7

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on : 22nd August, 2013
Judgment pronounced on: 29th November, 2013

\+ **ITA Nos. 247/2012**

COMMISSIONER OF INCOME TAX ..... Petitioner

Through Mr. Sanjeev Sabharwal, Advocate

Versus

ODEON BUILDERS PVT. LTD. ..... Respondent
Through Mr.Ved Jain, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

For orders see ITA No.246/2012.

SANJEEV SACHDEVA, J.

SANJIV KHANNA, J.

29th NOVEMBER, 2013
SV

Signature Not Verified
Digitally Signed
By:AMULYA

8

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on : 22nd August, 2013
Judgment pronounced on: 29th November, 2013

\+ ITA Nos. 246/2012

COMMISSIONER OF INCOME TAX ..... Petitioner
Through Mr. Sanjeev Sabharwal, Advocate

Versus

ODEON BUILDERS PVT. LTD. ..... Respondent
Through Mr.Ved Jain, Advocate

\+ ITA Nos. 247/2012

COMMISSIONER OF INCOME TAX ..... Petitioner

Through Mr. Sanjeev Sabharwal, Advocate

Versus

ODEON BUILDERS PVT. LTD. ..... Respondent
Through Mr.Ved Jain, Advocate

\+ ITA Nos. 248/212

COMMISSIONER OF INCOME TAX ..... Petitioner

Through Mr. Sanjeev Sabharwal, Advocate

Versus

ODEON BUILDERS PVT. LTD. ..... Respondent
Through Mr.Ved Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The revenue has filed these appeals against the common order dated 30.9.2011 passed by the Income Tax Appellate Tribunal (for short, 'ITAT') whereby the ITAT dismissed the appeals filed by the revenue against the orders of the Commissioner of Income Tax (Appeals) (for short, CIT (Appeals)) for the relevant assessment years as mentioned below. The ITAT confirmed the orders passed by the CIT (Appeals) and upheld the deletion made in the hands of the Assessee for the three assessment years. On account of the order passed by the ITAT with regard to the deletion, the cross objections by the Assessee to Section 148(3) were dismissed as not pressed.

2. Though the Assessment years and the Assessment Orders for the three appeals are different, the orders of the CIT (Appeals) for all the three Assessment years are identical and the ITAT vide a common Judgment has disposed of the Appeals. Three separate appeals have been preferred by the Revenue against the common impugned Judgment of the ITAT. Since the legal issue arising in all the three appeals are identical, we are disposing of all the three appeals by a common orders but we will be referring to the factual matrix of each appeal separately.

3. The following question of law was framed vide order dated 10.12.2012 in all the three appeals for consideration by this Court:

> "Did the Tribunal fall into error in holding that the addition made under Section 68 was not justified in the facts and circumstances of the cases?"

11

ITA 246 of 2012

4. The present appeal is for assessment year 2003-04. the return of income declaring an income of Rs.93,79,390/- was filed on 15.10.2003. The same was assessed under Section 143(3) of the Act on 28.02.2006.

5. Information was received from the Investigation Wing of the Income Tax Department regarding entry operators and their beneficiaries. As per the information received the Assessee had received accommodation entry of Rs.60,00,000/- pertaining to the assessment year 2003-04 as mentioned below:

Beneficiary bank name and branch	*Value of entry*	*Date of entry*	*Name of the entry operator*	*Bank and branch of the entry operator*	*Account no. of entry operator*
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	06.05.03	BIC Consultants P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank	4,00,000/-	06.05.03	BIC	State Bank	

of India, Khari Baoli, Delhi			Consultants P. Ltd	Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	06.05.03	Nikhil Builders & Promoters P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	06.05.03	Nikhil Builders & Promoters P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	06.05.03	Transpan Finance Services	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	06.05.03	Transpan Finance Services	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	07.05.03	Royal credits P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	07.05.03	Royal credits P. Ltd	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	07.05.03	Sparrow Mkt. P. Ltd.	State Bank Of Patiala, Daryaganj	

Union Bank of India, Khari Baoli, Delhi	5,00,000/-	07.05.03	Sparrow Mkt. P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	08.05.03	Shree Gupteshwar Mkt. P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	08.05.03	Shree Gupteshwar Mkt. P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	09.05.03	SRS Vijay Sales P. Ltd.	State Bank Of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	09.05.03	SRS Vijay Sales P. Ltd	State Bank Of Patiala, Daryaganj	
Total	**60,00,000/-**				

6. On the basis of the information, notice under Section 148 of the Act was issued on 21.11.2006 for the assessment year in question. Notice was served on the Assessee on 23.11.2006. The Assessee vide letter dated 19.12.2006 stated that the original return

of income may be treated as return filed in compliance to notice under Section 148 of the Act.

7. Notices under Section 142(1) and 133(6) were issued on 21.6.2007 to the Assessee to show cause as to why accommodation entries of Rs.60 lacs and commission at 2% be not added to the income of the Assessee.

8. The assessing officer noticed that in the return of income for the year 2003-04 there was increase in the share capital of Rs.41,90,000/- and there was share premium of Rs.35,15,000/-. The Assessee was asked to give details of the increase in share capital during the relevant year.

9. The Assessee vide its letter dated 10.12.2007 provided details of increase in share capital for Rs.30 lacs and stated that the share capital introduced was Rs.30 lacs and not Rs.60 lacs as mentioned in the notice under Section 133(6) of the Act. The Assessee

submitted a copy of the bank statement to show the deposit of cheques received from the said parties. The Assessee also filed the share application forms, copy of acknowledgement of IT return, copy of bank statement and copy of return to ROC in respect of the persons who had invested in share capital. The Assessee filed the party-wise details of the companies out of which two companies were operated by Mahesh Garg, the Entry Provider. The party-wise details of the said companies are as under:

S.No.	Name of Person	Amount
1.	BIC Consultant P. Ltd.	4,00,000/-
2.	Nikhil Builders and Promoters P. Ltd.	3,00,000/-
3.	Royal Credits P. Ltd.	5,00,000/-
4.	Shree Gupteshwar Mkt. P. Ltd.	5,00,000/-
5.	Sparrow Marketing P. Ltd.	5,00,000/-
6.	SRS Vijay Sales P. Ltd.	5,00,000/-

16

7.	Transpan Financial P. Ltd.	3,00,000/-
	TOTAL	30,00,000/-

10. The details of the investment by the two companies operated by Mr. Mahesh Garg, entry operator are as under:

S.No.	Name of Person	Amount
1.	M/s Chintpurni Credits & Leasing P Ltd	5,00,000/-
2.	M/s Royal Finvest P Ltd	5,00,000/-
	TOTAL	10,00,000/-

11. The assessing officer invoked the provisions of Section 131 of the Act and the bank statements of M/s Transpan Financial Services, M/s Shree Gupteshwar Marketing P. Ltd., were sought from the banks. The Assessee was also directed to produce the parties who had introduced the share capital during relevant previous year.

12. The assessing officer vide his order dated 19.12.2007 held that mere furnishing of the PAN Number or assessment particulars, copy of share application was not enough as the said documents did not facilitate in cross-verification and could be treated at best as only peripheral documents and the mere acknowledgement of return was not sufficient to prove the identity of a person or his correct and true address. The assessing officer held that none of the parties who had invested in the share capital were produced in cross-verification of documents submitted by the Assessee. The assessing officer further held that the Assessee was a private limited company and there was close and proximate relationship between the promoters/directors and shareholders and that the closely held companies accept subscriptions of share capital or deposits only from the friends or relatives of the promoters/directors and such companies were not allowed to accept the subscription or deposit from

general public. The assessing officer held that in such circumstances there should have been no difficulty on the part of the Assessee to produce a representative from the companies who had invested in the share capital.

13. The assessing officer also held that mere payment by an account payee cheque was not sacrosanct nor could it make a non-genuine transaction as genuine. The assessing officer on perusal of the bank statement obtained in case of three parties mentioned above found that there was a uniform pattern of transaction i.e. issuance of cheque was immediately preceded by deposit of an equivalent amount in the account either in the form of cash or through cheque/ transfer entry and at the end of the day the credit balance in the account mostly remained below Rs.10,000/-. The assessing officer held that unless the identity and creditworthiness of the entity and the transaction represented by the entries in the bank

were co-related with the business activity and the books of account of the said entity, the pattern and frequency of deposits and withdrawal at short intervals lent credence to the fact that the amount had been used only for the purpose of providing accommodation entries.

14. The assessing officer, thus, made an addition of Rs.40 lacs to the income of the Assessee under Section 68 of the Act and as a sequitur thereto made an addition of Rs.80,000/- as commission at 2% on Rs.40,00,000/- paid to the entry operators.

15. On an appeal by the Assessee, the CIT(Appeals) vide order dated 9.6.2009 deleted the addition made by the assessing officer of Rs.40,00,000/- under Section 68 of the Act and the consequent addition of Rs.80,000/- @ 2% commission paid to the entry providers.

ITA 247 of 2012

16. The present appeal is for the assessment year 2004-05. The Assessee filed the return of income on 28.10.2004 declaring an income of Rs.72,11,780/-. Information was received from the Investigation Wing of the Income Tax Department regarding entry operators and the beneficiaries. The return was processed under Section 143(1), however, as the case was selected for scrutiny, notice dated 25.5.2006 under Section 143(2)/142(1) was served and subsequently during the scrutiny proceedings it transpired that the Assessee had received share application money from 65 parties during the relevant previous year out of which Rs.9,58,53,500/- was lying in share application money account of 30 parties at the end of the previous year, i.e., on 31.3.2004. Balance 35 parties had been allotted share and the share application amount received from them was transferred to share capital at Rs.9,30,500/- and share

premium account at Rs.1,76,79,500/- as mentioned below:

S. no.	Name of persons	Share Capital	Share Premium	Total addition during the year	Opening balance after adjustment of repayment during the year
	Opening balance as at 01.04.03	1565500	7495500		
1.	Anil kumar Gupta	28500	541500		
2.	Renu Gupta	28500	532000		
3.	Asha Singhal	44500	845500	400000	490000
4.	Kashmere Lal Gupta (HUF)	28500	541500		
5.	Mehak Singhal	41000	779000	630000	190000
6.	Narendra Kumar Singhal	18500	351500	160000	210000
7.	Narendra Kumar Singhal (HUF)	26000	494000		
8.	Naveen Singhal	10000	190000	200000	
9.	Naveen Singhal (HUF)	11000	209000		220000
10.	Naveen Mittal	25000	475000	500000	
11.	Praveen Gupta	50000	950000	1000000	
12.	Poonam Singhal	22500	427500	250000	200000
13.	Rakhi Singhal	41000	779000	600000	220000
14.	Suresh Kumar	31500	598500	425000	205000
15.	Sushila Gupta	24500	465500		490000
16.	J. Singh trading & investment P.	25000	475000	500000	

22

	Ltd				
17.	New Generation Finvest P. Ltd.	25000	475000	500000	
18.	Rizzer Exim P. Ltd.	25000	475000	500000	
19.	BIC Consultants P. Ltd	25000	475000	500000	
20.	Chintapurni credits & leasing P. Ltd.	25000	475000	500000	
21.	Division Trading P. Ltd.	25000	475000	500000	
22.	Kuberco Sales P.Ltd	25000	475000	500000	
23.	Kuldeep Textiles P. Ltd	25000	475000	500000	
24.	Nikhil Buildes & Promoters P. Ltd.	25000	475000	500000	
25.	Nishant finvest p. Ltd.	25000	475000	500000	
26.	Performance Trading & Investment P. Ltd.	25000	475000	500000	
27.	Rahul Finlease P. Ltd.	25000	475000	500000	
28.	Right Choice Constructions P. Ltd.	25000	475000	500000	
29.	Sekhawati Finance P.Ltd.	25000	475000	500000	
30.	Shree Gupteshwar Marketing P.Ltd.	25000	475000	500000	
31.	Sobar	25000	475000	500000	

23

	Associates Pvt Ltd.				
32.	Sparrow Marketing Pvt. Ltd.	25000	475000	500000	
33.	SRS Vijay sales Pvt. Ltd.	25000	475000	500000	
34.	Transpan Financial Services Ltd.	25000	475000	500000	
35.	V.R. Traders Pvt. Ltd.	25000	475000	500000	
	Total	930500	17679500		
	Grand Total	2496000	25175000		

17. The assessing officer directed the Assessee to file confirmation of the share application money/share capital/share premium received by the Assessee and to justify the credits in the account of the Assessee and to file the confirmation from the respective parties. The Assessee vide order sheet entries dated 30.11.2006 was directed to file the following evidences:

1. Identify of the person.
2. Genuineness of the transaction.
3. Source of creditworthiness of the investment.

24

4. Latest confirmation of the party not more than 30 days old with complete address. PAN/Ward Circle."

18. The assessing officer vide his order dated 26.12.2006 has recorded that the Assessee was specifically asked these details with respect to parties mentioned in the above list from serial No. 19 to 35. After various adjournments the AR of the Assessee filed confirmations of the parties with copy of bank accounts and acknowledgment of return of income for the parties mention in the above list from serial No. 1 to 15 for the share application money on 13.12.2006. However, the Assessee did not file any confirmation or any of the evidences for the 20 parties mentioned at Sl No. 16 to 35 in the above table from which Assessee had received a total sum of Rs.1 Crore (Rs.5 lacs each). Assessee was again directed to file the above mentioned details, confirmation vide order sheet entry dated 13.12.2006 for the 20 parties mentioned from

serial. No. 16 to 35. The Assessee was also directed to produce these 20 parties to confirm entries. However, the Assessee filed undated general certificates as confirmation qua said parties just before time barring date of the assessment.

19. The Assessee was asked to show cause why in some cases confirmation was not furnished, establish genuineness of transactions, produce the parties and why the above sums credited in the books of account of Assessee on account of share application money/share capital/share premium amounting to Rs. 1 Crore during the year under consideration, should not be treated as Assessee's undisclosed income u/s 68 of the I.T.Act. The Assessee was also asked to furnish the details of the parties who would not be appearing so that summons u/s 131 of the Act could be issued to enforce their attendance.

20. The assessing officer in his order has noticed that the 20 companies mentioned at serial No. 16 to 35 of the list extracted above from whom the Assessee received share application money were companies operated by Mahesh Garg who was involved in providing accommodation entries.

21. The assessing officer has also noticed that the confirmations filed by the Assessee were undated and had been taken at the time of taking the entries for share application/share capital/share premium cheques. The assessing officer noticed that out of the 35 persons from whom the Assessee had received share application money, the Assessee could file proper confirmations only qua 15 parties and for the remaining 20 parties which were the companies operated by the said Mahesh Garg, the confirmations filed were undated.

22. The assessing officer held that the Assessee had not discharged its onus and could not prove the genuineness of the transactions as well as the creditworthiness or proper sources of receiving the share application money/share capital/share premium of Rs.1 crore from these 20 parties. The assessing officer treated the said money as the money of the Assessee routed through the companies run by Mahesh Garg who, as per the assessing officer, was an entry provider. The assessing officer, thus, added the sum of Rs. 1 crore along with commission being charged by the entry provider @ 1% to the income of the Assessee.

23. The Assessee filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide order dated 9.6.2009 deleted the addition of Rs.1crore made under Section 68 of the Act and consequent addition of commission at 1%.

ITA 248 of 2012

24. The present appeal is for the assessment year 2002-03. The return of income declaring an income of Rs.68,43,440/- was filed on 30.10.2002. The same was processed under Section 143(1) of the Act. on 22.02.2003. Information was received from the Investigation Wing of the Income Tax Department regarding entry operators and the beneficiaries. As per the information received the Assessee company had received accommodation entry of Rs.74,00,000/- pertaining to the assessment year 2002-03 as mentioned below:

Beneficiary bank name and branch	Value of entry	Date of entry	Name of entry operator	Band and branch of entry operator	Account No. of the entry operator
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	21.03.02	Transpan Finance Services.	OBC, Minto Road, N.D.	
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	21.03.02	BIC Consultants P. Ltd	State bank of Patiala, Daryaganj	
Union	4,00,000/-	21.03.02	BIC	State	

Bank of India, Khari Baoli, Delhi			Consultants P. Ltd	bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	21.03.02	Performance trading and investment P. Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	21.03.02	Performance trading and investment P. Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	D.K. Ispat & Timber Ltd.	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	D.K. Ispat & Timber Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Division trading Private Ltd.	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Division trading Private Ltd.	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Nikhil builders and promoters P. Ltd.	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Nikhil builders and promoters P. Ltd.	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	23.03.02	Rahul Finlease P. Ltd	State bank of Patiala, Daryaganj	

Union Bank of India, Khari Baoli, Delhi	2,00,000/-	23.03.02	Rahul Finlease P. Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	3,00,000/-	23.03.02	Rahul Finlease P. Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	2,00,000/-	23.03.02	Rahul Finlease P. Ltd	State bank of Patiala, Daryaganj	
Union Bank of India, Khari Baoli, Delhi	4,00,000/-	23.03.02	Transpan Finance Services	OBC	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Sobar Associates P. Ltd.	Innovative	
Union Bank of India, Khari Baoli, Delhi	5,00,000/-	23.03.02	Sobar Associates P. Ltd.	Innovative	
TOTAL	74,00,000/-				

25. On the basis of the information received from the Investigation Wing, notice under Section 148 of the Act was issued on 21.11.2006 for the assessment year in question. Notice was served on the Assessee on 23.11.2006. The Assessee vide letter dated

19.12.2006 stated that the original return of income may be treated as return filed in compliance of notice under Section 148 of the Act.

26. Notices under Section 142(1) and 133(6) were issued on 21.6.2007 to the Assessee to show cause as to why accommodation entries of Rs.74 lacs and commission at 2% be not added to the income of the Assessee.

27. The assessing officer noticed that in the return of income for the year 2002-03 there was increase in the share capital of Rs.37 lacs and there was share premium of Rs. 35,15,000/-. The Assessee was asked to give details of the increase in share capital during the relevant year.

28. The Assessee vide its letter dated 14.12.2007 provided details of increase in share capital of Rs.37 lacs and stated that the share capital introduced was Rs.37 lacs and not Rs.74 lacs as mentioned in the

notice under Section 133(6) of the Act. The Assessee submitted a copy of the bank statement to show deposit of cheques received from the said parties. The Assessee also filed the share application forms, copy of acknowledgement of IT return, copy of bank statement and copy of return to ROC in respect of the persons who had invested in share capital. The Assessee filed the party-wise details as under:

S.No.	Name of the person	Amount
1	BIC Consultants Pvt. Ltd.	4,00,000/-
2	D.K. Ispat & Timbers Pvt. Ltd.	5,00,000/-
3	Division Trading Pvt. Ltd.	5,00,000/-
4	Nikhil Builders & Promoters Pvt. Ltd.	5,00,000/-
5	Performance Trading & Investment Pvt. Ltd.	4,00,000/-
6	Rahul Finlease Pvt. Ltd.	5,00,000/-
7	Sobar Associates Pvt. Ltd.	5,00,000/-
8	Transpan Financial Pvt. Ltd.	4,00,000/-

	Total	37,00,000/-

29. The assessing officer invoked the provisions of Section 131 of the Act and the bank statements of M/s Transpan Financial Services, M/s BIC Consultants P.Ltd, M/s Sober Associate P. Ltd. were sought from the banks. The Assessee was also directed to produce the parties who had introduced the share capital during relevant previous year.

30. The assessing officer vide his order dated 19.12.2007 held that mere furnishing of the PAN Number or assessment particulars, copy of share application was not enough as the said documents did not facilitate in cross-verification and could be treated at best as only peripheral documents and the mere acknowledgement of return was not sufficient to prove the identity of a person or his correct and true address. The assessing officer held that none of the parties who had invested

in the share capital were produced in cross-verification of documents submitted by the Assessee. The assessing officer further held that the Assessee was a private limited company and there was close and proximate relationship between the promoters/directors and shareholders and that the closely held companies accept subscriptions of share capital or deposits only from the friends or relatives of the promoters/directors and such companies were not allowed to accept the subscription or deposit from general public. The assessing officer held that in such circumstances there should have been no difficulty on the part of the Assessee to produce a representative from the companies who had invested in the share capital.

31. The assessing officer also held that mere payment by an account payee cheque was not sacrosanct nor could it make a non-genuine transaction as genuine. The assessing officer on perusal of the bank

statement obtained in case of three parties mentioned above found that there was a uniform pattern of transaction i.e. issuance of cheque was immediately preceded by deposit of an equivalent amount in the account either in the form of cash or through cheque/ transfer entry and at the end of the day the credit balance in the account mostly remained below Rs.10,000/-. The assessing officer held that unless the identity and creditworthiness of the entity and the transaction represented by the entries in the bank were co-related with the business activity and the books of account of the said entity, the pattern and frequency of deposits and withdrawal at short intervals lent credence to the fact that the amount had been used only for the purpose of providing accommodation entries.

32. The assessing officer, thus, made an addition of Rs.37 lacs to the income of the Assessee under Section 68 of the Act and as a sequitur thereto made an addition

of Rs.74,000/- as commission at 2% on Rs.37,00,000/- paid to the entry operators.

33. On an appeal by the Assessee, the CIT(Appeals) vide order dated 8.6.2009 deleted the addition made by the assessing officer of Rs.37,00,000/- under Section 68 of the Act and consequently addition of Rs.74,000/- @ 2% commission paid to the entry providers.

34. The orders of the CIT (Appeals) for the three assessment years is identical and as such are being commonly dealt with hereinafter.

35. The CIT (Appeals) held that the Assessee had submitted the following documents to substantiate the genuineness of the transaction though could not produce the said parties for confirmations:

> "a) Share Application forms received from Investor Companies containing full details of investment in Assessee company their addresses & PAN etc.

b) Board Resolutions of Investor Companies for making investment in Assessee company.

c) Certificates issued by investor Companies confirming the investment in Assessee company & source thereof along with their PAN & assessment particulars.

d) PAN and address proof of Investor Companies.

e) IT return Acknowledgement receipt/I.T. Asstt. orders etc. of Investor Companies.

f) Certificate of Incorporation and other relevant documents of R.O.C relating to Investor Companies."

36. The CIT (Appeals) held that the statement of Mahesh Garg recorded by the Addl. D.I.(Inv.) Unit-I was shown to the Assessee only on 18.12.2006 at the fag end of the proceedings. The CIT (Appeals) held that the said statement was general with no reference to the transactions with the appellant. The CIT (Appeals) held that the assessing officer had simply relied upon

the information received from the Investigation Wing of the Department without making any concrete effort to verify the facts stated therein and has not brought any positive material or evidence to indicate that the shareholders were benamidars, fictitious persons or any part of the share capital money represented the income from undisclosed sources.

37. The CIT (Appeals) held that the assessing officer returned the finding that the investor companies were only paper entities floated for the purposes of arranging accommodation entries and the share application money received was accommodation entries without any factual basis on which this conclusion was drawn. The CIT (Appeals) further held that the Assessee was not afforded an opportunity to cross examine the said parties based on which adverse inference was drawn by the assessing officer.

38. The CIT (Appeals), thus, held that the appellant had discharge the initial onus of establishing the bona fides of the transactions and the assessing officer was not justified in ignoring various evidences provided to him and had not brought on record any adverse material to show that the share application money received by the Assessee from the said parties represented its own undisclosed income.

39. The CIT (Appeals), thus, deleted the additions made by the assessing officer under Section 68 of the Act and the consequent addition of commission paid @ 1 or 2% (as the case may be) for obtaining the entries from the entry provider.

40. Aggrieved by the decision of the CIT (appeals) the Revenue filed an appeal to the ITAT. The ITAT has upheld the order of the CIT (Appeals) and held that the additional documents submitted by the Assessee supported the identity and creditworthiness of the

investor companies and proved that the share application transaction entry by the Assessee with the said investors transactions were genuine transactions and confirmed the deletion.

41. Aggrieved by the said decision the Revenue is up in appeal before us.

42. We have heard the learned counsel for the parties. We are of the considered opinion that the orders of the CIT (Appeals) and the ITAT in deleting the addition made by the AO of Rs. 40,00,000/- under Section 68 of the Act and the consequent addition of Rs.80,000/- as commission paid @ 2% for obtaining the entry of Rs.40,00,000/- are clearly unsustainable.

43. Recently in **COMMISSIONER OF INCOME TAX VS NR PORTFOLIO PVT. LTD (INCOME TAX APPEAL NO. 1018 OF 2011 AND 1019 OF 2011)** vide Judgment dated 22nd November, 2013 we have held that when an Assessee does not produce evidence or tries to avoid

appearance before the assessing officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the assessing officer is denied advantage of the contention or factual assertion by the Assessee before him. In case an Assessee deliberately and intentionally fails to produce evidence before the assessing officer with the desire to prevent inquiry or investigation, an adverse inference should be drawn.

44. The said case, i.e., **N.R. PORTFOLIO PRIVATE LIMITED (SUPRA)**, was also one of the cases where accommodation entries were being provided by Mahesh Garg Group of entry providers as in the present case. It has been noticed in that case that the modus operandi used by the entry providers for providing accommodation entry to different persons/beneficiaries was very similar to the one in the present case. It has been further noticed that the bank statements of the entry operators showed

substantial deposit of cash in the bank accounts and subsequent issuance of cheques to the beneficiaries. The entry providers were not carrying on any business activity but the only activity was for providing entries. It has been held that a private limited company is a closely held company having proximate relationship between promoters and shareholders and usually in closely held companies, share capital subscription is from friends, relatives and not from unrelated/unknown third parties/general public.

45. We have further in N.R.PORTFOLIO PRIVATE LIMITED (SUPRA) held that mere production of PAN Number or assessment particulars does not establish the identity of a person. The identification of a person includes the place of work, the staff and the fact that it was actually carrying on business and further recognition of the said company/individual in the eyes of public. We have further noticed that PAN Numbers are allotted on the basis of applications without actual de facto

verification of the identity or ascertainment of the active nature of business activity. PAN Number is allotted as a facility to revenue to keep track of transactions. The PAN Number cannot be blindly and without consideration of surrounding circumstances treated as sufficiently disclosing the identity of the individual.

46. Following CIT vs NOVA PROMOTERS AND FINLEASE PRIVATE LIMITED CASE (2012) 342 ITR 169 (DELHI) we have held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN Number, acknowledgement of Income Tax Returns of the entry providers, bank account statement is not sufficient to discharge the onus on the Assessee.

47. In the case of private limited companies, generally person known to the directors or shareholders directly or indirectly buy or subscribe to shares. The share

subscribers post investment do not lose touch or become incommunicado. In the case of private limited companies where normally there is close proximity between the company, i.e., the directors and shareholders and the investors. The Assessee cannot simply furnish details and remain quiet even when summons issued to the shareholders under Section 131 are returned unserved and uncomplied. IN N.R.PORTFOLIO PRIVATE LIMITED (SUPRA) we have held that the Assessee cannot plead as a general preposition that they had received summons and it was for the assessing officer to enforce the attendance of the share holders.

48. We have further held that the Court or Tribunal should be convinced about the identity, creditworthiness and genuineness of the transactions. The onus to prove the three factum is on the Assessee as the facts are within the personal knowledge of the Assessee. Mere production of incorporation details, PAN Numbers or

income tax returns may not be sufficient when surrounding and attending facts predicate a cover up. The production of incorporation details, PAN numbers or income tax details may indicate towards completion of paper work or documentation but genuineness, creditworthiness and identity of investment and the investors are deeper and obtrusive than mere completion of paper work or documentation.

49. As we have held that PAN Numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertainment of the active nature of business activity. PAN Number is allotted as a facility to revenue to keep track of transactions. The PAN Number cannot be blindly and without consideration of surrounding circumstances treated as sufficiently disclosing the identity of the individual. The mere filing of share application is not enough as the said application is not an unimpeachable document and does not on its own

prove the genuineness or authenticity of the transaction. It can at best be treated as a corroborative document. Since the share application form is not an unimpeachable document, it cannot on its own be treated as sufficient for establishing genuineness of the transaction or credit worthiness of the share applicant. The identification of a person includes the place of work, the staff and the fact that it was actually carrying on business and further recognition of the said company/individual in the eyes of public.

50. The Assessee is a private limited company and has received substantial amounts of Rs. 9,30,500/- as share application money and Rs 1,76,79,500/- as share premium in the Assessment Years 2004-05 and share capital of Rs. 37,00,000/- and share premium of Rs. 35,15,000/- in the Assessment Years 2002-03 and share capital of Rs. 41,90,000/- and Share Premium of Rs. 35,15,000/- in Assessment Years 2003-04. The

share subscribers post investment do not lose touch or become invisible. Nature and normal conduct is that they would protect and seek return on their investment if the same is genuine. This failure, the bank account statements, huge premium received are palpable surrounding facts, which have to be given due credence and relevance. The Assessee cannot in these circumstances simply furnish details and remain quiet even when summons issued to the shareholders under Section 131 are returned unserved and uncomplied. The Assessee cannot plead in the factual matrix that they had received summons and it was for the assessing officer to enforce appearance of the share holders.

51. None of the parties that had invested in the share capital were produced for examination/verification of the documents, transactions or to prove the genuineness of the transactions. Reason and cause to make investment remains unknown and unexplained.

48

52. The assessing officer on perusal of the bank statements obtained in case of three parties has found that there was a uniform pattern of transaction i.e. issuance of cheque immediately preceded by deposit of an equivalent amount in the account either in the form of cash or through cheque/ transfer entry and at the end of the day the credit balance in the account mostly remaining below Rs.10,000/-.

53. Another aspect of the matter that was noticed by the Assessing officer in the ITA 247 of 2013 is that some of the confirmations filed by the Assessee were undated and had been taken at the time of taking the entries for share application/share capital/share premium cheques. We find it strange that an Assessee alongwith share application money would obtain confirmations from the investors to confirm genuineness of the transaction. In a normal business transaction, no

such confirmation would be obtained by any company from persons investing in its share capital. The fact that the Assessee felt the necessity of obtaining such confirmations at the time of receiving share application money raises a suspicion on the genuineness of the very transaction.

54. The assessing officer found and rightly so that unless the identity and creditworthiness of the entity and genuineness of the transactions were co-related with the business activity and the books of account of the said entity, the pattern and frequency of deposits and withdrawal at short intervals lent credence to the fact that the amount had been used only for the purpose of providing accommodation entries.

55. We are of the considered opinion that the Assessee has not been able to discharge the initial onus and has not been able to establish the identity,

creditworthiness of the share applicants and the genuineness of the transaction.

56. The substantial question of law is thus answered in favour of the Appellant/Revenue and against the Respondent/Assessee. The appeals are accordingly allowed with costs that are assessed at Rs. 20,000/- in each case.

SANJEEV SACHDEVA, J.

SANJIV KHANNA, J.

29th NOVEMBER, 2013

SV