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

+ ITA No. 218/2012

Reserved on: 20th August, 2014
% Date of Decision : 16th September, 2014

Commissioner of Income Tax - IV, New Delhi ....Appellant
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Ruchir Bhatia, Jr. Standing Counsel and Ms. Swati Thapa, Adv.

Versus

Focus Exports Pvt. Ltd. …Respondent
Through Ms. S. Krishnan, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.

This appeal by the Revenue relates to assessment year 2002-03 and was admitted for hearing by order dated 13th November, 2013 on the following substantial question of law:

> "Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs.55,66,995/- under Section 68 of the Income Tax Act, 1961 by applying correct principles?"

The said order also records that the aforesaid question will include the aspect whether the impugned decision is perverse.

2. The impugned order passed by the Income Tax Appellate Tribunal ('Tribunal', for short) dated 9th September, 2011 affirms the order of the Commissioner of Income Tax (Appeals) ('CIT(A)', for short), deleting the addition of Rs.55,66,995/- purportedly received by the respondent assessee, a company, on account of share allotment. It has been held that the assessee has been able to discharge the onus and prove the identity, creditworthiness of the share applicants, and genuineness of the transactions on the ground that copy of the PAN number, income tax returns and bank details, etc. were filed and hence, ratio of the decision of the Supreme Court in ***CIT vs. Lovely Exports P. Ltd.*** (2008) 299 ITR 268 (SC) and that of Delhi High Court in ***CIT vs. Rockford Metal & Minerals Ltd.*** 198 Taxman 497 (Del), applied. Consequently, the addition of the above said amount by invoking Section 68 of the Income Tax Act, 1961 ('Act', for short) by the Assessing Officer, was contrary to law, and should be deleted.

3. At the outset, we notice that there is a big divergence on the aspect of PAN details, income tax returns, etc. as recorded in the assessment order dated 18th December, 2007 and as per the findings recorded by CIT(A) and the Tribunal. The assessment order records

that the authorized representative of the assessee was pointedly asked to provide details vide note sheet entry dated 20th July, 2007, on the business activities carried out during the year; details of the share capital raised during the year; details of the investment made during the year; details of the loans and advances made during the year; job work income during the year; shareholding pattern, copy of all accounts of the company; list of bank accounts of Directors; and, a note justifying the expenses. Thereafter, the assessee did file some details but they were not exhaustive/complete. For example, the details of accounts received on account of share premium were not furnished along with the details of share capital, and the address and PAN numbers were not provided for all parties. Some other details were filed consisting of some short notes and a list without PAN numbers and addresses of the investors. In these circumstances, the assessment order passed was under Section 144 read with Section 147 of the Act. Thus, in the present case, the assessee had not cooperated in the assessment proceedings and hence, best judgment assessment was made.

4. The CIT (A) has recorded that the authorized representative of the assessee had brought to his notice relevant pages of the paper

book wherein confirmation of the respective share applicants, their income tax returns, their PAN card and election card, etc., were made available. Tribunal had proceeded on the findings recorded by the CIT(A).

5. On being queried in the Court, learned counsel for the assessee accepted that these details might not have been filed during the course of the reassessment proceedings but were filed during the course of the original assessment proceedings, which had resulted in an order under Section 143(3), dated 29th November, 2004. There is no such finding recorded by the CIT(A) or the Tribunal. However, what is clear is that in the reassessment order dated 18th December, 2007, passed under Section 144 read with Section 147 of the Act, there is an unambiguous, assertive and decisive finding that the assessee had failed to cooperate and furnish the details. The assessment order records that summons under Section 131 of the Act were issued to the two directors of the company, i.e. Virender Oberoi and Alka Oberoi, seeking their explanation but the same were not complied with. The assessment order also records that the bank account statements of Tashi Contractors (P) Ltd. were examined and there was a transfer entry of Rs.4,95,000/- dated 7th March, 2002 and a cheque in favour

of the assessee was cleared on the same day. In the case of Baldev Harish Electrical Pvt. Ltd., a transfer entry of Rs.5,00,000/- dated 6th March, 2002, was noticed along with a cheque of the next date, i.e. 7th March, 2002, transferring the amount to the account of the assessee. Further, the bank account statement showed that there were regular deposits and cheques were cleared and payments were made to third parties on the same day. Reference was made to the investigation made in the case of Arun Finvest and statement of Mukesh Gupta on oath. He had stated that cash received from third parties used to be deposited in the bank accounts and transferred to the same parties by charging a commission @ 25 paise. The said details and particulars came to the knowledge of the Revenue after assessment order under Section 143(3) dated 29th November, 2004 was passed.

6. As noticed above, the assessee did not furnish complete details and particulars and virtually "absconded" during the course of reassessment proceedings, resulting in a best judgment assessment. These facts have been completely ignored by both the CIT(A) and the Tribunal. Obvious inference is that the assessee had intentionally tried to block and obstruct enquiries and hinder a thorough probe knowing the nature of the transactions. Thus, the reluctance and hesitation to

appear in response to summons and produce documents is apparent and conspicuous.

7. The facts mentioned in the reassessment order, i.e. failure to cooperate in filing details and responding to summons, have not been disputed or controverted by the CIT(A) and the Tribunal. There is no adverse comment or finding regarding the validity of the best judgment assessment. The assessee was incorporated on 23rd March, 2000 with the object of conducting export business. However, during the first year, i.e. the assessment year 2001-02, no export orders were received and no business was conducted. At the time of incorporation, Virender Oberoi made an investment of Rs.100/- towards share capital and Alka Oberoi had invested Rs.3,00,000/-. During the assessment year in question, i.e. 2002-03, no export orders were received but it was contended that the assessee company undertook fabrication work. Total taxable income declared in the return filed on 29th October, 2002, was Rs.10,880/-. Noticeably, hardly any business activity was undertaken by the respondent assessee in the first two years. During the period relevant to this assessment year, the two directors, viz. Virender Oberoi and Alka Oberoi had invested Rs.12,50,000/- and Rs.100/- respectively as share capital.

Surprisingly, unrelated third parties had as per the assessee found it attractive and compelling to make huge investments thereby increasing the reserve and surplus by a towering sum of Rs.55,66,996/-. It is not the case of the assessee that these third parties were in any way related, connected, or known to the assessee or its directors. It is this aspect which required an explanation but nothing was stated and affirmed by the assessee who maintained a transient silence and adopted an evasive approach to block scrutiny. Learned counsel for the respondent assessee accepts that the shares were issued at a premium to the third parties but justification and reason for premium is perspicuously missing and not forthcoming. Why and for what reasons, a share premium would be payable in a case like this, is beyond comprehension. It is highly implausible that some unknown persons would invest their money, without adequate protection and ensuring appropriate returns, in a company which did not have a proven, reputable and a reliable record. Any and every reasonable man is normally expected to practice due diligence while investing his hard earned money, let alone purchase shares of an unknown company. It is not a case where angel investors had invested upon being satisfied about the innovativeness and entrepreneurial

skills of the management. The aforesaid facts have to be read along with factum that the summons issued to the Directors to appear in person under Section 131 of the Act remained uncomplied with. Further, details with regard to the loans and advances, job work income, etc., were not furnished. Lastly, bank accounts of Tashi Contractors (P) Ltd. and Baldev Harish Electrical Pvt. Ltd. did indicate deposits and immediate withdrawals/transfers of money. The Assessing Officer had also noticed the statement of Mukesh Gupta on the said entries. The aforesaid facts have dented the creditworthiness of the said creditors and the genuineness and legitimacy of the transactions. The transactions were merely a façade to mislead the tax authorities.

8. In view of the aforesaid factual position and the copious material before us, we are not inclined to remand the matter to the Tribunal for fresh decision as the facts are crystal clear and are not debatable nor do they require further elucidation and examination.

9. A bare reading of Section 68 of the Act suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be a sum during the previous year and if the assessee offers no explanation about the nature and source of such credit or the

explanation offered is not satisfactory, then the sums so credited can be treated as income of the assessee for that previous year. The expression 'no explanation is offered' or 'the explanation offered is not satisfactory' puts an onus on the assessee to offer a lucid, reasonable and acceptable explanation before the Assessing Officer and thereupon the Assessing Officer should form an opinion accepting or rejecting the explanation based upon appreciation of facts/materials and other attending circumstances. Section 68 of the Act was examined in ***Govindarajulu Mudaliar (A.) versus CIT***, (1958) 34 ITR 807 (SC) observing that there were ample authorities for the proposition that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during an accounting year, the Assessing Officer is entitled to draw inference that the receipts are of an assessable nature. Whether explanation should be accepted or not is not to be examined factually but having regard to test of human probabilities and normal course of conduct. Reference can be made to ***CIT versus Durga Prasad More*** (1971) 82 ITR 540 (SC), ***CIT versus Daulat Ram Rawatmull***, (1973) 87 ITR 349 (SC) and other cases referred to in ***CIT versus Nova Promoters and Finlease Private Limited***, (2012) 342 ITR 169 (Del.). In these

cases, it has been observed that what is apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real. Caution must be exercised on self-serving statements made in the documents as they are easy to make and rely upon in case an assessee wants to evade taxes. Proof is required and the assessing authorities should not put blinkers while looking at the documents before them. Surrounding circumstances are equally important. Reference before us was made to the decision of the Supreme Court in ***CIT versus Lovely Exports Private Limited***, (2008) 216 CTR (SC) 195, which upheld the decisions of this court in (1) ***CIT versus Divine Leasing and Finance Limited,*** (2) ***General Exports and Credits Limited*** and (3) ***Lovely Exports Private Limited (Del),*** (2008) 299 ITR 268 (Del.) wherein it was observed that in spite of sufficient time to carry out examination of the documents, the Assessing Officer remained a mute spectator and did not conduct investigation to controvert or disprove the material filed by the assessee. In ***Divine Leasing and Finance Limited*** (supra) the following observations were made by the Delhi High Court:-

> "In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessed

> 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 assessed. (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 assessed nor should the AO take such repudiation at face value and construe it, without more, against the assessed. (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."

10. In ***Nova Promoters and Finlease Private Limited*** (supra), referring to the aforesaid judgment of Supreme Court in ***Lovely Export*** (supra), it has been observed:-

> "39. … So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register,

share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence

> or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary."

11. Thereafter, in ***Commissioner of Income Tax versus Nipun Builders and Developers Private Limited***, (2013) 350 ITR 407 (Del.) referring to ***CIT versus M. Ganapathi Mudaliar***, (1964) 53 ITR 623 (SC), ***CIT versus Devi Prasad Vishwanath Prasad***, (1969) 72 ITR 194 (SC) and decision of Delhi High Court in ***Yadu Hari Dalmia versus CIT***, (1980) 126 ITR 48 on the ambit and scope of Section 68 of the Act, it stands observed that when an assessee offers no explanation or the same is not satisfactory, the amount can be charged to be taxed as income of the assessee and this principle enshrined in Section 68 of the Act provides statutory recognition to the principle, which were earlier adumbrated in judicial decisions. Further, when there is a cash credit, then the Assessing Officer can hold that it is income of the assessee unless the burden to prove the source of income/credit is discharged by the assessee. The decision in ***Nipun Builders and Developers Private Limited*** (supra) deals with how the burden can be discharged and it has been observed that even

assuming bank statements were filed, it may not be sufficient to prove creditworthiness without explanation for the deposits in the accounts and their source. Though while deciding the said aspect, the difficulty which may be faced by the assessee to unimpeachably establish creditworthiness has to be kept in mind. There should be some positive evidence to show the nature and resources of the share subscribers. The conduct of the assessee and his explanation before the Assessing Officer assumes great importance and he should actively participate and cooperate in the assessment proceedings and not take an extreme stand of a quiet spectator after producing certain basic documents, which may in certain cases be only termed as neutral.

12. In ***Commissioner of Income Tax versus NR Portfolio Private Limited***, 206 (2014) DLT 97, the issue was again examined and it was observed:-

> "12. The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing

officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is required. The verification and investigation should be done with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee

> when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects.
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> 13. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken. We shall now come to the merits and the findings recorded by the Commissioner (Appeals), which as noted above, have been simply affirmed by the tribunal without verifying or referring to the facts."

Referring to the term 'identity' reference was made to the observations of the Assessing Officer in the remand report that the word 'identity' meant the "condition or fact of a person or a thing being that specified unique person or thing". PAN number or card is relevant but cannot be blindly and without considering surrounding

circumstances in all cases be sufficient to treat as a discharge of the onus. Identity is not established by stating that the payment was made through a bank account. On the question of creditworthiness and genuineness, it was observed as under:-

> "18. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions."

13. Proof or evidence to show the circulation in money was clearly rejected in view of the statutory provision of Section 68 of the Act

and on the question of doctrine of 'source of source' or 'origin of origin' it was observed:-

> "23. We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of 'source of source' or 'origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counter-productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which

> masquerade as pretence should be exposed and not accepted."

It has also been held:-

> "29. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.
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> 30. … In view of the aforesaid discussion the substantial question of law framed in the two appeals is answered in favour of Appellant-Revenue and against the Respondent- assessee. The appeal is accordingly allowed to the extent indicated above. The Appellant is also entitled to costs which is assessed at Rs.20,000/-."

14. In view of the aforesaid discussion, the unmistakably apparent, patent, and conspicuous facts were ignored by the first appellate authority and the Tribunal. In the facts of the present case, section 68

of the Act was rightly invoked and is applicable. The question of law mentioned above is answered in favour of the appellant Revenue and the addition of Rs.55,66,995/- made by the Assessing Officer is confirmed. The order passed by the Tribunal affirming the finding of the Commissioner of Income Tax (Appeals) deleting the addition, is set aside. The appellant would be entitled to costs as per High Court Rules.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

September 16th, 2014
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