

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

Decided on: 08.01.2018

+ **ITA 9/2018**

PRINCIPAL COMMISSIONER OF INCOME TAX-7..... Appellant
Through : Sh. Sanjay Kumar, Standing Counsel.

versus

ORIENTAL INTERNATIONAL CO. PVT. LTD. Respondent
Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHALWA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%

1. The Revenue is aggrieved by an order of the Income Tax Appellate Tribunal (ITAT). The ITAT confirmed the order of the CIT(A) who had set aside addition made to the extent of ₹5 crores under Section 68 of the *Income Tax Act, 1961* [hereafter “the 1961 Act”].

2. The assessee had claimed that these amounts were received as share application money from various parties, i.e. M/s. Creative Financial Services Pvt. Ltd.; M/s. Rahul Finlease P. Ltd.; M/s. Shri Niwas Leasing Finance Ltd.; M/s. Meghdoot Express P. Ltd. and M/s. Niti Housing Development and Finance Corporation Ltd.

3. The Assessing Officer (AO) was of the opinion that such large amounts of share application money need to be probed further and, therefore, required the assessee to furnish particulars, which it did.

4. The assessee *inter alia* provided details relating to the share

application money provided by each of the entities - confirmation letters; board resolutions from each company; PAN card details; copies of the Memorandum and Articles of Association; Forms 18 and 32 and audited financial statements for the years 2004, 2005 and 2006; copies of pay orders which were used for the share application money. In addition, affidavits of Directors and share investors were also furnished.

5. The AO was not satisfied with the materials furnished and held that the assessee had not discharged the onus/burden of proving the genuineness of the identity of the applicants, the genuineness of the transactions or the creditworthiness of the investors as required by the decision in *CIT v. Lovely Exports P. Ltd.* 216 ITR 195 (SC).

6. Aggrieved, the assessee appealed to the CIT(A). By an order dated 02.08.2010, the CIT(A) examined all the materials afresh and held that further material in the form of documents pertaining to the share applicant companies had been provided, which however, were not examined by the AO while confirming the assessment. The CIT(A) was of the opinion that the AO gave undue importance to the statements given by Mr. Mahesh Garg, Ms. Rekha Garg and Mr. Vinod Garg and one Mr. Suresh Kumar Jain, Director of M/s. Creative Financial Services Pvt. Ltd. The relevant findings of the CIT(A) are as follows:

“.....After careful consideration of above facts. I am of the view that in view of various judgements of jurisdictional High Court as well as of Hon'ble Supreme Court, no addition on account of share application money (received from other corporate entities/parties) can be made in the hands of the appellant company. The assessing officer has not effected any enquiries to bring out any facts which could suggest that these parties have given accommodation entries to the appellant and

that the money received from these parties is appellant's own undisclosed income and routed back to the appellant company in the guise of share application. Even appellant has not been provided with an opportunity to cross-examine the so called entry providers. He has simply relied upon the statement given by Sh. Mahesh Garg, Ms. Reba Garg and Sh. Vinod Garg to Investigation Wing of the Department in the year 2003. No concrete efforts have been made to verify the facts stated therein. On the contrary, the appellant has filed copies of share application forms which contained names, addresses, PAN, bank details, confirmations of the investors, copy of the annual returns and returns of allotment filed with the Registrar of Companies, etc. and hence, in view of various judicial pronouncements, no addition can be made in appellant's hand. In the case of Addl. CIT v. Hanuman Pd. Aggarwal 151 ITR 151 (Parna) it was held that assessee having furnished the correct name and address of the creditor, having confirmatory letter from the creditor and all materials show prima facie not only identify of the creditor but also the genuineness of the transaction, no adverse inference can be drawn. Reference can also be made to the judgement of Hon'ble Apex Court in the case of Steller Investment Ltd. (2001) 251 ITR 263 (SC) wherein it was held that even if the subscribers to the increased share capital of assessee company were not genuine, the amount could not be regarded as undisclosed income of the assessee company. The above view point of the Hon'ble Apex Court has also been expressed by Jurisdictional Delhi High Court in the case of Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Del), A-One Housing Complex Ltd. vs. ITO 110 ITD 361 (Del), CIT vs. Value Capital Service Pvt. Ltd. 307 ITR 334 (Del) and CIT vs. General Exports and Credits Ltd (2008) 299 ITR 268 (Del). In the case of CIT vs. Lovely Exports Pvt. Ltd. (2008) 299 ITR 268 (Del), the Delhi High Court held that once the identify of the share holder has been established, even if there is a case of bogus share capital, it can not be added in the hands of the company unless any adverse evidence is no record. The Hon'ble Delhi High Court in the case of CIT vs. Divine Leasing & Finance Ltd. (supra) has laid down the law on the subject as to

what is the extent of the burden that lies on the assessee to prove the cash credit in the share of share capital. The Hon'ble Court held that "if the relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with the copies of share holder's register, share application money forms, share transfer register, etc, it would constitute an acceptable proof or acceptable explanation by the assessee. The Department would not be justified in drawing an adverse inference only because the creditors/subscribers fails or neglects to respond to its notices. The onus would not stand discharged if the creditors/subscriber denies or repudiates the transaction set up by the assessee."

7. The CIT(A) was also of the opinion with respect to M/s. Creative Financial Services Pvt. Ltd that the AO did not complete the task assigned diligently in that the master details furnished to him were neither examined nor controverted. The CIT(A) was of the opinion that the assessee had discharged the onus to prove the identity of the concerned share applicants, i.e. M/s. Creative Financial Services Pvt. Ltd. as in the other cases. The ITAT, by the impugned order, re-examined the materials afresh and affirmed the findings of the CIT(A). It was held *inter alia* as follows:

"10. We have heard the rival submissions and perused the judgments relied upon by the both the parties. In the case of M/s Creative Financial Services Pvt. Ltd., the assessee has submitted before the AO that Sh. Suresh Chand Garg, who has denied on behalf of the company to have made any transaction with the assessee company was not a director of the share subscriber company when the share capital was subscribed. The assessee has given particulars of all the directors of the aforesaid company since its incorporation vide letter dated 30.12.2009. The master details available from the ROC also clarifies that the said Sh. Suresh Chand Garg was neither the promoter nor the original director. The share application money was invested on the basis of the resolution of Board of

Directors of the aforesaid company. In the said resolution, Sh. Deepak Changia was authorized to execute documents for the purpose of subscription to share capital. It is relevant to note that Sh. Deepak Changia was the Director of the company from the year 2003 and thereafter. The said facts have not been rebutted by the AD. Moreover, the authorized representative of the assessee was denied the opportunity to cross examine Shri Suresh Chand Garg. The reliance placed by the AO on the statement of Sh. Suresh Chand Garg in the absence of cross examination is incorrect. The law with respect to cross examination is well settled in view of the judgment passed by the Hon'ble Delhi High Court in the case of CIT Vs. SMC Brokers Ltd. 288 ITR 245. The said statement cannot be used against the assessee company.

11. The assessee in the present case, has discharged its onus by producing all the documents showing the genuineness, creditworthiness and identity of the share subscriber. The AD has not produced anything on record to show how the share application money was tainted money of the assessee company which was routed through the share subscriber company. The Hon'ble Delhi High Court in the case of CIT Vs. Divine Leasing And finance Ltd., 299 ITR 268, observed that if the AO fails to unearth any wrong or illegal dealings, he cannot adhere to his suspicion and treat the subscribed capital as undisclosed income of the company. It is to be further noted that mere denial by Sh. Suresh Chand Garg would not ipso facto lead to the conclusion that the transaction was hit by Section 68 of the Act. We therefore uphold the deletion of addition with respect to the share subscribers M/s Creative Financial Services Pvt. Ltd.”

8. Learned counsel for the Revenue highlighted that the AO examined all the materials in great detail and rejected the affidavit furnished to him. It was highlighted that the AO took note of the statement made by the individual styled as Director, disowning the investment made in the assessee company by M/s. Creative Financial Services Pvt. Ltd.

9. This Court is of the opinion that the lone circumstance of a Director disowning the document *per se* could not have constituted a fresh material to reject the documentary evidence. In this case, the existence of the company as an income tax assessee, and that it had furnished audited accounts is not in dispute. Furthermore, its bank details too were furnished to the AO. If the AO were to conduct his task diligently, he ought to have at least sought the material by way of bank statements etc. to discern whether in fact the amounts were infused into the share holder's account in cash at any point of time or that the amount of ₹1.3 crores – in the case of M/s. Creative Financial Services Pvt. Ltd and ₹3.7 crores in the case of other share applicants were such as to be beyond their means. In the absence of any such enquiry, the Court is of the opinion that the findings holding that the assessee had not discharged the onus placed upon it by law cannot be considered unreasonable. No question of law arises.

10. The appeal is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JANUARY 08, 2018