

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

% *Reserved on: 18th December, 2012*
Date of Decision: 7th January, 2013

+ **ITA 120/2012**

CIT Appellant
Through: Mr. Sanjeev Rajpal, Sr. Standing
Counsel
versus

NIPUN BUILDERS & DEVELOPERS PVT. LTD. Respondent
Through: Mr. Ajay Vohra with Ms. Kavita Jha
and Mr. Somnath Shukla,
Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

This is an appeal by the revenue filed u/s. 260A of the Income Tax Act. It relates to the assessment year 2004-05. The assessee is a private limited company which filed its return on a figure of loss which was accepted u/s. 143(1). On the basis of a report of the investigation wing of the income-tax department, the assessment was reopened u/s.147 on the ground that income chargeable to tax had escaped assessment, in as much as the share capital shown to have been received by the company was alleged to represent mere accommodation entries.

2. In the course of the reassessment proceedings, enquiries were sought to be made by the Assessing Officer (AO); summons u/s. 131 were issued on 14.09.2007 to the companies from whom the share capital was stated to be received and they were returned unserved with the remarks “no such

company”; the inspector sent to the addresses for verification confirmed the fact. In view of this, the assessee was asked to produce the principal officer of the companies who had subscribed to the shares along with the relevant details. In response, the assessee filed a letter dated 21.11.2007 at the “dak” counter of the office of the AO stating that all the notices of the annual general meeting and call notices for shares were being sent to the same addresses of the share subscribers under certificate of posting and they have not come back unserved, implying that the share subscribers did exist at the addresses given to the AO. It was also submitted that the capital was subscribed through account payee cheques with valid share application forms, copies of the memorandum of association and board resolutions. It was pointed out that the registered offices of the companies could be found in the website www.mca.gov.in. and the AO may visit the site for further verification.

3. These submissions were not accepted by the AO as constituting satisfactory explanation of the nature and source of the monies as required by Section 68 of the Act. He held that the genuineness of the transactions was not proved by the assessee and brought to tax the share application money of ₹1,47,00,000/- to tax; commission of 2.5% on the amount, which worked to ₹3,94,500/- was also added on the ground that the assessee would have paid the same to get the accommodation entries of share capital.

4. The assessee does not appear to have questioned the reassessment on the ground of lack of jurisdiction and the appeal before the CIT (A) was confined to the merits of the addition. The CIT (A) accepted the submissions of the assessee that enough documentary evidence had been adduced before the AO to prove the identity and creditworthiness of the share subscribers and the genuineness of the transactions and applying the ruling of the Supreme

Court in *CIT v. Lovely Exports (P) Ltd.*, (2008) 216 CTR 195; (2009) 319 ITR (St.) 5 held that the addition was not justified. He deleted it.

5. The revenue carried the matter in appeal before the Income Tax Appellate Tribunal in ITA No.557/Del/2010. The Tribunal agreed with the CIT (A) and dismissed the appeal.

6. The revenue has filed the present appeal impugning the aforesaid order of the Tribunal. The following substantial question of law is framed: -

“Whether the Tribunal was right in law in upholding the order of the CIT(A) deleting the addition made u/s. 68 of the Act on the ground that the assessee has proved the nature and source of the share subscription amounting to ₹1,47,00,000/- and has established the identity and creditworthiness of the share subscribers and the genuineness of the transactions?”

The revenue contends that the Tribunal failed to appreciate that the assessee could not establish satisfactorily the nature and source of the monies received as share capital nor could it discharge the onus of proving the identity and creditworthiness of the share subscribers and the genuineness of the transactions which are the fundamental requirements of section 68.

7. We are in agreement with the contention of the revenue. Under Section 68 the onus is upon the assessee to prove the three ingredients, i.e., identity and creditworthiness of the person from whom the monies were taken and the genuineness of the transaction. As to how the onus can be discharged would depend on the facts and circumstances of each case. It is expected of both the sides – the assessee and the Assessing authority – to adopt a reasonable approach. The assessee here is a private limited company. It cannot issue shares in the same manner in which a public limited company does. It has to generally depend on persons known to its directors or shareholders directly or indirectly to buy its shares. Once the monies are received and shares are

issued, it is not as if the share-subscribers and the assessee-company lose touch with each other and become *incommunicado*. Calls due on the shares have to be paid; if dividends are declared, the warrants have to be sent to the shareholders. It is a continuing relationship, even granting that it may not be of the same degree in which it exists between a debtor and creditor. The share-subscribers in the present case have each invested substantial amounts in the assessee's shares, as the chart at pages 2-3 of the assessment order would show. Most of them, barring two or three, are themselves private limited companies. It cannot therefore be contended, as was contended before us on behalf of the assessee, that if the summons issued u/s. 131 to the subscribing companies at the addresses furnished by the assessee returned unserved, the AO is duty-bound to enforce their attendance with all the powers vested in him. The unreasonableness of such a general proposition is writ large in the face of the contention. The assessee-company received the share monies; it even says that the communications sent by it at the addresses did not return unserved, yet when the AO requested it – that too only after trying to serve the summons unsuccessfully – to produce the principal officer of the subscribing companies, the assessee developed cold feet and said it cannot help if those companies did not appear and that it was for the assessing officer to enforce their attendance. It needs to be remembered that the AO did not merely stop with issuing summons; he followed it up with a visit by the inspector who confirmed that no such companies functioned from the addresses furnished by the assessee. Let us see the attitude of the assessee towards discharging its onus in such circumstances. It says that the AO may get the addresses from the ROC's website. We do not think that an assessee can take such an unreasonable attitude towards his onus u/s. 68, little realising that when the finding is that the subscribing companies have not been found existing at the addresses given by the assessee, it is open to the AO to even hold that the

identity of the share-subscribers has not been proved, let alone their creditworthiness and the genuineness of the transactions. It was not open to the assessee, given the facts of this case, to direct the AO to go to the website of the company law department/ROC and search for the addresses of the share-subscribers and then communicate with them for proof of the genuineness of the share subscription. That is the onus of the assessee, not of the AO.

8. So far as the creditworthiness of the share subscribers is concerned, the contention of the assessee before us is that it was proved by the bank statements of those subscribers submitted before the AO. The AO has not referred to them in the assessment order but it is not in dispute that the copies of the bank statements were furnished before him. Even assuming that the bank statements were filed before the AO, that by itself may not be sufficient to prove the creditworthiness without any explanation for the deposits in the accounts and their source. The usual argument in all such cases, including the present case, is that it is not for the assessee to prove the source of source and origin of origin of the receipts. We are alive to the difficulty that may be faced by an assessee to unimpeachably establish the creditworthiness of the share subscribers but at the same time we are of the opinion that mere furnishing of the copies of the bank accounts of the subscribers is not sufficient to prove their creditworthiness. There must be, in our opinion, some positive evidence to show the nature and source of the resources of the share subscriber himself and therefore it is necessary for him to come before the AO and confirm his sources from which he subscribed to the capital. In the present case the assessee did not produce the principal officer of the companies who subscribed to the shares; it merely filed a letter at the “dak” counter of the AO, stating that the communications sent by it to the share subscribers have not come back unserved. This is not compliance with the

direction of the AO who had issued notice to the assessee to produce the principal officers of the subscribing companies. As is well known, in the case of private limited companies, it cannot be denied that there is a continuing contact and relationship with the share holders and if the assessee was serious enough to establish its case, it ought to have produced the principal officers of the subscribing companies before the AO so that they can explain the sources from which the share subscription was made. That would also have taken care of the difficulty of the assessee in proving the creditworthiness of the subscriber companies. It was, therefore, in the assessee's own interest to have actively participated and cooperated in the assessment proceedings and complied with the direction of the AO to produce the principal officers of the subscribing companies. Instead, the assessee took an adamant, if we may use that expression, attitude and failed to comply with the direction of the AO; not only that, it challenged the AO's finding that the summons sent to the companies came back unserved with the remark "no such company", which was also supported by the report of the inspector who made a visit to the addresses. The assessee thus took a very extreme stand which was in our opinion not justified; certainly it did nothing worthwhile to discharge the onus to prove the creditworthiness of the subscribing companies.

9. We referred to the argument of the assessee that it is not part of its onus to prove the source of source and origin and origin of the share subscriptions. In addition to what we had said with reference to that argument in the preceding paragraph we cannot also help observing that the basis of the argument is perhaps the judgment of the Madras High Court in *S. Hastimal vs. Commissioner of Income Tax, Madras*, (1963) 49 ITR 273. That was a case of reassessment commenced in the year 1957 calling upon the assessee to explain a credit in his favour in the books of account of the firm, made in the year 1947. The assessee explained that he had borrowed the amount from one V in

order to provide the monies to the firm. The explanation was not accepted right up to the Tribunal. Commenting on the order of the Tribunal, a Division Bench of the Madras High Court observed as under:-

“The Tribunal however has not chosen to accept the assessee’s case on grounds which we are unable to appreciate. The Tribunal commenting upon the fact that the books of account of the assessee were kept only at Phalodi, that pakka and katcha roker of the assessee at Phalodi had not been produced, and that the necessary link between the borrowing of Vijayaram and the money brought to Coonoor had not been established. As stated already, with regard to the sum of ₹15,000, the assessee produced indisputable documentary evidence to show that the amount came out of his borrowing at Jodhpur whether it was from Vijayaram Ganeshdas or from Gowri Shankar Bagdy. The assessee has been able to point out a source for this sum of ₹15,000 and this cannot be refuted by a mere steady disability on the part of the department or the Tribunal. After the lapse of ten years the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well.”

The quoted observations will clearly explain the context and setting in which they were made. They cannot, therefore, be understood as placing an embargo on the power of the AO to ask the assessee to prove the creditworthiness of the creditor/share holder for the purpose of Section 68. In an appropriate case, if the facts and circumstances justify, it would be open to the AO to seek information from the assessee as to the creditworthiness of the creditor/share subscriber which may include information as to the sources of the creditor/share subscriber. If proving the creditworthiness of the creditor/subscriber is now judicially accepted as one of the ingredients of the onus cast on the assessee under Section 68, we do not see how proof of the resources of the creditor/share subscriber can be completely excluded from the sweep of the burden. It may not be required of the assessee to give in-depth

particulars and details about the resources of the creditor or the share subscriber, but the minimum required of him would be, in our opinion, information that will prima face satisfy the AO about the creditworthiness. Mere furnishing of the bank statements of the share subscribers without any explanation for the deposits in the accounts may not meet the requirements of Section 68. It may be necessary to know the business activities of the share-subscribers in order to ascertain whether they are financially sound and are able to purchase shares for substantial amounts; if they have borrowed monies for making the investment, whether they were capable of repaying them having regard to the nature of their business, volume of the business, etc. These are very relevant, in our opinion, to establish the creditworthiness of the investors. It is for this purpose that it is necessary for the assessee, in appropriate cases where the facts and surrounding circumstances justify, to seek the assistance of the principal officer of the subscribing companies and present him before the AO so that he will be in a position to explain in detail the source from which the shares were subscribed. A curious aspect of the matter which cannot be lost sight of is that the record reveals the assessee's ability to procure the share applicant's bank statement. This speaks volume about its conduct, and belies the argument about its inability to ensure the presence of such company's principal officers.

10. It was further argued for the assessee that the investigation report on the basis of which the assessment was reopened and which allegedly contained information that the share subscriptions received by the assessee were in fact accommodation entries was not put to the assessee for rebuttal in the course of the reassessment proceedings and so the assessee did not have any opportunity to rebut the findings therein. It is true that the assessment order does not show that the investigation report was placed before the assessee for rebuttal. But the addition cannot be deleted merely on that

ground. The investigation report which permitted the reopening of the assessment was only a starting point for the enquiry. It was not the sole basis for making the addition. Based on the material contained in the investigation wing's report, the AO had initiated an enquiry into the genuineness of the share subscription. It is because of the suspicion justifiably based on the fact that the investigation wing's report contained information as to the complicity of the companies from whom the assessee received share subscription in the racket of providing accommodation entries for commission, that the AO wanted to enquire into the matter since it is from those companies that the assessee had shown receipt of monies as share capital. In making assessments, including reassessments, the AO has to act on information or material in his possession. If he wants to make use of the material or information, it is certainly necessary according to the principles of natural justice that the information be put to the assessee for rebuttal. There is no requirement that the report of the investigation wing itself should have been put to the assessee because the report only contained material which implicated the companies from whom the assessee claimed to have received share monies in the business of providing accommodation entries for commission. It was, therefore, necessary for the AO to have the information verified because the assessee also has shown receipt of share monies from those companies. The AO had issued summons to the companies in an attempt to verify their identity, existence and the genuineness of the transaction. It was only when he failed to find the companies at the addresses furnished, that he called upon the assessee to produce the principal officers of those companies so that he can elicit the truth behind the assessee's claim. In these circumstances, it was not necessary to have put the report of the investigation wing to the assessee for rebuttal. The assessee can hardly raise the issue, having itself failed to comply with the direction of the AO and

having taken an unreasonable attitude towards the discharge of its onus. We, therefore, hold that the non-furnishing of the report of the investigation wing to the assessee was not fatal to the validity of the addition.

11. It was then contended on behalf of the assessee with considerable vehemence that there was nothing to show that the monies represented the undisclosed income of the assessee brought in under the guise of share subscription. It was submitted that it was incumbent upon the AO to show that the monies emanated from the coffers of the assessee in order to sustain the addition under Section 68. We are afraid that these are untenable propositions and were rejected at least on three occasions by the Supreme Court. In *A. Govindarajulu Mudaliar v. Commissioner of Income Tax, Hyderabad*, (1958) 34 ITR 807 such a contention was rejected in the following words:-

“Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of ₹80,000 and the other being receipt of ₹42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been, it was clearly open to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the

Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs.”

Again in *CIT v. M. Ganapathi Mudaliar*, (1964) 53 ITR 623 the Supreme Court held as follows: -

“Once it is held that an amount credited in the account books of the assessee is the income of the assessee it is not necessary for the department to locate its exact source.”

This principle was reiterated by the Supreme Court in *Commissioner of Income Tax v. Devi Prasad Vishwanath Prasad*, (1969) 72 ITR 194 wherein Shah, J. (as His Lordship then was) held as follows: -

“The question again assumes that it was for the Income-tax Officer to indicate the source of the income before the income could be held taxable and unless he did so, the assessee was entitled to succeed. That is not, in our judgment, the correct legal position. Where there is an explained cash credit, it is open to the Income-tax Officer to hold that it is income of the assessee and no further burden lies on the Income-tax Officer to show that that income is from any particular source. It is for the assessee to prove that even if the cash credit represents income it is income from a source which has already been taxed.”

The law as stated above has not undergone any change because of the introduction of Section 68 in the Income Tax Act, 1961. As observed by S.Ranganathan J in *Yadu Hari Dalmia v. Commissioner of Income Tax, Delhi (Central)*, (1980) 126 ITR 48, a decision of a Division Bench of this Court: -

“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, 1961, only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions.”

Section 68 thus only codified the law as it existed before 1.4.1962 and did not introduce any new principle or rule. Therefore the ratio laid down in the three Supreme Court Judgments is equally applicable to the interpretation of Section 68 of the 1961 Act. We may also state that the learned counsel for the assessee vaguely referred to some decisions taking the view that it was necessary for the AO, before making the addition under Section 68, to prove that the share application monies actually emanated from the assessee and represented undisclosed income of the assessee. He, however, did not cite any of those decisions. In any case the law having been laid down by the Supreme Court in the judgments cited above, we do not think that there is any merit in his submission.

12. A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the AO and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee's own monies were brought back in the form of share application money. As noted in the earlier paragraph, it is not the burden of the AO to prove that connection. There has been no examination by the Tribunal of the assessment

proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the genuineness of the transactions. No attempt was made by the Tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under Section 68. With respect, it appears to us that there has only been a mechanical reference to the case-law on the subject without any serious appraisal of the facts and circumstances of the case.

13. We, therefore, answer the substantial question of law framed by us in the negative, in favour of the revenue and against the assessee. The appeal of the revenue is allowed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JANUARY 7, 2013
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