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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 169/2017, C.M. APPL.7385/2017

PR. COMMISSIONER OF INCOME TAX-5 Appellant
Through: Sh. Rahul Chaudhary, Sr. Standing
Counsel with Ms. Lakshmi Gurung, Advocate, for
appellant.

Versus

LAXMAN INDUSTRIAL RESOURCES LTD. Respondent
Through : Ms. Monika Ghai and Ms. Shayamlima
Borha, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER
14.03.2017

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The Income Tax Appellate Tribunal's (ITAT) order upholding the Appellate Commissioner's opinion that the additions made in the course of reassessments were unsustainable, were challenged by the Revenue. The reassessment notice was issued to the assessee for AY 2002-03 on the ground that information received from the Investigation Wing pointed to its being the beneficiary of the accommodation entries that were subjected to addition under Section 68. The Assessing Officer (AO), in the reassessment proceedings, added a sum of ₹70,77,290/- . Upon appeal, the CIT(A) took note of the materials filed by the assessee and provided an opportunity to the AO to remand proceedings. The AO merely objected to the materials furnished but did not undertake any verification. The CIT(A), found favour with the assessee, and directed that the amounts brought to tax

should be deleted *inter alia* observing as follows:

“.....Reliance is placed on the following decisions of the Apex Court and the jurisdictional High Court of Delhi:-

- (i) CIT v. Lovely Exports (P) Ltd. 2008 (216) CTR (SC) 195;*
- (ii) CIT v. Divine Leasing & Finance Ltd. 2007 (299) ITR 268 (Del). Hon'ble Delhi High Court in paras 13 & 16 has 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.

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.

iii) *CIT vs. Value Capital Services Ltd.* (2008) 307 ITR 334 (DeI.) – Hon'ble Delhi High Court has held as under:-

"5. While setting aside the order of the Commissioner of Income-tax (Appeals), the Tribunal relied upon two decisions of this court, namely *CIT v. Stellar Investment Ltd.* [1991J 192 ITR 287 and a Full Bench decision in *CIT v. Sophia Finance Ltd* [1994] 205 ITR 98. Several other decisions have been rendered by this Court following the above two decisions. The principle that has

been laid down by the various decisions rendered by this Court from time to time is that if the existence of the applicant is proved, normally no further inquiry is necessary.

6. Learned counsel for the Revenue submits that the creditworthiness of the applicants can nevertheless be examined by the Assessing Officer. It is quite obvious that it is very difficult for the assessee to show the credit-worthiness of strangers. If the Revenue has any doubt with regard to their ability to make the investment. Their returns may be reopened by the Department.

7. In any case what is clinching is the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. This has not been done in so far as the present case is concerned and that has been noted by the Tribunal also.

8. Under the circumstances, we are of the view that the Tribunal has not committed any error in deleting the addition.

9. No substantial question of law arises "

iv) CIT vs. TDI Marketing Pvt. Ltd. (2009) 26 DTR (Del.) 358; and

v) Bhav Shakti Steel Mines (P) Ltd. v. CIT (2009) 179 Taxman 25. wherein the Hon'ble Delhi High Court has observed as under:-

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"In any event we also note that the Supreme Court in the case of CIT v. Lovely Exports (P) Ltd. [2008] 216 CTR

195 considered the question as to whether the share application money can be regarded as undisclosed income under Section 68 of the Income Tax Act, 1961. The Supreme Court dismissing the SLP observed that if the share money is received by the assessee company from alleged bogus shareholders whose names are given to the Assessing Officer, then the Department is free to proceed to assess them individually in accordance with law. The Supreme Court did not find any infirmity with the impugned judgment of the High Court which was a common order along with the decision in CIT v. Divine Leasing & Finance Ltd. [2008] 299 ITR 268 (Delhi). Since the Commissioner of Income-tax (A) has not only found that the identity of each of the shareholders stood established, but has also examined the fact that each of them were income-tax assesseees and had disclosed the share application money in their accounts which were duly reflected in their Income-tax return as well as in their balance sheets. In these circumstances we see merit in what the learned counsel for the appellant has submitted and we feel that the Tribunal was unjustified in coming to the conclusion that the CIT(A) had not considered the matter in the right perspective. Consequently, we decide the question in favor of the assessee and set aside the order passed by the Tribunal.”

5.4 In the present case the assessee can be said to have discharged its onus under section 68 of the Act. The appellant has given all the necessary details in order to establish the identity of the share applicants. After considering the entire material placed on record, it is fair to conclude that the share applicants were existing parties and the payments were made through banking channels, It is also observed that the Assessing Officer could not point out any discrepancy in the evidences relied upon by the assessee, He has neither brought out any direct or inferential evidence to contradict the

contention of the assessee. It is further observed that even though A.O. has vast powers u/s 131 and 133(6) of the Act, he has not used any of his powers to verify the genuineness of the claim of the assessee by verifying the documents furnished by it. If A.O. had doubted the impugned transaction after receiving the evidences (in the remand proceedings in terms of Rule 46A(3) of the Income-tax Rules, 1962) which had been produced by the assessee in support of its claim it was very much open to the A.O. to do his independent enquiry and verification, This has not been done by the A.O. Though, the share-applicants could not be examined by the AO, since they were existing on the file of the Income Tax Department and their income-tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective AOs having jurisdiction over them (share-applicants), which has not been done by him.

5.5 The AO has also given a finding that all the share-applicants were entry operators as per the information available on the basis of the investigation conducted by the Investigation Wing of the Income Tax Department. As contended on behalf of the appellant. the I.d. Assessing Officer did not provide any such information to the assessee to rebut the adverse material if any and he did not afford any opportunity of cross examination of all the adverse material on the basis of which impugned addition has been made in the assessment order. It is settled proposition of law that the information gathered behind the back of the assessee cannot be used against him unless until an opportunity of rebutting the same is given to the assessee, It is against the principle of natural justice. Reliance is placed on the decision of Hon'ble Supreme Court in case of Prakash Chand Nahta v. Union of India [2001] 247 ITR 274 in

support of the proposition that cross-examination of the witness is must, before the AO relies on the on the statement of the witness for making addition. 'Reliance is also placed on the decision of Allahabad High Court in the case of nathu Ram Prcmchand v. CIT [1963] 49 ITR 561, wherein the Hon'ble Court explained that it was the duty of the Assessing Officer to enforce the attendance of a witness. if his witness is material in exercise of his powers under order 16. Rule 10 of CPC and where the officer does not do so, no inference can be drawn against the assessee. Reliance is also placed on the decision of the jurisdictional High Court, i.e. Delhi High Court in CIT v. Pradeep' Kumar Gupta and- Vijay Gupta (2008) 303 ITR 95 (Del) wherein it was held that reopening of assessment is not permissible on mere adverse statements from others. Such statement by itself does not constitute information. unless the Assessing Officer has made enquiries thereon and inferred understatement or Income. Iam therefore inclined to agree with the submissions made on behalf of the appellant to the effect that the information ,if any, gathered behind the back of the assessee without being subjected to crossexamination cannot be fully admitted as evidence against the assessee.

5.6 Under the facts and circumstances of the case stated above, it is held that the addition of Rs. 70,00,000/- can not be sustained and accordingly, the same is directed to be deleted. The consequential addition on account of commission of Rs.70,000/- for obtaining the said accommodation entries is also directed to be deleted. As a result, grounds no.5,6,7,8 and 9 are allowed.”

The ITAT confirmed the opinion of the CIT(A).

It is argued by the Revenue that the ITAT should have taken appropriate steps and remitted the matter, not merely confirming the

CIT(A)'s opinion since the Investigation Wing's report confirmed unequivocally that the assessee was beneficiary to bogus transactions whereby the genuineness of identity of the shareholders, the genuineness and identity of the share applicants and the genuineness of transactions was suspect.

This Court notices that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case. No substantial question of law arises. The appeal is dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

MARCH 14, 2017/ajk