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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 49/2018

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Reserved on: 31st October, 2018

Pronounced on: 17th January, 2019

PR. COMMISSIONER OF INCOME TAX -6, NEW DELHI

.... Appellant

Through: Mr. Asheesh Jain, Sr. Standing Counsel
for Income Tax Department with Mr. Dushyant
Sarna, Advocate.

versus

NDR PROMOTERS PVT. LTD.

..... Respondent

Through: Mr. Ved Jain, Mr. Kislaya Parashar and
Ms. Umang Luthra, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J.

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short), in the case of NDR Promoters Pvt. Ltd. relates to Assessment Year 2008-09 and arises from the order dated 3rd March, 2019 passed by the Income Tax Appellate Tribunal ('Tribunal', for short).

2. The appeal was admitted for hearing vide order dated 17th January, 2018 on the following substantial question of law:-

“Whether the ITAT fell into error in upholding the deletion directed by the CIT (A) in respect of the amount of Rs.1,51,50,000/- brought to tax under Section 68 of the Income Tax Act, 1961, in the circumstances of the case ?”

3. It is an undisputed position that during the Assessment Year 2008-09, the respondent-assessee had received money in the form of share capital/share premium as per the following details:-

S No	Name & Address of company from whom claim of share capital/share premium made	Value of shares at Par (as claimed)	Share Premium (as claimed)	Total share holder's fund claimed to have been raised during the year
1	M/s Tejasvi Investment Pvt. Ltd. 13/34, WEA, IV Floor, Main Arya Samaj Road, Karol Bagh, New Delhi-110005	4,00,000	16,00,000	20,00,000
2	M/s Sai Baba Finvest Pvt. Ltd. 13/34, WEA, IV Floor, Main Arya Samaj Road, Karol Bagh, New Delhi-110005	6,40,000	25,60,000	32,00,000
3	M/s Bhavani Portfolio Pvt. Ltd. 13/34, WEA, IV Floor, Main Arya Samaj Road, Karol Bagh, New Delhi-110005	7,40,000	29,60,000	37,00,000
4	M/s Thar Steels Pvt. Ltd. 13/34, WEA, IV Floor, Main Arya Samaj Road, Karol Bagh, New Delhi-110005	4,00,000	16,00,000	20,00,000
5	M/s Taurus Iron & Steel Pvt. Ltd. 13/34, WEA, IV Floor, Main Arya Samaj Road, Karol Bagh, New Delhi-110005	8,50,000	34,00,000	42,50,000
6	M/s Ashwani Finman Services Pvt. Ltd. 79, Agroha Kunj, Sect.13, Rohini Delhi-110085	1,30,000	5,20,000	6,50,000
7	M/s Victory Software Pvt. Ltd. 3198/15, IVth Floor, Arihant Plaza, Gali No.1, Sangat	2,00,000	8,00,000	10,00,000
	Total			1,68,00,000

Issue raised in this appeal relates to first five companies, who had invested Rs.1,51,50,000/- as share application money with premium as per details given in above table.

4. The Assessing Officer vide assessment order dated 30th December, 2010, made an addition of Rs.1,51,50,000/- recording that the aforesaid

companies were 'creation' of and *de facto* operated by one Tarun Goyal, Chartered Accountant, who had set up about 90 companies/firms including the aforesaid 5 companies for providing accommodation entries. Paper work was perfect but there were chinks, which had revealed that the true nature of the transactions was to convert illegitimate money by providing bogus or accommodation entries. These evidences and details collected and ascertained during the course of search under Section 132 of the Act conducted by the Investigation Wing in the case of Tarun Goyal, had revealed that the registered office of 90 companies was located at 13/34, Main Arya Samaj Road, Karol Bagh and their former office was at 203, Dhaka Chambers, 2069/39, Naiwala, Karol Bagh, New Delhi. These companies were not carrying on any genuine business activities. Directors of these companies were employees of Tarun Goyal, who were working as peons, receptionists etc. Entries in the books were bogus. Modus operandi in such cases is well known, money is circulated by first depositing cash in the bank account of one such company, and thereupon it is transferred/circulated within the group companies before cheque is issued to the beneficiary.

5. The Assessing Officer had asked the respondent-assessee to produce Directors of the shareholder companies for examination after recording:-

- (i) most of the directors in their statement recorded by the Investigation Wing had admitted that they had signed documents/papers on direction of Tarun Goyal.
- (ii) shares of face value of Rs.10/- were issued at a premium of Rs.40/- (total Rs.50/-). There was no justification and reason for a third person to purchase shares in the respondent-assessee and to pay substantial premium.

(iii) The respondent-assessee had shown receipts of Rs.16.38 lakhs and 'Nil' income in the year ending 31st March, 2008 and 31st March, 2007, respectively. There were no fixed assets and the respondent-assessee had incurred expenses amounting to Rs.12.17 lakhs and 'Nil' in the year ending 31st March, 2008 and 31st March, 2007, respectively.

(iv) share capital/share premium of Rs.168 lakhs was after deposit shown as investment partly as advance for land and as advance to S.M. Udyog and Guruji Industries. FDR of Rs.80 lakhs was obtained from Oriental Bank of Commerce.

6. Respondent-assessee was also asked to produce all papers relating to issue of shares; state, how the dealings had started with the shareholder companies; if directly, state the year/date since when they were known to each other; if indirectly, give the name of the introducer and state that since when the introducer was known including years of relationship; state, whether the applications for allotment of shares were received in one lot or on different dates and whether they were received by hand or post. If acknowledgement was issued, supporting evidence should be given; provide the proof if any offer letter was received or issued; whether stamp duty was paid on allotment of shares; whether the share certificates were delivered by hand or post. If by hand, details of the person who had delivered the certificates. If share certificates were issued by post, state whether they were received back; indicate whether annual reports, balance sheet or notices of AGM/EGM of the respondent-assessee company were sent to the shareholders.

7. The respondents-assessee did not produce the Directors for examination. Other details and particulars were also not filed as required by the Assessing Officer. However, the respondent-assessee had filed:-

- (i) Copy of the ledger account of share application.
- (ii) Copy of the bank statement of the account in which money was received.
- (iii) Copy of the ledger account of share capital.
- (iv) Copy of balance sheet and profit & loss account reflecting receipt of share application money.
- (v) Share application form with complete list of shareholders, old and new.
- (vi) Annual return filed before the Registrar of Companies.
- (vii) Copy of Form No.2 i.e., return of allotment filed before the Registrar of Companies.
- (viii) Affidavits of Directors of the shareholder companies along with PAN details, copy of PAN cards, Board Resolutions, confirmations from the parties, share application forms, bank account statements of the shareholder companies, Memorandum and Articles of Association, confirmation of receipt of shares from M/s Bhawani Portfolio and CIN details of M/s Bhavani Portfolio.

8. The Assessing Officer made an addition of Rs.1,51,50,000/- as unexplained cash after referring to the factual matrix including failure to produce Directors of the shareholder companies so that they could be examined on oath. He observed that no prudent businessman would invest in the shares of the respondent-assessee at five times the face value of shares. There was sufficient evidence to indicate and infer that beneficiaries i.e. the

respondent-assessee had introduced income from undisclosed sources into their business in the garb of share capital/share premium.

9. The addition was deleted by the Commissioner of Income Tax (Appeals) on the ground that the respondent-assessee had been able to establish identity, creditworthiness of the shareholders and genuineness of the transactions in terms of several decisions of this Court including ***CIT Vs. Oasis Hospitalities Pvt. Ltd.*** decided on 31st January, 2011. He held that once documents like PAN or bank account details were given, then the onus had shifted on the Assessing Officer and it was up to him to reach the shareholders. This burden could not be passed on to the assessee, merely on the ground that the summons issued to the shareholders were returned. Assessing Officer had issued notice Section 133 (6) of the Act and in response had received replies confirming the investment. The shareholder companies were incorporated and had invested money through banking channels, which was reflected in the books. Investment was proved by the bank statements that disclosed sufficient balance before cheques were issued. Accordingly, the three requirements i.e. identity of the investor, creditworthiness of the investors and genuineness of the transactions were satisfied.

10. Appeal preferred by the Revenue against the said deletion has been dismissed by the impugned order passed by the Tribunal, which records as under:-

“4. In view of above citations, when we go through the orders of the authorities below, we find that there is no dispute that the assessee in support of genuineness of their claims regarding receipt of share application moneys from different parties had furnished their confirmatory letters, PAN details, copies of Income Tax Returns as well

as share application forms and complete name and address of share applicants. These documents were sufficient to establish the identity of share applicants. It is also not in dispute that all the transactions have been routed through banking channels and share application money has been received through account payee cheques, details of which were furnished. The assessee had also furnished returns of income of the creditors accepted by the Department and thus, we are of the view that in absence of rebuttal of these facts there was no reason to doubt the genuineness of the transactions. The creditworthiness of the share applicants was also established by the assessee by filing the audited balance sheet of each of the share-holder company. On the contrary, no evidence has been brought on record by the Assessing Officer to prove that share application money emanated from the coffers of the assessee. It is also pertinent to note here that in response to the notices issued under section 133(6) of the Act by the Assessing Officer were responded by the share applicants. Merely because the assessee, as directed by the Assessing Officer, could not produce any of the share applicants, cannot be a reason for doubting the genuineness of the transactions. This view is well supported by the decisions of the Hon'ble jurisdictional High Court of Delhi in the cases of CIT Vs. Rakam Money Matters Pvt. Ltd. (supra) and CIT Vs. Victor Electrodes (supra), relevant extract thereof, are respectively reproduced hereunder :-

CIT Vs. Rakam Money Matters Pvt. Ltd. :

" 12. A perusal of the order of the AO shows that its foundation is the report of the DIT (Investigation). Admittedly, the Assessee was not confronted with that material in the course of the reassessment proceedings. The Assessee was also not confronted with the statements recorded in the course of the investigation. Once that material is kept aside then the scope

of enquiry can only be whether the Assessee has produced documents to discharge the initial onus of proving the genuineness and creditworthiness of the companies who were stated to have subscribed to the Assessee's shares.

13. It is not in dispute that extensive material was produced by the assessee in the present case to prove the identity, genuineness and creditworthiness of the companies who had subscribed to its shares. Among the materials produced were the Income Tax Returns and the PAN card details of the eight companies. Even if the Directors of these companies did not respond to the summons issued by the AO, it was not impossible for the AO to make proper enquiries to ascertain the genuineness of these entities and satisfy himself of their creditworthiness. As pointed out by the CIT(A), the AO failed to make any effort in that direction. He did not take to the logical end the halfhearted attempt at getting the Directors to appear before him. He did not even seek the assistance of the AOs of the concerned companies whose ITRs and PAN card copies had been produced.

14. The view taken by the CIT(A) that the AO failed to come up with the material to disprove what had been produced by the Assessee is certainly a plausible view in the facts and circumstances of the case. Likewise, the view taken by the ITAT concurring with the CIT(A) on facts cannot be said to be perverse. "

CIT Vs. Victor Electrodes :

"There was no legal obligation on the assessee to produce same Director or other representative of the applicant companies before the Assessing Officer. Therefore, failure of assessee to produce then could not by itself have justified the additions made by A. O. "

4.1 As discussed above, we find that the assessee has been able to discharge its initial onus to establish the genuineness of the claimed transactions of share application moneys by furnishing all the necessary possible evidences and thus, the onus to disprove those evidences were shifted upon the Assessing Officer. The Assessing Officer has failed to discharge by not disproving those evidences. The assessee was thus, able to establish the identification as well as creditworthiness of the share applicants and the genuineness of the claimed receipt of share application moneys from those parties. The Id. CIT (Appeals) was thus justified in deleting the additions made under section 68 of the Act on account of the alleged unexplained share application money. The same is upheld. The grounds questioning the action of the Id. CIT (Appeals) in this regard are thus rejected."

11. Issue of bogus share capital in the form of accommodation entries has been subject matter of several decisions of this Court and we would like to refer to decision in ***Commissioner of Income Tax Vs. Navodaya Castles Pvt. Ltd.*** [2014] 367 ITR 306, wherein the earlier judgments were classified into two separate categories observing as under:-

"11. We have heard the Senior Standing counsel for the Revenue, who has relied upon decisions of the Delhi High Court in ***Commissioner of Income Tax Vs. Nova Promoters and Finlease (P) Ltd.*** [2012] 342 ITR 169 (Delhi), ***Commissioner of Income Tax Vs. N.R. Portfolio Pvt. Ltd.***, 206 (2014) DLT 97 (DB) (Del) and ***Commissioner of Income Tax-II Vs. MAF Academy P. Ltd.***, 206 (2014) DLT 277 (DB) (Del). The aforesaid

decisions mentioned above refer to the earlier decisions of Delhi High Court in *Commissioner of Income Tax Vs. Sophia Finance Ltd.*, [1994] 205 ITR 98 (FB)(Delhi), *CIT Vs. Divine Leasing and Finance Limited* [2008] 299 ITR 268 (Delhi) and observations of the Supreme Court in *CIT Vs. Lovely Exports P. Ltd.* [2008] 319 ITR (St.) 5 (SC).

12. The main submission of the learned counsel for the assessee is that once the assessee had been able to show that the shareholder companies were duly incorporated by the Registrar of Companies, their identity stood established, genuineness of the transactions stood established as payments were made through accounts payee cheques/bank account; and mere deposit of cash in the bank accounts prior to issue of cheque/pay orders etc. would only raise suspicion and, it was for the Assessing Officer to conduct further investigation, but it did not follow that the money belonged to the assessee and was their unaccounted money, which had been channelized.

13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of

the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

14. Certificate of incorporation, PAN number etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor. It is in this context, the Supreme Court in ***CIT Vs. Durga Prasad More*** [1971] 82 ITR 540 (SC) had observed:-

“Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.”

15. Summarizing the legal position in ***Nova Promoters and Finlease (P) Ltd.***(supra), and highlighting the legal effect of section 68 of the Act, the Division Bench has held as under:-

“32. The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-

company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. In **A. Govindarajulu Mudaliar v CIT**, (1958) 34 ITR 807, this argument advanced by the assessee was rejected by the Supreme Court. Venkatarama Iyer, J., speaking for the court observed as under (@ 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 receipts are shown in the account books of a firm 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 upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where 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.”

(emphasis supplied)

Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.”

12. The present case would clearly fall in the category where the Assessing Officer had not kept quiet and had made inquiries and queried the respondent-assessee to examine the issue of genuineness of the transactions. The Tribunal unfortunately did not examine the said aspect and has ignored the following factual position:-

- (a) The shareholder companies, 5 in number, were all located at a common address i.e. 13/34, WEA, Fourth Floor, Main Arya Samaj Road, Karol Bagh, New Delhi.
- (b) The total investment made by these companies was Rs.1,51,00,000/-, which was a substantial amount.
- (c) Evidence and material on bogus transactions found during the course of search of Tarun Goyal. Evidence and material that the companies were providing accommodation entries to beneficiaries was not considered.
- (d) The findings recorded as mentioned in the assessment order, which read as under:-

“1. From the finding of search, it is evident and undeniable that all the companies including the alleged shareholders companies belong to Sh. Tarun Goyal. This is enforced even more from the following:-

- i. All the companies are operated from the-office premises of Sh. Tarun Goyal.
- ii. All the directors are either his employees or close relatives. Sh. Tarun Goyal could never produce the directors nor furnish their residential address.
- iii. The statement of employees of Sh. Tarun Goyal is ,on record, whereby they have clearly stated that they signed on the papers produced before them by Sh Tarun Goyal. They do not know about the basic

details of the companies like shareholding patterns, nature of business of these companies etc.

- iv. The statement of auditors of Sh. Tarun Goyal is on record. They have stated to have never meet (sic) the directors of the companies and audited the accounts only on the directions of Sh Tarun Goyal. As per the statement of auditors, the employees of Sh Tarun Goyal were directors of the companies run by them, also they could not ascertain the so called share capital subscribed by Sh Tarun Goyal as documentary proof of the same was lacking.
- v. During the course of search, all the passbooks, cheque books, PAN Cards etc. were always in possession of Sh Tarun Goyal. On his directions all the employees signed all the documents.
- vi. All the bank account opening forms appear to be in the handwriting of Sh Tarun Goyal.
- vii. All the books of accounts of all the companies have been retrieved from the computers/laptop of Sh Tarun Goyal.
- viii. Sh Tarun Goyal has given letters for the release of bank accounts of companies put under restraints after search. No such application was received from so called directors of the companies.
- ix. Sh Tarun Goyal appears in all the scrutiny assessments as well as appeals of his companies himself before various income' tax authorities. From verification carried out in respective wards/ circles where the above mentioned companies are assessed, it is' evident that Sh Tarun Goyal is appearing in all the income tax proceedings on behalf of all the

companies. He is not charging any fees for appearing in these cases.

- x. During the post search investigation it was revealed that besides, aiding and abetting the evasion of taxes, Sh Tarun Goyal has been indulging in violation other provisions of the law of the land. This matter has also been taken up by REIC for multi-agency probe.”

(e) The respondent-assessee did not have any business income in the year ending 31st March, 2007 and had income from other sources of Rs.16.38 lakhs in the year ending 31st March, 2008. The respondent-assessee had not incurred any expenditure in the year ending 31st March, 2007 and had incurred expenditure of Rs.12.17 lakhs in the year ending 31st March, 2008.

(f) Shares of face value of Rs.10/- each were issued at a premium of Rs.40/- (total Rs.50/-).

(g) The respondent-assessee had failed to produce Directors of the companies, though they had filed confirmations, and therefore, were in touch with the respondent-assessee. The respondent-assessee had also failed to produce the details and particulars with regard to issue of shares, notices etc. to the shareholders of AGM/EGM etc.

13. In view of the aforesaid factual position, we have no hesitation in holding that the transactions in question were clearly sham and make-believe with excellent paper work to camouflage their bogus nature. Accordingly, the order passed by the Tribunal is clearly superficial and adopts a perfunctory approach and ignores evidence and material referred to in the assessment order. The reasoning given is contrary to human probabilities, for in the normal course of conduct, no one will make investment of such huge

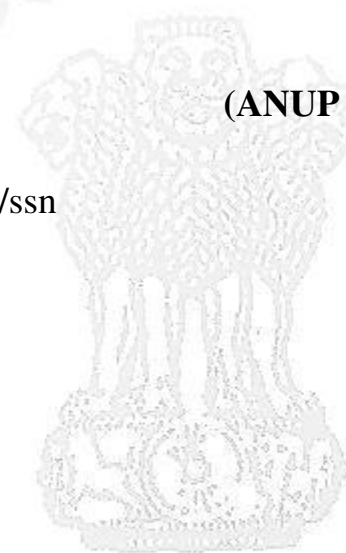
amounts without being concerned about the return and safety of such investment.

14. Accordingly, the appeal is allowed. The substantial question of law framed above is accordingly answered in favour of the appellant-revenue and against the respondent–assessee. There would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(ANUP JAIRAM BHAMBHANI)
JUDGE

JANUARY 17th, 2019 NA/ssn



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