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

+ ITA 263/2018

PRINCIPAL COMMISSIONER OF INCOME TAX-4

..... Appellant

**Through: Mr. Sanjay Kumar with Mr. Rahul
Chaudhary, Standing Counsels for Revenue.**

versus

M/S HIMACHAL FIBRES LTD.

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

% 28.02.2018

1. The Revenue appeals concurrent factual findings with respect to the lack of justification in the addition made to the assessee's income for A.Y. 2007-08 under Section 68 of the Income Tax Act, 1961 (for short 'the Act').

2. The Assessing Officer (AO) noted that the assessee was a sick company during the relevant assessment year but had nevertheless garnered substantial amounts to the extent of ₹12 crores invested by two share applicants i.e. M/s Khaitan United Sales Pvt. Ltd. and M/s Garg Corporation Ltd. After taking into account the material placed before him, the AO concluded that the identity of the shareholders and the genuineness of the transaction had not been established and accordingly brought to tax the said amount. The CIT(A), who sought a remand report, noted that the AO had recorded in the course of his order that the assessee was a

sick company to start with and that it had come out of the woods in 2010. The CIT(A) also noticed that the remand report disclosed that the AO did not carry out any enquiries with respect to the identity of the share applicants whose address was provided. The assessee had contended that the share applicant was neither tainted nor was unverifiable and that what was provided was sufficient to warrant an enquiry. The ITAT endorsed the opinion of the CIT(A).

3. It is urged that the findings rendered by the CIT(A) and the ITAT with respect to the inappropriateness of the addition under Section 68 of the Act are perverse and not based upon facts. Learned counsel stressed that the primary burden of establishing the identity of the applicant, the genuineness of the transaction and the creditworthiness of the party is always upon the assessee, who in this case, did not discharge it.

4. The ITAT in this case noted and held as follows:

“6. Now it was the turn of revenue to be aggrieved. The revenue has filed this appeal in year 2013 and no paper book from revenue side is filed to show specific perversity in unambiguous findings of learned CIT(A). Only written note on decisions u/s.68 is filed by Ld. CIT-DR. We have been taken through the records by assistance of representative of both sides. We have gone through assessee's paper book running into 57 pages placed on records. Our findings ground wise is given herein after. Apropos revenue's first ground assailing deletion of addition made u/s 68, it is found that assessee's case on given facts and documents specially unchallenged shareholder affidavits and in

view of lack of enquiry by the AO during assessment and remand proceedings, is squarely covered by Hon'ble Apex court decision in case of Lovely exports 216 CTR 195 wherein it is held that:

"2. Can the amount of share money be regarded as undisclosed income under s. 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment."

It is noteworthy that in period under consideration for AY 2007-08 said decision was fully applicable.

7. Further, the case of assessee is also covered on facts noted in learned CIT(A) order by Hon'ble Apex court decision in case of Mehta Parikh, 30 ITR 181 that without examining the deponent affidavits cannot be straightway rejected. Also noted here is the aspect of lack of enquiry by AO from share holders u/s.68 which is repeatedly held in various decisions by Jurisdictional Delhi high court in decisions mentioned in assessee's paper book at sr no. 13 namely Hon'ble Delhi high court decisions in cases (a) N.C.Cables 391 ITR 11 (b) Softline creations 387 ITR 636 and c) Gangeshwari Metals 361 ITR 10. Further, we note recent full bench of Hon'ble P&H high court decision in case of Jawahar Lal Oswal reported at 382 ITR 453 in context of section 68 additions, wherein it is lucidly held that:

"... The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a

prima facie doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to proffer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. The revenue cannot draw an inference based upon suspicion or doubt or perceptions of culpability or on the quantum of the amount, involved particularly when the question is one of taxation, under a deeming provision. Thus, neither suspicion/doubt, nor the quantum shall determine the exercise of jurisdiction by the Assessing Officer Further a deeming provision requires the Assessing Officer to collect relevant facts and then confront the assessee, who is thereafter, required to explain incriminating facts and in case he fails to proffer a credible information, the Assessing Officer may validly raise an inference of deemed income under section 69-A. As already held, if the assessee proffers an explanation and discloses all relevant facts within his knowledge, the onus reverts to the revenue to adduce evidence and only thereafter, may an inference be raised, based upon relevant facts, by invoking the deeming provisions of Section 69-A of the Act. It is true that inferences and presumptions are integral to an adjudicatory process but cannot by themselves be raised to an adjudicatory process but cannot by themselves be raised to the status of substantial evidence or evidence sufficient to raise an inference. A deeming provision, thus, enables the revenue to raise an inference against an assessee on the basis of **tangible material and not on mere suspicion, conjectures or perceptions.** "

8. Decisions cited by learned CIT-DR are carefully gone through and same are found to be distinguishable on facts as same are earlier to aforesaid decisions and in all those decisions specific incriminating material in form of investigation wing information was there and it was noted in those cases that shareholders are not traceable whereas facts in present case are otherwise as neither any incriminating material is there nor shareholders are found to be non traceable.”

5. In this case, the assessee was a sick company; it pulled out of the woods in 2010. To tide over its financial sickness, apparently, it sought the help of the share applicants. The identity of those share applicants was clearly revealed. As noted by both the lower appellate authorities, no suspicion is attached to the said share applicants; moreover, the AO did not conduct any further enquiry except resting his conclusions on surmises.

6. In these circumstances, the Court is of the opinion that the concurrent findings rendered are purely factual. No substantial question of law arises. The appeal is, therefore, dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 28, 2018
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