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IN THE HIGH COURT OF DELHI AT NEW DELHI

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INCOME TAX APPEAL NO. 1019/2011

Reserved on: 14th August, 2013

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Date of Decision : 22nd November, 2013

COMMISSIONER OF INCOME TAX

..... Appellant

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

versus

NR PORTFOLIO PVT LTD.

..... Respondent

Through Dr. Rakesh Gupta and Mr. Rishabh Kapoor,
Advocates.

CORAM:

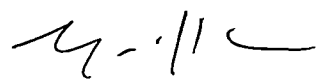
HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

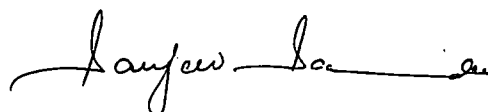
For detailed order see ITA 1018/2011, *Commissioner of Income*

Tax Vs NR Portfolio Pvt. Ltd. pronounced today.



(SANJIV KHANNA)

JUDGE



(SANJEEV SACHDEVA)

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SANJIV KHANNA, J.

These two appeals by the Revenue relate to a common assessee i.e., N.R. Portfolio Pvt. Ltd. and the questions raised relating to assessment years 2002-03 and 2003-04 are similar. They pertain to the additions made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 (Act, for short) of Rs.1,2,34,100/- and

Rs.75,60,200/- for the assessment years 2002-03 and 2003-04 on account of share application money. (17)

2. The contention of the Revenue is that the Income Tax Appellate Tribunal (tribunal) has dealt with the issue superficially and has failed to notice the money laundering indulged into and the clandestine manner in which unaccounted and black money had been brought into books by this dubious method. It is contended that the decision in the case of *CIT Vs. Lovely Exports Ltd.* 299 ITR 268 (Del) is being misunderstood and misinterpreted resulting in a spate of matters wherein assesseees have adopted this surreptitious method to convert unaccounted for money into share application money.

3. Revenue has relied upon the decision of this Court in the case of *CIT vs. Nova Promoters and Finlease (P) Ltd.* [2012] 342 ITR 169 (Del).

4. By order dated 13th August, 2013, the following substantial question of law was framed in the two appeals:-

“Whether the Income Tax Appellate Tribunal was right in deleting the additions of Rs.63,80,100/- and Rs.75,60,200/- in respect of Assessment Years 2002-03 and 2003-04 under Section 68 of the Income Tax Act, 1961 and whether the decision of the Tribunal is perverse?”

5. The respondent-assessee is a private limited company and for the assessment years 2002-03 and 2003-04 had filed returns declaring income of Rs.11,566/- and 18,720/-, respectively. These returns were processed under Section 143(1) of the Act. Subsequently, reassessment proceedings were initiated under Section 147/148 of the Act on the basis of information received from the Investigation Wing that the assessee was one of the beneficiaries, who had procured share

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application money from entry providers. Assessment proceedings under Section 147/148 of the Act in the two years were initiated by issue of notices on 28th November, 2006. The notices were received back unserved and subsequently were served by affixture at the last known address i.e., the address given in the returns. The assessee, however, did not appear in response to the said notices. The Assessing Officer thereupon on 8th October, 2007 issued show cause notice under Section 144 read with Section 147 of the Act, which was sent through Speed Post, but was returned unserved with the remark "no such firm". Respondent-assessee again was served through affixture on 25th October, 2007. On examining the return for the assessment year 2004-05, it was noticed that M/s Prakash K. Prakash Chartered Accountants had certified the accounts of the respondent-assessee. Office of M/s Prakash K. Prakash Chartered Accountants was contacted and thereupon they filed their power of attorney on 1st November, 2007. The said Chartered Accountants also filed a letter that the respondent company had not received any notice and had been regularly filing their returns mentioning the correct address and after that there was change in address, the same was informed. Along with this letter, no detail of new address was filed. They had not mentioned the present/current address.

6. Another show cause notice was issued and sent at the last known address of the respondent-assessee and the address of the Chartered Accountants fixing the hearing on 4th December, 2007. The letter referred to the notice under Section 147/148 of the Act, show cause notice under Section 144 dated 8th October, 2007 and the fact that the reasons could be provided only after return of income was filed but yet in the interest of justice and for the purpose of proceedings it was

stated that as per information available, the share capital was received during the years from the persons who had been identified as entry operators. Thus, the respondent-assessee had received accommodation entries which were likely to be hit under Section 68 as unexplained cash credit. Details and manner in which entries were made in the books of account and the clandestine manner of circulation, was stated in detail in the show cause notice. (24)

7. On 4th December, 2007, no one appeared at the time of hearing. Subsequently, a request for adjournment was received by way of courier from M/s Prakash K. Prakash Chartered Accountants and they were allowed time up to 10th December, 2007, but on the said date also, no one appeared and no written request was received. Accordingly, ex-parte or best judgment assessment orders both dated 17th December, 2007 were passed for the two assessment years. We shall be referring to the details/contents of the assessment orders subsequently.

8. The respondent-assessee, however, preferred appeals and substantially succeeded on merits before the Commissioner of Income Tax (Appeals) but did not succeed in their challenge to reopening under Section 147/148 of the Act or on the question of service of notice.

9. Two cross appeals were preferred before the tribunal by the Revenue and the respondent-assessee for the two assessment years but the same have been dismissed by the impugned order dated 29th October, 2010. The reasoning given by the tribunal is that the respondent-assessee had furnished Permanent Account Number (PAN) of the share applicants except with regard to the share capital of Rs.4,50,000/- and before the Commissioner (Appeals), the assessee

(15)

had also submitted various details and documents to establish identity of the investors/share applicants. The impugned order in paragraph 6 refers to and quotes several paragraphs from the order passed by the Commissioner (Appeals) and in paragraph 7 refers to the observations made by the Commissioner (Appeals). Thereafter, in paragraph 8 it is recorded that the tribunal had gone through various reasons and principles on which Commissioner (Appeals) had deleted the addition. Commissioner (Appeals) had given a finding that verification of PAN was made and found to be correct except with regard to the share application money of Rs.4,50,000/- and, therefore, in the light of the judgments of Delhi High Court in *CIT v. Lovely Exports Private Ltd.*[2008] 299 ITR 268, *Winstral Petrochemicals Pvt. Ltd.* [2011] 330 ITR 603 and *CIT Vs. Dwarkadhish Investment (P) Ltd.* [2011] 330 ITR 298 and other cases, addition was not justified and not in accordance with law.

10. Cross objections filed by the assessee were not pressed and in paragraph 20 of the impugned order it is specifically recorded that the validity of notice under Section 148 was not argued by the respondent- assessee and it was fairly accepted that the assessee's appeals had no merit. The tribunal thereafter held that they had gone through the order of the Commissioner (Appeals) and the findings recorded on the said issue were right. At this stage, we would like to reproduce the findings recorded by the Commissioner (Appeals) on this issue:-

“3.6.2 Similar is the position with regard to service of show- cause notice for completing the impugned assessment u/s 144 of the Act as it is an established fact that in absence of any intimation with regard to change of registered office address from the appellant company, the assessing officer has left with very little option except getting the same served through affixture. It is beyond doubt that the assessing officer took pains to locate the authorized representative M/s Prakash K.

Prakash, CAs and served show- cause notice on them meaning thereby that the appellant was fully in known of the things that the assessment proceedings are going on and it is required to file information with regard to the various points on the basis which the case was reopened u/s 147/148 of the Act. It is matter of record that after the authorized AR could be located by the assessing officer, the AR filed a letter dated 'nil' along with POA dated 1-11-2007 but still the appellant chose not to intimate the address to the assessing officer except vaguely stating that the Department have been informed about the change of address from time to time. In these circumstances, I do not see any justification on the part of the appellant to either raise the issue of non- service of notices or improper procedure of substituted service and accordingly, I hold that the impugned assessment is in order.

The contentions of the appellant company that the impugned assessment has been framed without looking into the contentions of the appellant has also not found favour with me as despite knowing fully well that the assessment shall be time barred as on 31-12-2007, the AR chose to sent the details through post which were received by the assessing officer on 18-12-2007 whereas the impugned order was passed on 17-12-2008. Otherwise too, during the present proceedings, the assessing officer submitted a remand report wherein the appellant has not been given an opportunity to put forth its view points and on which rejoinder has also been filed which means that the principle of natural justice has been adhered to and hence contention of the Ld. AR needs rejection."

11. Other findings recorded by the Commissioner (Appeals) refers to the remand report which was called from the Assessing Officer stating that notice under Section 148 was sent at the last known address i.e., F-280, New Rajinder Nagar, New Delhi, which was also mentioned in the return of income, but was received unserved with the remark "no such assessee", but subsequently served through affixture at A-46, Mohan Co-op. Industrial Estate, Mathura Road, New Delhi, the address which was shown in the return of income for the assessment year 2004-05. The Assessing Officer in the remand report

has mentioned that the assessee's registered office was located at A-46, Mohan Co-op. Industrial Estate, Mathura Road, New Delhi on the date of affixture of notice. Subsequently, on 18th April, 2007, they shifted their registered office to A-15, B-1 Extension, Mohan Co-op. Industrial Estate, Mathura Road, New Delhi. We have already quoted the observation of the Assessing Officer after M/s Prakash K. Prakash Chartered Accountants were served and they in their letter dated 1st November, 2007 had not furnished the new address, though the respondent-assessee have stated that they had shifted their registered office address from A-46, Mohan Co-op. Industrial Estate, Mathura Road, New Delhi to A-15, B-1 Extension, Mohan Co-op. Industrial Estate, Mathura Road, New Delhi. The respondent-assessee had also stated that they had "misplaced" the intimation filed with the department on change of address. The Commissioner (Appeals) has recorded a finding that the respondent-assessee had wrongly claimed that they had informed the department about change of their registered office address, as not even a single intimation was presented before the Assessing Officer or him.

12. The contention of the Ld. AR for the appellant, that they had intimated change of address to Registrar of Companies, and the Assessing Officer should have ascertained the said address, it was rightly observed could not cut any ice in the facts of the present case. It was the obligation and responsibility of the respondent- assessee to intimate change of address to the Assessing Officer as no return with the new address was furnished or even filed. Further, the conduct of the respondent, when they did not give the latest address in spite of the fact that M/s Prakash K. Prakash, Chartered Accountants were served and informed about the proceedings, speaks for itself. Their conduct in

not responding and appearing before the Assessing Officer was adversely commented upon by the Commissioner (Appeals) and the said finding has not been disturbed by the tribunal. However, this fact and the conduct of the respondent before the Assessing Officer was not noticed and given adequate reference while dealing with the question of deletion of addition on merits.

13. The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is required. The verification and investigation should be done with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should

reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects.

14. 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 view should be taken. We shall now come to the merits and the findings recorded by the Commissioner (Appeals), which as noted above, have been simply affirmed by the tribunal without verifying or

referring to the facts.

15. In the present case, the undisputed position is that the respondent had received share application money of Rs.68,30,100/- and Rs.75,60,200/- in the Assessment Years 2002-03 and 2003-04 respectively. For the Assessment Year 2002-03, the Assessing Officer had taken the share application money received in the year as Rs.1,20,34,100/-, which included Rs.32,80,000/- and Rs.19,24,000/- related to previous years or was the opening share capital. As noted above, addition of Rs.4,50,000/- has been sustained in the Assessment Year 2002-03. Thus, the Commissioner (Appeals) and the tribunal have deleted additions of Rs.63,80,100/- and Rs.75,60,200/- in the two assessment years. Before the Commissioner (Appeals), the respondent-assessee had furnished name of the share applicants which mostly consisted of companies. It was accordingly submitted that the respondent had been able to establish identity of the shareholders, their creditworthiness and also genuineness of the transaction as the payments were received through banking channels. Thus, the respondent had discharged the primary onus and there was no evidence or material to show that unaccounted for money was recycled and introduced in the books as share application money. The Commissioner (Appeals) has recorded that verification of PAN numbers was done in the present case and was found to be correct except in the case of Technochem Associates Private Limited and M/s Yogesh Gupta from whom share application money of Rs.1,50,000/- each was raised but no PAN details were furnished. Regarding Ganga Infin Private Limited, PAN number furnished was found to be incorrect and accordingly addition of Rs.1,50,000/- was justified. With regard to others, the Commissioner (Appeals) has recorded that the assessing officer had not affected inquiries to bring on record and

establish that the other parties had given accommodation entries and the money, i.e., the share application money was assessee's own undisclosed income. It was further recorded that the respondent had not been provided an opportunity to cross-examine the so-called entry providers and the assessing officer simply relied upon the investigation reports/information provided by the Information Wing of the Department.

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16. The aforesaid finding of the Commissioner (Appeals), which have been affirmed by the tribunal, ignores the finding of the Assessing Officer that the Assessee had failed to attend the assessment proceedings, explain and put forward their stand and stance. To this extent, there is contradiction in the order passed by the Commissioner (Appeals), which was ignored and not taken note of by the tribunal.

17. The Commissioner (Appeals) thereafter proceeded on the basis that even if the subscribers to the share capital were not genuine, the amount received cannot be regarded as undisclosed income of the respondent-assessee. Reference was made to the decision of the Delhi High Court in *Lovely Exports Private Limited* and *Divine Leasing and Finance Limited* (supra). Reference was made to some decision of the tribunal. It would be here relevant to highlight and note what was recorded by the Assessing Officer in the assessment order. The Assessing Officer has mentioned that the subscribers belonged to Mahesh Garg group of entry operators, which included 51 companies/persons, who were operating more than 100 bank accounts in different banks/branches. Their *modus operandi* was to provide accommodation entries to different persons/beneficiaries. Reference was made to the bank statements of the entry operators that showed substantial deposit of cash in the bank accounts and subsequent issue of cheques to the

beneficiaries. This was the only activity of these companies/persons. The said companies/persons were not carrying on any other business activity i.e., manufacturing or trading activity. The assessment order has quoted and referred to the bank account statements in support of the said assertion and finding. The Assessing Officer has mentioned that the respondent-assessee was a private limited company, closely held and there should be proximate relationship between the promoter directors and the shareholders. Closely held companies usually receive share capital subscriptions from friends, relatives and not from unrelated/ unknown third parties/ general public. There was no relationship or connection between the subscribers and the respondent-assessee, for subscribers to become investors. Assessment order records that to establish identity and availability of funds, it was necessary to have at least some idea if not complete details of the actual business undertaken and engaged in by the respondent-assessee and explained how and why these unrelated and unconnected third parties decided to become investors in the absence of public issue or advertisement.

18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word "identity" as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal

position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual *de facto* verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

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19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

20. Vicky Chaurasia, additional director of the respondent company was asked to appear before the Assessing Officer pursuant to the letter by the Commissioner (Appeals) directing the Assessing Officer to go

through the submissions and submit a report after carrying out necessary inquiries. He was asked to produce books of accounts and evidence in support. By letter dated 12th October, 2009, the respondent-assessee was asked to furnish details/information. These included details of dividend paid to the shareholders and to show and establish creditworthiness of the parties. Statement of Vicky Chaurasia recorded under Section 131 of the Act dated 5th November, 2009 has been placed on record by the respondent in ITA No. 1019/2011. He has stated that he along with Sandeep Chaurasia had been directors of the company since June, 2003 and the company was engaged in investment and finance, but he could not give details of the subscribed share capital of Rs.2 crores as it was stated that this was before he became the director. He could not also give details of how share capital got subscribed in a private limited company. Specific question was put to him regarding verification of the shareholders as the summons issued to them had by and large remained uncomplied for want of correct addresses. In response, he had stated that the company had supplied addresses of shareholders as per share application forms and in the absence of dividend or any form of return on the investment, the company was not in a position to call the subscribers for cross-examination. The company had not received any letter for change of address etc. Vicky Chaurasia stated that according to him the subscribers, who were allotted shares, continued and had not ceased to be shareholders. With regard to the past directors, he had stated that they had resigned and he was not in a position to produce the same. In the remand report, it was specifically mentioned that books of accounts were neither produced on 5th November, 2009 nor during the course of remand proceedings.

21. The Assessing Officer had issued notices by speed post to 31 parties as per addresses given by the respondent-assessee requiring them to appear for personal deposition, produce books of accounts with complete vouchers and bills and statement of bank accounts for the relevant period. In respect of 22 parties, the notice summons were received back with postal remarks "No such firm/company/person" or a few "Left without address" and a very few "Refused to accept". Remaining 9 parties neither attended and filed any application for adjournments nor filed details. Thus, it was observed that the identities had been only proved on paper, i.e., in form of neutral documents like PAN number, ITR, Registrar of Companies registration, but without full details as to the actual business activities undertaken by these companies, the reason why these companies had made investment in a private limited company etc. This coupled with the fact that there was cash deposits in their bank accounts and withdrawals were highlighted.

22. In the rejoinder filed to the remand report, it was stated that the share applicants were required to appear in person on 17th November, 2008 in response to summons under Section 131 dated 23rd October, 2009. Subsequently, fresh summons dated 30th October, 2009 were issued requiring compliance by 7th November, 2009, but the Assessing Officer had sent the remand report on 6th November, 2009 without waiting for compliance of summons. The said submission is without merit as we notice that the order of the Commissioner (Appeals) is dated 1st October, 2010, i.e., much after the date 17th November, 2009 and 7th November, 2009. A wrong year was mentioned in the earlier summons dated 23rd October, 2009. It was only a typographical error and a response or reply from the shareholder would have been sufficient. Further, in the case of 22 parties, the summons were

received back undelivered/unserved.

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23. The contention that the Revenue must have evidence to show circulation of money from the assessee to the third party is fallacious and has been repeatedly rejected, even when Section 68 of the Act was not in the statute. In *A. Govindarajulu Mudaliar v. CIT* [1958] 34 ITR 807, Supreme Court observed that it was not the duty of the Revenue to adduce evidence to show from what source, income was derived and why it should be treated as concealed income. The assessee must prove satisfactorily the source and nature of cash received during the accounting year. Similarly observations were made in *CIT vs. M. Ganapathi Mudaliar* [1964] 53 ITR 623 (SC), inter alia holding that it was not necessary for the Revenue to locate the exact source. This principle was reiterated in *CIT vs. Devi Prasad Vishwanath Prasad* [1969] 72 ITR 194 (SC), wherein the contention that the Assessing Officer should indicate the source of income before it was taxable, was described as an incorrect legal position. Thus when there is an unexplained cash credit, it is open to the Assessing Officer to hold that it was income of the assessee and no further burden lies on him to show the source. In *Yadu Hari Dalmia vs. CIT* [1980] 126 ITR 48, a Division Bench of Delhi High Court has observed:-

“It is well known that the whole catena of sections starting from s. 68 have been introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even though there were judicial decisions covering some of the aspects. For example, even long prior to the introduction of s. 68 in the statute book, courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the ITO, not satisfactory, the sums so credited could be charged to income-tax as income of the assessee of a relevant previous year. Section 68 was inserted in the I.T. Act,

24. We are conscious of the doctrine of ‘source of source’ or ‘origin of origin’ and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of ‘source of source’ or ‘origin of origin’ cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the “transaction” and that it was not entirely an arm’s length transaction, resort or reliance to the said doctrine may be counter-productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which masquerade as pretence should be exposed and not accepted.

25. In *Lovely Exports (supra)*, a Division Bench examined two earlier decisions of this court in *CIT vs. Steller Investment Ltd.* [1991] 192

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ITR 287 (Delhi) and *CIT vs. Sophia finance Ltd.* [1994] 205 ITR 98 (FB) (Delhi). The decision in *Steller Investment's case* (supra) was affirmed by the Supreme court but, by observing that the conclusion was on the facts and no interference was called for. *Lovely Exports (supra)* was a case of public limited company where shares were subscribed by public and it was accordingly observed:-

“This reasoning must apply a fortiori to large scale subscriptions to the shares of a public Company where the latter may have no material other than the application forms and bank transaction details to give some indication of the identity of these subscribers. It may not apply in circumstances where the shares are allotted directly by the Company/assessee or to creditors of the assessee. This is why this court has adopted a very strict approach to the burden being laid almost entirely on an assessee which receives a gift.”

26. Thereafter reference was made to Full Bench decision in the case of *Sophia Finance Ltd.'s case* (supra) wherein it has been observed that if the shareholders exists then, “possibly”, no further enquiry needs to be made and that the Full Bench had not reflected upon the question of whether the burden of proof rested entirely on the assessee and at which point this burden justifiably shifted to the assessing officer. The Full Bench has observed that they were not deciding as to on whom and to what extent was the onus to show that the amount credited in the books of accounts was share capital and when the onus was discharged, was not decided. The standard of proof might be rigorous and stringent and was dependent upon nature of the transaction and where there was evidence that the source of investment cannot be manipulated, it was material. Similarly, it was observed that assessee could scarcely be heard to say that he did not know the particulars of a donor in case of a gift. It was held:-

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“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 assessee it should not be harassed by the Revenues’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 Assessing Officer 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 Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; 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 Assessing Officer 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.....

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.....Once material to prove these ingredients are produced it is for the Assessing Officer to find out as to whether, on these materials, the assessed has succeeded in establishing the ingredients mentioned above. The Assessing Officer ‘lift the veil’ and enquire into the real nature of the transaction. C.I.T. v. Ruby Traders and Exporters Ltd. : [2003]263ITR300(Cal) , C.I.T. v. Nivedan Vanijya Niyojan Ltd. [2003]263ITR623(Cal) and C.I.T. v. Kundan Investment Ltd. [2003]263ITR626(Cal.) are the other three.

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 assessee 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

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Shareholders Register, Share Application Forms, Share Transfer Register etc., it would constitute acceptable proof or acceptable explanation by the assessee. (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 assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; and (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."

27. The decision in the case of *Lovely Exports* (supra) was considered in *CIT vs. Nova Promoters and Finlease (P) Ltd.* (supra) and it was elucidated:-

"38. The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case; such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessee bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence

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with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.”

28. In *Nova Promoters & Finlease* (supra), it was 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 provider, bank account statements etc. was not sufficient to discharge the onus.

29. In *CIT v. Nipun Builders and Developers* [2013] 350 ITR 407 (Del) , this principle has been reiterated holding that the assessee and the Assessing Officer have to adopt a reasonable approach and when the initial onus on the assessee would stand discharged depends upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call monies, dividends, warrants etc. have to be sent and the relationship is/was a continuing one. In such cases, therefore, the assessee cannot simply furnish details and remain quiet even when summons issued to shareholders under Section 131 return unserved

and uncomplained. This approach would be unreasonable as a general proposition as the assessee cannot plead that they had received money, but could do nothing more and it was for the assessing officer to enforce share holders attendance. Some cases might require or justify visit by the Inspector to ascertain whether the shareholders/subscribers were functioning or available at the addresses, but it would be incorrect to state that the assessing officer should get the addresses from Registrar of Companies' website or search for the addresses of shareholders and communicate with them. Similarly, creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank account. Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after due diligence or for personal reasons. Thus, finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders.

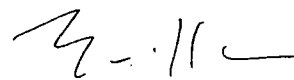
30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are

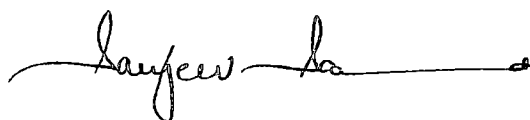
dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them. 23

31. The respondent herein is a Private Limited Company. It is not the case of the respondent that the Directors or persons behind the companies making the investment in their shares were related or known to them. It is highly implausible that an unknown person had made substantial investment in a private limited company to the tune of Rs.63,80,100/- and Rs.75,60,200/- in two consecutive assessment years 2002-03 and 2003-04 respectively without adequately protecting the investment and ensuring appropriate returns. Other than the share application forms, no other agreement between the respondent and third companies had been placed on record. The persons behind these companies were not produced by the respondent. On the other hand respondent adopted prevaricate and non- cooperation attitude before the Assessing Officer once they came to know about the directed enquiry and the investigation being made. Evasive and transient approach before the Assessing Officer is limpid and perspicuous. Identity, creditworthiness or genuineness of the transaction is not established by merely showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered

into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object and purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large.

32. In view of the aforesaid discussion the substantial question of law framed in the two appeals is answered in favour of Appellant-Revenue and against the Respondent- assessee. The appeal is accordingly allowed to the extent indicated above. The Appellant is also entitled to costs which is assessed at Rs.20,000/-


(SANJIV KHANNA)
JUDGE


(SANJEEV SACHDEVA)
JUDGE


22 NOVEMBER, 2013
NA/kkb