

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

RESERVED ON: 01.08.2012
PRONOUNCED ON: 24.08.2012

+ **ITA 183/2002**

CIT-IV Appellant
Through: Mr. N.P. Sahni, Sr. Standing
Counsel.

versus

M/S FROSTAIR P.LTD Respondent
Through: Dr. Rakesh Gupta,
Ms. Rani Kiyala and Mr. Piyush Singh,
Advocates.

+ **ITA 1638/2006**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. Sanjeev Sabharwal, Sr. Standing
Counsel.

versus

M/S FROSTAIR P.LTD Respondent
Through: Dr. Rakesh Gupta, Ms. Rani Kiyala
and Mr. Piyush Singh, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

%1. This common judgment will dispose of Revenue's two appeals directed against the judgment and order of the Income Tax

Appellate Tribunal (ITAT) dated 30.10.2001 in ITA No.1868/DEL/2001 and further order dated 11.05.2006 in ITA-4691/DEL/2002, and cross-objection nos.113/DEL/2006.

2. The question of law framed in these two cases was:

“(i) whether the ITAT erred on facts and in law in deleting the addition of Rs. 25 Lakhs made by the AO by treating the alleged investment of shareholders as income from undisclosed sources (ITA-183/2002) and

(ii) whether the ITAT was correct in law in deleting the penalty of Rs. 44 Lakhs imposed by the AO under Section 271 (i) (c) of the Income Tax Act, 1961.”

3. The brief facts necessary to decide the cases are that the assessee company had filed its return declaring the income @ ₹.10,986/- on 29.11.1996. The Revenue received information alleging that assessee had accepted share capital from companies engaged in providing bogus entries in the form of loan and share application money to interested parties. Accordingly, the AO called for information under Section 142 (1) by letter dated 29.12.1998. The assessee filed a list of shareholders who contributed share capital including premium aggregating to ₹.95 Lakhs. It transpired that the assessee had increased its share capital by ₹.95 Lakhs to which end it had issued 9500 shares of a face value of ₹.100/-, at a premium of ₹.900/- each. The total amount was invested by 18 companies who were share applicants. The AO felt that the nature of the assess company and its business was not such as to attract a premium of ₹.900/- per share. He also was of

the opinion that the share applicants were not known to the assessee or its management and investment of ₹.5 Lakh by each of them except M/s Kanpur Properties and Finance Ltd. - which had invested ₹.10 Lakhs was improbable. The concerned Assessing Officers in respect of the 18 shareholders were notified. The AO was informed that in most of the cases, no such company existed in their ward or circle. The AO accordingly issued summons to all shareholders at their given address. None of the addresses were found to be correct. On the other hand, during the course of enquiries, one Shri R.C. Goela accepted summons on behalf of six parties. He did not, however, acknowledge any of the summons personally; they were acknowledged by six different persons in his office. He appeared before the AO on 5.3.1999 and admitted that he represented all companies and one M/s Devlok Finance Ltd. Separate summons were issued to R.C. Goela asking him to produce the principal officers of the companies with their books of accounts. This was not complied with and instead six envelopes containing information and copies of bank accounts in respect of five concerns (who he claimed to represent) were sent. All of them were sent from one post office by R.C. Goela. The AO inferred that the identity and credit worthiness of those five concerns have not been proved. The AO went into great details about the bank accounts and related details of the companies and found that they were operated from Vaish Cooperative Adarsh Bank Ltd; the bank accounts were opened due to an introduction by R.C. Goela. The assessee's arguments were that the identity of the companies or

other persons could be ascertained through GIR/PAN, was rejected since the share applicants who were contributed monies were not filing IT returns. The availability of particulars of 18 share applicants with the Registrar Of Companies was held to be insufficient. In his order, the AO noticed that out of 18 share applicants, 9 companies were account holders with the Vaish Cooperative Adarsh Bank Ltd in Karol Bagh and Darya Ganj. He also noticed certain common features which emerged from their account opening forms. The introduction of all these were either by M/s Sukriti Foundations, Devlok Finance Pvt. Ltd, Shri R.C. Goela or Akashdeep Offset Printers. The Karol Bagh branch of the Vaish Cooperative Adarsh Bank Ltd. supplied the AO with the list of accounts from where credit entries were made through transfers. The account numbers used for transfer of the amounts were listed and the AO noticed that *“in fact the cash was deposited in one account and from this account, the amount transferred to the account from where the cheques for share application monies were cleared”*.

5. The AO further analyzed information relating to names of account holders who operated, the listed and specified accounts and were indulging in entry provision services. The account of some of the share applicants were scrutinized on the basis of their banker's statements. These included statements given by Vijaya Bank, Kamla Nagar, Punjab National Bank, Tri Nagar and Syndicate Bank, G.T. Karnal Road. The AO noticed the following common features: -

“Before I conclude, from the verification of the above bank accounts out of which few are the name lenders share-holders of the company, it is found: -

- a) some of the accounts are opened on the same date and have common introducer.*
- b) either cash has been deposited or amount has been transferred or clearance received after depositing cash in the base account from where the transfer entries started.*
- c) huge amounts of cheques and pa orders have been issued immediately after the amounts were deposited.*
- d) introducers of the accounts are not traceable.*
- e) share-holders are not traceable at the given addresses.*
- f) summons were issued to the directors of the company but none of them appeared personally for verification.”*

5. On the basis of these details and also after taking into account various factors, such as that the assessee failed to give the correct GIR/PAN number and designation of the concerned Assessing Officers, who were seized of the share applicant companies' returns; the fact that none of the shareholders existed at the addresses given by the assessee; the books of accounts of the share applicants not being produced before him, the AO held that an inference could be drawn that the transactions were not genuine. The AO, therefore, rejected the assessee's contentions that it had satisfied the requirements of law by furnishing the names, addresses and GIR/PAN Numbers. It was held in that regard that

“the argument of the assessee cannot be accepted for the reason that the enquiries have gone several steps further than to verify it from GIR/PAN numbers. It is not identity but the credit worthiness and the genuineness of the transactions remained not proved.”

6. The AO applied the law declared by a Full Bench of this Court in *CIT v. Sophia Pvt. Ltd.* 1994 (205) ITR 98 and proceeded to add the sum of ₹.95 Lakhs on account of unexplained cash credits under Section-68. The parallel proceedings were also initiated under Section 271 (i) (c) of the Act.

7. The assessee carried the matter in appeal to the CIT (Appeals). The Appellate Commissioner sought a remand report which was furnished by the AO. It transpired in the report that cross verification of the share applicants' addresses was sought by sending the Inspectors to the respective places. It was discerned that the PAN/GIR number given by the assessee was not correct and that the said share applicants were not filing their income tax returns in the ward or circle concerned. The remand report also further stated that field enquiry have revealed that out of 18 shareholders 16 were not found at the addresses furnished. After considering the report and after considering the submissions of the assessee - who was also furnished with the copy of the remand report - the Appellate commissioner dismissed the assessee's appeal observing as follows: -

“I have considered the facts of the case, explanation of the AR and the remand report of the AO, and rejoinder of the;

AR on the remand report of the AO. I am not inclined to agree with the view of the AR inasmuch as the question of proving the onus with regard to credits in the accounts of so called shareholders lies upon the appellant and not upon the shareholders who had invested money in the appellant company which the appellant has failed to discharge. The case law of Sophia Finance Co. relied upon by the appellant is not applicable in the present case as the identity of the shareholders remained unproved. Moreover, in this case, it was also held by the Hon'ble High Court that the AO would be entitled to enquire and would indeed he is duty bound to do so where the alleged share holders had, in fact, existing and in such as case, the AO would have the jurisdiction, if the facts so warrant, to treat such credit to be the income of the assessee since in the instant case the identity of the share holders as mentioned supra has not been proved by the appellant, therefore, the AO is well within his jurisdiction to treat it as unexplained investment of the appellant company. Further the reliance placed by the AR on the ratio of the decision of the Hon'ble Supreme Court in CIT v. Stellier Investment Ltd., 192 ITR 287, does not help the appellant as the AO has proved beyond reasonable doubts that most of these alleged share holders are not even assessed to tax as those have been verified to have not filed income tax returns and thus question of reopening the assessment of these parties who do not exist at the addresses mentioned by the appellant does not arise. Therefore, the aforesaid case law relied upon by the AR does not apply to the case of the appellant. Thus keeping in view the detailed facts and circumstances of the case and clear-cut distinction in respect of the case laws relied upon by the AR, both on facts and law, it is held that the AO is justified in treating the so called investment of shareholders amount to Rs.95,00,000/- as appellant's income from undisclosed sources. The addition of Rs.95,00,000/- made by the AO is therefore confirmed.

In the end, appeal is dismissed.”

The assessee appealed to the ITAT and succeeded; the impugned judgment accepted its contentions and allowed the appeals.

8. Learned counsel for the Revenue has highlighted that the Tribunal fell into grave error in setting aside purely factual findings which was entirely well founded and based on the peculiar circumstances. It was emphasized that in cases like the present one where the doubts are there as to the genuineness of the transactions, the assessee's duty does not stop only by furnishing some essential particulars with regard to the share applicants. In this context, it was submitted that the entirety of facts pointed to careful thought outstretched to defeat the Revenue whereby for no apparent reason, the share with a face value of ₹.100/- was sought to be sold at a premium of ₹.900/-. These shares were subscribed by 18 applicants, all except one invested ₹.5 Lakhs. The pattern of investment revealed that monies were deposited through some common accounts within a short time before they were given as share application amounts. Despite summons, the share applicants did not appear or cause appearance. Furthermore, out of 18, 16 share applicants' addresses were incorrect. The income tax particulars such as PAN/GIR numbers were also incorrect. After a thorough and detailed scrutiny, the AO inferred that the amounts had to be added back under Section-68; a decision upheld by the Appellate Commissioner. The Tribunal's approach in making a broad generalization that the assessee had discharged its onus by furnishing the names, addresses and GIR particulars is unsustainable in law.

9. Learned counsel for the assessee argued that the reasoning of the Tribunal is well founded. Counsel submitted that in this case, the Department could not have fastened the liability only on the basis of the suspicion. There was no independent material to suggest that a premium of ₹.900/- on every share having a face value of ₹.100/- was unwarranted. Furthermore, neither the AO nor the CIT (Appeals) had held that there was any connection between the assessee and the share applicants or that they had common shareholders. The assessee could not be punished for the details of the share applicants who might be tax offenders. The fact that amounts invested by the share applicants were not brought to tax in their hands ought not to have prejudiced the assessee's since no nexus could actually be established between it and those concerns.

10. Fortunately for this Court, the correct approach which should be adopted by Assessing Officers who suspect that amounts which are claimed to bear one kind of description, are not genuine transactions, in the context of disallowances to be made under Section 68 of the Act, is no longer a matter of debate, especially when it concerns share application moneys. The Supreme Court in *CIT v. Lovely Exports P. Ltd.* (2009) 319 ITR (St.) observed as follows:

"2. Can the amount of share money be regarded as undisclosed income under section 68 of the Income-tax 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 Assessing Officer, 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."

The Supreme Court in effect, affirmed a decision of this Court, which had outlined the correct course to be adopted by income tax authorities in cases of alleged bogus share application monies. The relevant observations of this Court in its judgment (*Divine Leasing v*) is extracted below:

"16. 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 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, Shared 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 AO 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."

This position, apart from being endorsed by the Supreme Court, has been applied in subsequent decisions. Thus, the assessee is under a burden to explain the nature and source of the share application money received in a given case. For discharging this, the assessee has to establish:

- (a) the shareholder's identity;
- (b) genuineness of the transaction ; and
- (c) the creditworthiness of shareholders.

In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, the registered address or PAN identity, and other relevant details are to be furnished. Genuineness can also be proved by disclosing materials pointing to receipt of the share application money from the applicant. Copies of shareholders' register, share application forms, transfer registers, etc. can be furnished. So far as the share applicants' creditworthiness is concerned, the assessee can prove it by producing bank statements. *Prima facie*, these may satisfy the requirement of law. The Assessing has to then examine the materials to probe the matter further. He can reject these documents, and hold, for valid reasons, that the transaction is not genuine. The reasons should be based on materials, and not the product of conclusions based on suspicion.

11. In the present case, this Court notices that the Assessing Officer went into great lengths to verify the genuineness of these transactions. He issued summons to the share applicants- only 9 could be served; none actually responded through their authorized or principal officer. Even during remand, 16 of the 18 share applicants could not be served. The AO also examined the bank accounts (of the share applicants) from which the share application amounts were subscribed. He noticed a regularity, a pattern, in the methodology of infusing cash into the accounts, and within a short while afterwards, withdrawing sums to pay for the shares. The PAN/GIR numbers of the share *applicants* furnished by the assessee were not found to be correct, upon verification from the concerned Income Tax officers of the ward(s) in question. The assessee was given opportunity to produce the share applicants' principal officers, but did not do so. The share applicants' addresses too were incorrect.

12. The application of the *ratio* of every decision by a quasi-judicial body like the ITAT has to be nuanced, and contextual. Thus, while the findings in *Divine Leasing*, *Oasis International* or even *Lovely Exports* might be preceded by a general discussion of the correct approach to be adopted by the AO, in a given case where additions are sought to be made on account of share application moneys not found to be genuine, the basic facts of the case cannot be lost sight of. On a proper application of the *ratio* in *Oasis* – and subsequently, the Division Bench ruling in *Commissioner Of Income Tax vs. Nova Promoters & Finlease (P)*

Ltd (ITA 342/2011 decided on 15 February, 2012 by this Court) it is evident that the AO took into account – if we may say so, in exhaustive detail, after a painstaking examination of the records after two or three layers of scrutiny- all the materials and held that the claim that the amounts claimed to be received on account of share applications were not based on genuine transactions. The CIT (A) upheld that order, after calling for a remand report. In these circumstances, the conclusion of the Tribunal, that the assessee had discharged its onus, appears to be based on a superficial understanding of the law, and an uninformed one about the overall facts and circumstances of the case.

13. In view of the above reasons, the questions of law in these appeals are answered in favour of the revenue. The orders of the Assessing Officer are restored. The appeals are to succeed and are therefore allowed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

AUGUST 24, 2012
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