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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 13th January, 2015

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ITA 645/2012

CIT

..... Appellant

Through: Mr.Rohit Madan, Mr.Ruchir Bhatia
and Mr.Akash Vajpai, Advs.

versus

FUNNAY TIME FINVEST LTD

..... Respondent

Through: Mr.Salil Aggarwal, Mr. Prakash
Kumar and Mr. Ravi Pratap, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The revenue claimed to be aggrieved by the order of Income Tax Appellate Tribunal (ITAT) dated 10.12.2010 whereby it confirmed the order of the CIT (Appeals). The latter had directed a deletion of the sum of ₹28,40,000/- which was added by the A.O. The substantial question of law sought to be urged is that the ITAT and CIT(A) erred in holding that Section 148 did not apply in the facts and circumstances of the case.
2. The assessee at the relevant time in A.Y. 2001-02, filed its return declaring a sum of ₹2860/-. The assessee was engaged in the business of investment in shares and fixed deposit in banks, and derived income from dividend and interest. Initially, the return was

processed under Section 143(1), thereafter assessment notice was issued to the assessee. On consideration of the material, the A.O. held that fresh share capital to the extent of ₹28.40 lac had to be added. This sum is sought to be brought to tax under Section 68 by the A.O. holding that the assessee did not furnish any satisfactory explanation, and had not, in fact, discharged the initial burden under the said provision. The A.O. had, in the course of the assessment proceedings, offered an opportunity to cross-examine one Mr. Mahesh Garg, (whose statement formed the basis for reassessment proceedings) to the assessee. Apparently, the assessee did not avail of the opportunity, and sought repeated adjournments. The CIT (Appeals) found in favour of the assessee, noticing that all the relevant particulars had been furnished in the course of assessment proceedings and that the A.O. did not choose to make any further enquiries from the investors, as seen from findings of the ITAT extracted below:

“On appeal, Ld. CIT(A) has deleted the addition on the ground that AO was not possessing any concrete material. He has just certain information supplied by the Investigation Wing exhibiting the fact that one Shri Mahesh Garg was involved in giving accommodation entries. According to the Ld. CIT(A), AO has made reference to the replies given by Shri Mahesh Garg but those questions and reply are of general nature. The AO has not given reference to any reply of Sh. Mahesh Garg where he had taken specifically the name of assessee and the amount. Apart from this assessee has time and again asked for giving an opportunity to cross examine Sh. Mahesh Garg but the AO did not provide such opportunity, rather he observed that statement of

Sh. Mahesh Garg was confronted to the assessee. Ld. CIT(A) further observed that the AO without discussing the defects in the details submitted by the share applicant directly to him in response to notice received u/s 133(6) of the Act, has just observed that these details are incomplete. According to the Ld. CIT(A) assessee has proved the identity of the creditors by giving the PAN No. confirmation, copy of the income tax return etc. AO has the information which can only give rise a suspicion about the details submitted by the assessee, effectively AO could not rebut the details submitted by the assessee. Ld. CIT(A) thereafter put reliance upon the authoritative pronouncements of Hon'ble Delhi High Court in the case of CIT vs. Value Capital Services reported in 307 ITR 334, DCIT vs. Divine Leasing and Finance Ltd. Reported in 299 ITR 268 also referred Lovely Exports 216 CTR 195. In this way Ld. CIT (A) deleted the addition."

3. The findings of the CIT (Appeals) were confirmed by the ITAT in the following terms:-

"In the light of these observations, if we examine the material placed on record by the assessee as well as the finding of Ld. CIT(A) then it will reveal that assessee has discharged its onus. The AO has just made general observation. Whatever material he was possessing it was sufficient to start the investigation, but Ld. AO instead of collecting concrete material treated that half baked information as a conclusive proof for doubting the share application money revived by the assessee in this year. As far as the decisions of the Tribunal relied upon Ld. DR are concerned we are of the view that in the case of Dhingra Global Credence Pvt. Ltd. Tribunal has made an observation on page 10 that all the papers are manufactured at the instance of assessee and do not depict the real transaction. We do not find any evidence collected by

the AO in the present case for holding so. The other two decisions are also based on appreciation of the facts in those cases. There is no ratio of law laid down in these orders. In view of the above discussion, we do not find any merit in the appeal it is dismissed.”

4. It is urged on behalf of the revenue that the failure of the assessee to cross-examine Mahesh Garg mean that the statement recorded by him on oath earlier, were, uncontroverted, and in the facts of the case, unless material in the form of bills and statements of the investors on oath were provided by the assessee, the latter could not be said to have discharged the onus that initially lay upon it under Section 68. Learned counsel relied upon the judgment of this Court reported as *CIT vs. Empire Builtech* 2014 366 ITR 110 and also judgment reported as *CIT vs. Nova Promotors & Finlease* (2012) 342 ITR 169. In those cases this Court had occasion to deal with the ruling of the Supreme Court in *CIT V. Lovely Exports (P) Ltd.* 216 ITR 195.
5. This Court has carefully considered the submissions of the revenue. Whilst the revenue could have legitimately relied upon the statement of Mahesh Garg, which sought to implicate the assessee to reopen the assessment proceedings under Section 148, to elevate that into a finding, the A.O. should have carried out some form of independent exercise as to the veracity and genuineness of the transaction furnished by the assessee. In this context, the assessee had furnished sufficient material in the form of identity documents, confirmation by the investors, copies of their return of income and bank statements and copy of the minutes of meeting of the Board of Directors of the investors wherever they happened to be companies. The least that the

A.O. was expected to do, in the circumstances, was to seek recourse to his powers and verify the material by calling statement from the banks and also calling the investors by issuing summons under Section 131. Concededly, he did not adopt that course and instead rested content in relying only upon the statement of Sh. Mahesh Garg and found that in the absence of his cross-examination, the assessee did not discharge the onus of proof which lay upon it. As noted by the ITAT in its impugned order, the onus of proof is not a static one and necessarily shifts depending upon the materials placed on record. *Lovely Exports* (supra) is authority for the proposition that the initial onus to show the genuineness of the transaction and creditworthiness of the investors is upon the assessee. Once some material is produced, is upto the A.O. to use his powers in the course of judicial proceedings, which he had undoubtedly to undertake. Plainly, in this case, he did not do so. His failure cannot be a ground for this Court to uphold the order of ITAT substantially in law, or even otherwise, on the facts.

6. The appeal being devoid of merits is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 13, 2015

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