onus and no addition could have been made in its hands. The learned counsel for the Revenue, on the other hand, made detailed submissions justifying the orders passed by all the Authorities below.

42. We have considered these submissions insofar as statements of the persons who are produced are concerned, they are gone into and analyzed by the three Authorities below on the basis of which finding of fact is arrived at that neither their identity is established nor their capacity to invest this kind of money is proved. They are all agriculturists and had not produced a single document to support their version. This is a finding of fact and there is no reason to interfere with the same. Learned counsel for the Revenue had drawn our attention to view all these statements. One Mr. Sukh Lal Singh in his statement had stated that he had purchased the share of ₹1,90,00. Out of the share money, he had paid ₹70,000 out of his own source and ₹1,20,000 was received by him from his friends and was paid in many installments. Likewise one Mr. Vijay Kumar who also purportedly purchased the share of ₹1.90 lacs stated that the payments were made by him in cash in

many installments. He also stated that he personally knew the Directors of the company and had very old relation with him.

43. On the basis of such statement without an iota of documentary evidence to support, we are of the opinion that the findings of the Authorities below cannot be treated as perverse. It is on proper analysis of the statements of these persons which were recorded by the AO. When we keep in mind the principle of law laid down in the ratio in the aforesaid decisions and apply the same to the facts of this case, it is difficult to find fault with the approach of the Tribunal. We have to keep in mind that the ratio in a decision cannot be applied in each case. The facts and circumstances of each case are to be weighed and examined as to whether a particular ratio decided in a particular case could be applied. As noted above, the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are: (i) Identity of investors; (ii) their creditworthiness/investments and (iii) genuineness of the transaction. Only when these three ingredients are established *prima facie,* it is only then the Department is required to undertake further exercise as discussed above. In the instant case, no such documents are filed and no steps taken by the assessee which could establish the aforesaid three ingredients.

44. Additional evidence in the form of bank statement, etc. is given, but the assessee has not done anything to prove these bank accounts. On this evidence produced by the assessee, remand report was called for and the AO in his remand report dated 23.12.2003 submitted as under:

> "None of the 6 alleged share holders produced any documents in support of their identity. The fact was intimated to the assessee vide order sheet entries dated 13.6.2002 & 17.3.2003. they are not assessed to tax. They have not produced any documentary evidence showing that they are capable of saving/investing any amount at all. If the persons produced are not carrying relevant documents to establish their identity, creditworthiness at the time of recording of the statements and furnishing photo copy of some documents after a gap of substantial period, it is not possible to verify its correctness unless the concerned persons are produced with necessary documentary evidences (in original) in support of their identity and creditworthiness.
>
> The assessee has not even furnished basic requirements of share capital i.e. cheque number, date, amount(s), details of drawee bank etc. The assessee's bank account was also not produced. Hence the assessee's claim regarding investment by the share-holders remained unverifiable. No comments can now be offered at this stage without necessary verification. Proof of identity produced at a later stage cannot be verified in the absence of concerned person original documents."

45. Order of the CIT (A) clearly demonstrates that this remand report was sent to the assessee who had submitted his reply dated 10.02.2004, which is even reproduced in the order and thereafter the CIT (A) discussed the same in the light of certain decision cited before him and came to the conclusion that the assessee had not given satisfactory evidence to discharge the onus. It had merely given names of the parties without anything more. That would not be sufficient compliance. Even the bank statement of the assessee which was submitted has not been proved.

46. For all these reasons, we are of the view that the assessee had not been able to discharge the onus *ptomaine* and addition was rightly made. We, therefore, answer the question in the negative and dismiss this appeal of the assessee.

ITA NO.539 OF 2008

47. This appeal relates to penalty proceedings which were initiated against M/s. Vijay Power Generator Ltd. (appellant in the aforesaid ITA No.514 of 2007) after making additions in the assessment order. As noted above, though the addition was sustained by the Tribunal in the quantum proceedings, insofar as penalty is concerned, the Tribunal vide impugned orders dated 31.08.2007 has deleted the penalty imposed by the AO and Revenue is in appeal. As can be seen from the discussion in ITA No.514 of 2007 above, the assessee had produced certain documents before the CIT (A). However, in the remand report sought by the CIT (A), the AO had stated that no comments can be offered at this stage without necessary verification. Exact contents of that report are also produced above. This would show that the assessee had given certain documents to prove the identity and creditworthiness of the share applicants, but the creditworthiness of these persons could not be proved because of gap of substantial period and the fact that those persons were not produced by the assessee with necessary documentary evidence originally in support of their identity and creditworthiness. It was, thus, a case where the assessee could not discharge the onus and it cannot be said that it was the case of the concealment of the case by the assessee.

48. Thus, while not accepting all the observations made by the Tribunal in the impugned order, we are of the view that the Tribunal is right in holding that insofar as penalty proceedings are concerned, case against the assessee of concealment of income is not made out. We would not like to interfere with the order of the

Tribunal on this aspect and dismiss this appeal of the Revenue a no substantial question of law arises.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JANUARY 31, 2011
pmc