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

+ ITA 176/2016

OM MACHINERIES PVT. LTD. Appellant
Through: Mr. Piyush Kaushik, Advocate.

versus

COMMISSIONER OF INCOME TAX V Respondent
Through: Mr. Rahul Chaudhary, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **08.11.2016**

The assessee is aggrieved by the Income Tax Appellate Tribunal's (ITAT) order which set aside the appellate commissioner's order, adding back ₹30 lakhs to the assessee's income under Section 68 of the Income Tax Act. The assessee, therefore, urges that the ITAT fell into error in the circumstances in reversing the judgment of the CIT (A).

The assessee had claimed in its return for assessment year 2008-09 that ₹30 lakhs was invested by some share applicants towards issuance of shares. The assessee company had issued 30,000 equity shares at a premium of ₹90 per share. Meanwhile, the assessee claimed to have received ₹30 lakhs from three companies as share application money. The Assessing Officer examined these

transactions to determine whether addition under Section 68 was justified and concluded that it was. In doing so, he took note of a search report made under Section 132 on the basis of which the assessee's Directors were asked to present themselves and reply to queries. The AO noted that the amounts invested by the share applicants emanated from some of the companies in which one Mr. Tarun Goyal was the promoter. In the course of the search proceedings, that individual had admitted that transactions reported by the ninety companies were bogus.

The CIT (A) held that the AO did not examine the facts from their proper perspective and that the assessee had disclosed all material facts relating to the identity of the share applicants, genuineness of the transactions and the credit worthiness of the investors. The ITAT reversed that order and held as follows: -

“Respectfully following the ratio laid down by Hon’ble High Court in the case of Nova Promoters and Finlease (P) Ltd. (supra), we hold that Ld. CIT (A) is not justified in deleting the addition of Rs.30 lacs inasmuch as the respondent assessee had failed to establish conclusively three essential ingredients ‘identity, genuineness and creditworthiness’ of share applicants. Further, Ld. CIT (A) had also failed to notice that the respondent assessee company failed to produce the Directors of share applicants before the A.O. As held by Hon’ble Jurisdictional High Court in the case of Nova Promoters and Finlease (P) Ltd. that the ratio laid down by Hon’ble Supreme Court in the case of Lovely Exports Pvt. Ltd. is not applicable and Cit (A) adopted wrong approach in allowing the appeal by holding that the A.O. had failed to point out source from which money was received by the assessee company before making addition u/s 68. This observation goes against the ratio laid down by Hon’ble Supreme Court in

the case of A. Govindarajulu Mudaliar Vs. CIT 34 ITR 807 (S.C.), this argument advanced by the assessee was rejected by the Hon'ble Supreme Court Venkatarama Aiyar J., speaking for the court, observed as under (at page 810):

“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 recipes are shown in the account books of affirm 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 Rs.80,000/- and the other being receipt of Rs.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 were 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 receipt 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.

The assessee contends that the impugned order cannot be

sustained firstly because the statement of Mr. Tarun Goyal was never provided and that the basis of the AO's order is nothing other than the search and survey report. It is also stated that no independent enquiry was conducted by the AO to conclude that the amount could be added back and brought to tax under Section 68.

The discussion by the AO of the material facts may be found in paragraph 10-12 of his order. The AO was of the opinion that the assessee failed to furnish substantive evidence regarding credit worthiness of the alleged investors which was keeping in mind the fact that the Directors who had furnished confirmations did not come forward in answer to the notice. The AO also held: -

“d. Keeping in view of the Balance Sheet of the assessee company and its nature of business no prudent business man can invest his money in the assessee company at 10 times of its face value of shares where there is no scope of earning return and where number of opportunities are available in the market to earn profit from the money.

e. If the alleged transaction are genuine and the alleged share subscribers have actually made investment in the assessee company and they are still the share holders of the assessee company, why there Directors are not come forward to accept their claim and give answer to the queries of this office and why the signatory of these companies have admitted before the investigation wing that they were only signing the documents on the behest of Sh. Tarun Goyal.

f. Their Lordships in the case of Lovely Exports have dismissed the SLP filed by the department. However, while dismissing the SLP, their Lordships have also stated that they find no infirmity with the impugned judgment given by the Hon'ble Delhi High Court. Therefore, the observations of their Lordships have to be read with the enunciation of law on

the subject by the Hon'ble High Court. The Hon'ble High Court in its decision in the said case (299 ITR 268) having analyzed the decisions of the various High Courts as well as the decision of the Apex Court in Commissioner of Income Tax vs. Stellar Investment Ltd., (2001) 251 ITR 263 (SC), distilled the precedents in para 16 of the judgments and has clearly enunciated that all the three ingredients of the section 68, (identity and credit worthiness of the investors and genuineness of the transactions) have to be proved. The following observations made by the Hon'ble High Court in para 21 of the judgment, are note-worthy.

“But we hasten to clarify that the statement of law made by the ITAT to the effect that in case of share capital no additions could be made if it is established that the share holders exist is not completely correct, and has not been so enunciated by this Court in Sophia Finance”.

Having regard to the factual nature of the findings and the circumstances that the AO carried out an exhaustive analysis of the materials before him which reveals that the company's credit worthiness and the identity of the share applicants was suspect, no question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

NOVEMBER 08, 2016

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