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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgement delivered on: 15.12.2016

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ITA Nos.547, 549 & 555/2013

COMMISSIONER OF INCOME TAX (CENTRAL)-IAppellant

Through: Mr. Mayank Aggarwal, Advocate for
Mr.Ajit Sharma, Advocate.

Versus

M/S RUSSIAN TECHNOLOGY CENTRE (P) LTD..... Respondents

Through: Mr. Rudra Kahlon, Advocate.

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ITA Nos.596, 597, 598, 599, 600 & 601/2015

PR. CIT

....Appellant

Through: Mr. Dileep Shivpuri and Mr. Vikrant A.
Maheshwari, Advocates.

Versus

CLARIDGES HOTELS (P) LTD. Respondents

Through: Mr.Aryama Sundaram, Senior Advocate
with Mr. Sandeep Kapur and Mr. Ajay
Wadhwa, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.:-

1. These appeals have been preferred by the Revenue under Section 260-A of the Income Tax Act, 1961 (hereinafter to be referred as 'the Act') against the common order dated 12.04.2013 passed in ITA Nos. 4932,4933, 5390 & 5391/Del/2011 and the common order dated 30.09.2014 passed in ITA

Nos. 4629,4630,4631,4632,4633 & 4707/Del/2013, whereby the Income Tax Appellate Tribunal ('the Tribunal') had allowed the assessee's appeal and deleted the additions made by the Assessing Officer ('AO').

2. The relevant facts of the case pertaining to the appeals filed in 2013 are that pursuant to the search proceedings under Section 132 of the Act conducted at the office and residential premises of the assessee, a reassessment order was passed by the AO under Section 153A of the Act, whereby *inter alia* additions of various amounts were made under Section 68 of the Act for Assessment Years (AYs) 2002-03, 2003-04, 2005-06 and 2007-08. These amounts, being primarily towards monies received from various companies as well as disallowances of expenditure, were debited to the profit & loss account for AYs 2002-03, 2003-04 and 2005-06. For AY 2007-08 disallowance of interest of ₹75,47,897/- on unsecured loans was added under Section 68 of the Act and an amount of ₹1,51,200/- which was expended on the foreign guests was added.

3. Apropos the appeals filed in 2015, a similar reassessment order was passed pursuant to the search proceedings under Section 132, whereby *inter alia* additions of various amounts were made under Section 68 of the Act for Assessment Years (AYs) 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10. These amounts were primarily towards share application money received from various companies. The AO made additions/disallowance of Rs. 7,05,00,000/- on account of unexplained share capital/share application money received by the assessee company from Paradigm Hotel Pvt. Ltd. (an Indian company) and of Rs. 69,26,313/- on account of unexplained/unaccounted income of the assessee company for the period under consideration pertaining to the payments made to M/s Y2 Space Pte Ltd, with the total tax effect being 2.76

Crore. The ITAT, while dismissing the appeals of the Revenue, had relied upon its order in ITA Nos. 4932 & Ors./Del/2011, which too is in appeal in these proceedings.

3. This Court had framed the following questions of law:-

“1. Did the Tribunal fall into error in holding that the assessee had established the genuineness of the transaction and the credit worthiness of the foreign investor, given the circumstances of the case?; and

2. Are the findings of the Tribunal on this score perverse on the face of the record?”

4. The assessee company is a subsidiary of M/s Russian Technology Centre Holding Ltd. (for short ‘RTCHL’), based in Tortola BVI, which had received various amounts towards share capital and increase in unsecured loans from RTCHL and M/s Protex Trading Company Ltd. The latter company is based in the Republic of Seychelles. The additions received from the Russian based promoter company in AY 2002-03 amounted to ₹24,44,300/-. The additions received from RTCHL and Protex Trading Co. Ltd in AYs 2005-06 and 2007-08 amounted to ₹55,44,000/- and ₹1,17,72,500/- respectively. For the said receipts, the AO had sought details of the depositor’s bank accounts along with the cheque number and date; copy of the acknowledgment of return of income etc. The assessee by its letter dated 23.12.2008 had replied that the shares had been allotted to foreign companies as per the chart detailing the addresses, shares allotted and amounts paid, which was annexed as Annexure-I to the said letter. To prove the genuineness and identity of the shareholders, the assessee also furnished the following documents:-

- “1. FIPB Approval dt. 16 September 1998 received by the Company authorizing to raise share capital up to (USD 3 lakhs.)*
- 2. Copy of certificates of incorporation of share holders*
- 3. Copy of bank statement*
- 4. Copy of Form 2 filed before ROC”*
5. The assessee also submitted that apropos squared-up loans, it accepted a loan of ₹5,00,000/- from M/s Tsunami Technologies India P. Ltd by a Demand Draft drawn on Union Bank of India, Vasant Vihar. The relevant documents in this regard were furnished. However, the AO, for reasons best known to him, was not satisfied by the aforesaid details and proceeded to add ₹5,00,000/- towards the unsecured loans and ₹55,44,000/- towards capital loss as being unexplained. Thereafter, in his appeals against the aforesaid additions, as well as in respect of AY 2007-08, the assessee produced the following additional documents under Section 46 of the IT Rules:-

“(i) Attested copy of Certificate of Incorporation of M/s Russian Technology Centre Holding Ltd.

(ii) Attested copy of Certificate of Incumbency of M/s Russian Technology Centre Holding Ltd.

(iii) Attested copy of Certificate of Good Standing of M/s Russian Technology Centre Holding Ltd.

(iv) Director Certificate of M/s Russian Technology Centre Holding Ltd.

(v) Balance Sheet of M/s Russian Technology Centre Holding Ltd. for the calendar year 2004 and 2005”

6. The Commissioner of Income Tax (Appeals), [CIT(A)] had disallowed the additional documents and the appeal. In doing so he relied upon the decision of the Gujarat High Court in ***N.B. Surti Family Trust Vs. CIT [2007] 288 ITR 523*** to hold that when the evidence is new and the assessee could not give any explanation as to why the additional documents could not be produced at the earlier stages, the Tribunal would be justified in sifting out of all such evidence. Hence, he declined to admit the additional evidence furnished by the assessee. The Tribunal, however, held that the issue of additional evidence was treated by the CIT(A) in a strange and unjustified manner because on the one hand the CIT(A) had held that although the evidence was sought to be filed without prejudice nevertheless the CIT(A) went on to hold that the additional evidence neither explained the creditworthiness of the shareholders nor the genuineness of the transactions. Hence, in a way, the CIT (A) had given a finding on the merits of the additional evidence which itself would lead to the conclusion that the additional evidence had been admitted by the CIT(A). The relevant portion of the impugned order reads as under:-

“7. Apropos the grounds about additional evidence, we have heard rival contentions and perused the relevant material on record. The assessee had already filed various documents in respect of identity, genuineness and creditworthiness of the shareholders. In our considered view when the assessee is able to make out a case of insufficient time for complying with the requirement, the additional evidence is to be admitted as per the prescription of Rule 46A. Besides, the remand was called by CIT(A) from assessing officer and further assessee was asked to file the rejoinder thereon. After consideration of entire material

in this behalf, the CIT(A) has given findings on the contents of the additional evidence. In our view, all these circumstances lead to a conclusion that CIT(A) considered the additional evidence and gave a finding on merits against assessee. Thus, the consideration of additional evidence by CIT(A) appears to be inbuilt in the order. In any case to avoid any controversy in facts and circumstances of this case, we are of the view that assessee was prevented by sufficient cause in filing the additional documents before assessing officer and they should have been admitted by CIT(A) as additional evidence under Rule 46A. In view of these facts and circumstances, though in our view the additional evidence has been technically admitted by CIT(A) by commenting on the merits of the additional evidence, however, we accept the plea of the Id. Counsel for the assessee that as a matter of abundant caution, the additional evidence be admitted, more so when the comments of both the lower authorities i.e. assessing officer and CIT(A) are on record. Thus, these grounds of the assessee in respect of admission of additional evidence are allowed.”

7. The Tribunal further noted that:-

“8.1. The FIPB further authorized the assessee company to raise capital upto Rs. 600 crores without approaching it for further approvals. This approval was given vide letter dated 20.12.2005. The assessee also, filed the Certificate of Incorporation of RTCHL and a detailed confirmation by RTCHL and M/s Protex Trading Company Ltd confirming the remittance of Rs.54,44,000/- towards share capital of the assessee company. The assessee contended that the money came in through banking channels and a copy of the Foreign Inward Remittance Certificate was also filed wherein it was specifically stated that the money's have come in towards share capital in the assessee company and the same had been remitted by RTCHL. The name of the banks involved was also given in the Certificate. The

assessee company filed documentary evidence to show that the increase in share capital was intimated to the Registrar of Companies in the requisite form.

8.2. *This was sought to be explained by the assessee by submitting following documents before the assessing officer:*

(i) FIPB approval dt 16 September 1998 authorising the company to raise share capital upto USD 3 Lakhs.

(ii) Amendment to FIPB approval dt 09-06-2004

(iii) FIPB approval dtd 20-12-2005 received by the company authorizing to raise share capital upto Rs. 600 Crores

(iv) Copy of certificates of incorporation of shareholders

(v) Confirmation given by remitter towards remittance for share capital

(vi) Copy of FIRC

(vii) Copy of bank statements

(viii) Copy of Form 2 filed with ROC”

8. The Tribunal considered the contentions of the assessee that:-

“(ii) The assessing officer has failed to consider the Hon'ble Supreme Court judgment in the case of Lovely Exports and various other judgments which describe the primary burden cast on the assessee while proving the share application money. Ignoring various documents procured from FIPB confirmations, ROC records, vehement insistence has been made only on the bank statements of the shareholders. According to ld. Counsel when the burden of the assessee can be amply proved from the documents filed by it, cash credit/share application money cannot be held to be non-genuine without adjudicating them and picking up

the non-filing of bank statements of shareholders. The assessing officer has a quasi judicial duty to weigh the quality of evidence produced before it and if it is sufficient to discharge the burden of assessee, the same cannot be cryptically disregarded in the pretext of document which was not filed by the assessee.”

9. It then concluded that:-

“11.7 Taking into consideration of all the above, we find merit in the argument of the ld. Counsel for the assessee .that the primary burden cast on the assessee was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the assessee is also to be decided on the basis of documents filed by the assessee and facts and circumstances of each case and on that basis a reasonable view is to be taken as to whether the assessee has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and genuineness of the transaction. From the documents filed during the course of assessment and before CIT(A), the independent existence of the share applicants in Russia is clearly established. The assessee's application to FIPB for raising the capital contains all the relevant details which is favourably accepted by the Board, particularly by allowing the assessee to raise further the capital without approaching the FIPB. The transactions are through banking channels. Thus the gamut of evidence does not leave any doubt in the discharge of primary burden of the assessee. On the issue CBDT Circular and Finlay Corporation judgment (supra) also we are in agreement with the ld. Counsel for the assessee that in these circumstances of the case moneys remitted by non-residents through banking channel outside India has to be held as capital receipts, not exigible to tax and cannot be treated as deemed income on the fictions created by sections 68 and 69 of the Act. In consideration of all these observations, we are inclined to hold that the share application money as raised in the grounds of appeal

cannot be held as non-genuine and added as income of the assessee u/s 68 of the Act. Consequently, additions made on this count, as raised in grounds of appeal, are deleted. Assessee's grounds of appeal on this issue are allowed.

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14. We have heard rival contentions and perused the relevant material available on record. For A.Y. 2002-03 & 2003-04 the assessee, was not granted registration as vendor by the Ministry of Defence as suppliers. Besides, no supply pad taken place. It appears that assessee was making efforts to establish its business for which prior registration from Ministry of Defence was necessary. Since assessee could not get registration, it cannot be held that till 31-3-2003 the assessee had set up its business also. In view thereof, we hold that for A.Y.2002-03 and 2003-04, the expenditure has been rightly disallowed, as in our view business of the assessee was not set up.

14.1. Apropos A.Y. 2005-06, the assessee had obtained the registration and participated in the tenders invited by the Ministry of Defence for which necessary evidence, has been referred in the form of correspondence demonstrating the negotiations at various stages. Thus, in A.Y. 2005-06, the assessee was in a state of readiness to obtain the orders if found successful for tendering/bidding. Thus, we hold that in A.Y. 2005-06 the assessee had set up its business and respectfully following the judgment of Hon'ble Delhi High Court in the cases of ESPN Software India P. Ltd. (supra); CIT Vs. Hughes Escorts Communications Ltd. (supra); and Aspentech India (P) Ltd. (supra), the business of the assessee for A.Y. 2005-6 was already set up and the expenditure incurred by it is to be allowed as revenue expenditure.

15. Next ground for A.Y.2005-06 pertains to addition of Rs.5 lacs being unsecured loans received by the assessee

from M/s Claridges SEZ Pvt. Ltd. (CSEZ), as assessing officer held that creditworthiness of M/s CSEZ was not established as the assessee had not produced the bank statements.

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17. We have heard rival contentions and perused the relevant material on record. We find merit in the arguments of ld. Counsel that CSEZ also being searched on the same date and the seized record being with the department, department could have verified the same from its record. The interest of justice will be served if the issue is remitted back to the file of assessing officer to verify from the seized record about the bank statement of CSEZ and decide the issue after giving the assessee fair and reasonable opportunity of being heard. The assessee may be allowed to submit necessary evidence in this behalf. This ground of the assessee is allowed for statistical purposes.

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22. We have heard rival contentions. From the orders of both the lower authorities, the names of the persons whose interest payment has been disallowed, has not been given. Besides, we have deleted additions made u/s 68 in respect of above parties. In the absence of the details about disallowance of interest, it will not be possible for us to adjudicate this ground. Therefore, we set aside the issue of interest of Rs.7,54,797/- back to the file of assessing officer to decide the same afresh, considering our conclusion on applicability of sec. 68, commencement of business in 2007-08, after giving the assessee reasonable opportunity of being heard. In view of above, this ground is allowed for statistical purposes.”

10. The learned counsel for the assessee relied upon the judgment of this

Court in ***Commissioner of Income Tax Vs. Divine Leasing & Finance Ltd. 2008 (299) ITR 268 (Del.)*** to contend that the assessee had furnished all relevant documents which should have been considered to prove the creditworthiness of the creditor/subscriber and the genuineness of the transactions.

11. In ***Divine Leasing & Finance Ltd.***'s case (*supra*), this Court had held as under:-

“13. 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 Revenue'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 sections 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessee: if the Assessing Officer 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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16. *In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the Income Tax 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 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. (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”*

12. The preceding enumeration of the circumstances of the case show that the assessee had furnished all relevant data before the AO and the CIT(A), which, however, were not inquired into by the AO. Instead he obdurately adhered to his first impression and/or initial understanding that the entire transaction was neither creditworthy nor genuine. The assessee relied upon the documents to prove that the monies had been received through banking channels from its principal and other related companies; it had submitted the FIPB Approval dated 10.12.2005 authorizing the assessee company to raise capital upto ₹600 crores, copy of certificates of incorporation of share

holders, copy of bank statement, copy of Form 2 filed before ROC, copies of Certificates of (i) Incorporation of RTCHL, (ii) Incumbency of RTCHL, (iii) Good Standing of RTCHL, (iv) Director Certificate of RTCHL as well as the Balance Sheet of RTCHL for the years 2004-05 and the confirmation given by the remitters towards remittance of share capital etc. This was all that the assessee could have furnished in the circumstances. It could not be expected to prove the negative that the monies received by it were suspicious or not genuine infusion of capital etc. The assessee had discharged its burden of proof in terms of the settled dicta in *Divine Leasing* (supra). It is only logical to expect that if the AO was not convinced about the genuineness of the said documents, he would have inquired into their veracity from the bank(s) to ascertain the truth of the assessee's claims. Having not done so, he was not justified in disregarding the assessee's contentions that the infusion of monies into its accounts was legitimate. Consequently, the AO was not justified in making additions of the various sums under Section 68 of the Act.

13. In view of the above, this Court is of the view that the conclusion of the Tribunal in deleting the additions made cannot be faulted. Accordingly, the questions of law are answered against the Revenue and in favour of the assessee. The order of the Tribunal is, therefore, affirmed.

14. Resultantly, the appeals are dismissed.

NAJMI WAZIRI, J.

S. RAVINDRA BHAT, J.

DECEMBER 15, 2016/sb