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Reserved on : 20.07.2012

Decided on :30.07.2012

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CIT

..... Appellant

Through : Sh. Deepak Chopra, Sr. Standing Counsel with
Sh. Harpreet Singh Ajmani, Advocate.

versus

M/S. NEELKANTH ISPAT UDHYOG PVT LTD. Respondent

Through : Sh. Sampat Sukumaran, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

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1. The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) dated 24.11.2011 in ITA No. 4194/Del/2011. The impugned order had rejected the Revenue's appeal.

2. The following questions of law was framed for consideration at the time the matter was heard:

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1. Whether the Tribunal was right in law in upholding the order of the CIT(A) deleting the addition of Rs.1,00,40,000/- made by the AO u/s 68 of the IT Act, 1961?

2. Whether the Tribunal was right in law in upholding the order of the CIT(A) deleting the addition of Rs.2,51,000/- made by the AO on account of commission paid to entry operators?

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3. Briefly the facts necessary for deciding the case are that in the return of income for the Assessment Year 2006-07, the assessee declared a total income of Rs.72,741/-. The assessee had declared book profits of Rs.3,50,40,745/- and paid tax under Section 115 JB. The assessee claimed deduction under Section 80IC of the Act for the same amount as its manufacturing facility was located in a notified area. The return was processed and selected for scrutiny and a notice was issued under Section 143(2). The Assessing Officer computed the total income of the assessee at Rs. 1,03,86,980/-. The AO noticed that the assessee had received a sum of Rs.1,00,40,000/- as Share Capital money from the four parties – Sh. Virender Singh, M/s. U.P. Electricals Pvt. Ltd., M/s. Salwan Developers and Promoters Pvt. Ltd. and M/s. Jain Project and Financial Consultants Pvt. Ltd. The AO observed that the last three of these applicants were subject to enquiries by the Investigation Wing and that according to the materials in the form of returns, they were only accommodation entry providers. The assessee was asked to lead evidence in support of its claim that amounts were received towards Share Capital money. Accordingly it filed confirmations, copies of tax returns, bank statements etc., of these parties under cover of letter dated 11.07.2008.

4. The AO appears to have given opportunities to the assessee which filed its written submissions on 11.07.2008, to furnish confirmations. Despite adjournments, the assessee did not appear in the proceedings but later on, its representative appeared. An analysis of the bank statement and account opening forms of the three companies were made after copies were obtained from the concerned banks. The AO noted that the amounts were in fact given by Mukesh Gupta and his Associates, a group of entry operators, whose

statement was recorded under Section 131 of the Act. The AO, on 05.09.2008, issued summons to the principal officers of the three parties, i.e. the assessee applicants, requiring them to attend hearing on 19.09.2008 along with the original Share Certificates, copies of bank statements etc. These notices were either not complied with or returned with the remark “left”. The assessee’s authorized representative, during the course of hearings, furnished statements of various parties, including M/s. Mukesh Gupta, Ranjan Jassal etc. in which they had conceded to admit that the three companies – who were share applicants of the assessee – were not carrying on any business activity and no books of accounts had been maintained. The deponents also stated that they were accommodation entry providers. The assessee had argued that since it filed confirmations along with assessment particulars etc. it discharged its onus by disclosing whatever relevant material it could lay hands on. It also submitted that the statements of Mukesh Gupta and others were recorded prior to the relevant time when the share application money was received by the assessee. The assessee appears to have sought for opportunity to cross-examine the individuals whose statements were concluded; that was declined.

5. The AO noticed that the assessee was a private company and that in such cases there was a close and proximate relationship between the promoters and shareholders. It was further held that the assessee should not have had any difficulty to produce the investors had the whole transaction been genuine. After analyzing each bank account entry of all the share applicants, the AO concluded as follows:

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The above analysis of the bank statements comprehensively establishes how cash has been deposited in one account and then the same has been routed through two or more accounts before the amounts have returned back to the assessee company in the garb of share application money. It is not sheer coincidence that multiple entities have accounts exiting in the same bank branch. This expedient is resorted to because it facilitates quick and easy transfer of funds from one account to another.

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As can be seen from the discussion above, **multiple companies/concerns have been got registered with the same address (e.g. A-4/181, Sector-17, Rohini, New Delhi 85” and 2A/65, Ground Floor, Ramesh Nagar, Delhi”).** For example, the address **“A-4/181, Sector-17, Rohini, New Delhi-85”** **(which is shown to be the business address of M/s. Salwan Developer & Promoters P. Ltd.),** has been used as the address in the case of more than a dozen of such “companies”/“concerns” including M/s. Maestro Marketing & Advertising P. Ltd. into the bank account of which, a cash running into crores has been found deposited. However, the local inquiries have shown that it is a small residential quarter with no sign whatsoever of any business activity with reference to which the deposits in the bank account can be explained. It is evident that these addresses have been used only a façade to establish the identity.

The balance sheets of the “investor companies” sought to be relied upon by the assessee are incomplete. The schedules showing the composition of investments have not been provided. **Since the amount is deposited in cash and then routed through the multiple accounts (never to return back), there are obvious reasons for not maintaining/producing books of accounts and filing annexures showing composition of investments in such cases. For one, the amounts given as share application money etc. are lost forever (as they are one time entries). Another reason for not filing the schedule of investment and loans is**

that while the amount shown in the balance sheet may be less the actual amounts may be more. For example, if one crore has been actually routed through the bank accounts the amount shown in the balance sheet may be just ten or twenty lakhs. Providing the schedule of investments and assets makes it difficult for them to give a confirmation to any one whose name is not available in the schedule.

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In view of the inferences and conclusions drawn by him, the AO added back a sum of Rs.1,00,40,000/- under Section 68 of the Act. The AO also added a sum of Rs.2,51,000/-, being 2.5% of the commission amount paid to the accommodation entry providers out of the undisclosed income of the company.

6. The Appellate Commissioner, to whom the assessee appealed, by order dated 13.01.2011, was of the opinion that in view of the ruling of the Supreme Court in *CIT v. Lovely Exports Private Limited*, 216 CTR (SC) 195 the onus of proving the questioned entries stood discharged the moment the assessee furnished the relevant particulars, such as the identity of the party, and certain other details, like the address and documents pertaining to its financial condition. It was held that the AO could not have, once these particulars had been furnished by the assessee, legitimately brought the amount to tax by invoking Section 68 of the Act.

7. The ITAT in the impugned order rejected the Revenue’s appeal, reasoning as follows:

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9. *We have heard the parties and have perused the material on record. The assessee, it is seen, had furnished before the Assessing Officer, the confirmations of all the four persons from*

whom the money had been received. Copies of their I.T.R. were also filed. The amounts were admittedly received through account payee cheques. The assessee had filed Form No.2 with the ROC in respect of allotment of share capital of Rs.1,00,40,000/-. A copy thereof was also provided to the Assessing Officer. The parties were also not proved to be non-existent. It was on the basis of these facts that the CIT(A) deleted and, in our considered opinion, rightly so, the additions wrongly made. As correctly observed by the CIT(A), the Hon'ble Delhi High Court in the case of "Dwarkadhish Capital Pvt. Ltd.", in I.T.A. Nos.911 & 913/2010, vide order dated 02.08.2010, has held that the onus of proof is not static; that once the assessee has proved the identity of the applicants by furnishing their PANS or income-tax assessment numbers and shows the genuineness of the transactions by reflecting the money in his books either by account payee cheques, or by draft, or by any other mode, the onus of proof shifts to the Revenue; that just because creditors/share applicants could not be found at the given address, it would not give the Revenue the right to invoke section 68 of the Act; that it is the Revenue which has all the power and wherewithal to trace any person; and that moreover, it is well settled that the assessee need not prove the source of the source.

10. In keeping with "CIT vs. Lovely Exports Pvt. Ltd." (supra), if the share application money is received by the assessee from alleged bogus shareholders, whose details are given to the Assessing Officer, as in the present case, the department is free to proceed to reopen their individual assessments in accordance with law and the amount cannot be taken as unexplained income in the hands of the assessee. The assessment order herein does not show the Assessing Officer, as rightly observed by the CIT(A), to have brought anything on record to the effect that the share application money received by the assessee during the year was actually the undisclosed income of the assessee itself. Rather, the identity of the share subscribers stood established. So was the genuineness of the transactions, these transactions being through account payee cheques. As

such, the Assessing Officer ought to have proceeded against the identified share subscribers, which was not done. The statements of the persons recorded by the Investigation Wing of the department, i.e., Mukesh Gupta and his associates, on which the Assessing Officer placed reliance, related to the period from December, 2003 to January, 2005. The year under consideration presently, however, is assessment year 2006-07. The CIT(A) has also taken note of the fact that the said statements do not find mention of the companies from which the assessee states to have taken the share application money. Reliance on the said statement by the Assessing Officer has also, therefore, rightly been rejected by the CIT(A).

11. *Apropos the remaining share subscriber i.e., Virender Singh, he was found to be an existing person. The share application money in his name was received by the assessee by account payee cheque. Shri Virender Singh had applied for shares of the assessee company on behalf of Poorva Techno Impex Pvt. Ltd., which is also assessed to tax. The directors of that company had passed a resolution in that regard. The share application money had originated from the bank account of that company. The CIT(A) has duly taken into consideration all these facts before deleting the addition made.*

12. *Apropos “CIT vs. Oasis Hospitalities P. Ltd.” (supra), the same is not applicable to the facts of the present case. In that case, the assessee had not even furnished basic requirements of share capital i.e., cheque number, date, amount(s) and details of drawee bank, etc. The assessee’s bank account was also not produced. It was in this background that it was observed that the assessee had not been able to discharge its onus and that the addition had been rightly made. In the present case, however, as discussed hereinabove, the assessee has duly furnished all relevant material evidence before the Assessing Officer, thereby discharging its primary onus u/s 68 of the Act, in keeping “CIT vs. Lovely Exports Pvt. Ltd.” (supra) and “Dwarkadish Capital” (supra).*

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8. The Revenue argues that the decision of the Tribunal cannot be sustained, because it mechanically and in a straight-jacketed manner accepted the Appellate Commissioner’s order. Counsel argued that the Tribunal should have seen the AO’s order, which was painstaking in details. Counsel highlighted the fact that so far as the assessee is concerned, the inquiry does not end nor does the burden (of proving that the suspect entries being genuine) shift, merely upon furnishing some material which might explain the source of the funds or the identity of the individual or concern who is responsible for the infusion of money. It was submitted that if, as a consequence of the information, further enquiry is deemed necessary, as it invariably is in most cases, and is undertaken, resulting in no light being shed, or if the source of the funds or amounts cannot be traced, the AO would be entitled to assume, unless the assessee leads convincing evidence to the contrary, that the funds are in fact liable to be added back under Section 68. It was also submitted that the dynamic nature of the burden or onus of proving that the amounts genuinely belonged to share applicants in this case, lay on the assessee, which could not discharge it. Learned counsel relied on the judgment in *Commissioner Of Income Tax vs Nova Promoters & Finlease (P) Ltd* (ITA 342/2011 decided on 15 February, 2012 by this Court).

9. Counsel for the assessee, on the other hand, submitted that the additions sought to be made by the AO were correctly directed to be deleted by the Appellate Commissioner, and that the Tribunal acted within the framework of law in not interfering with that order. It was submitted that the entire controversy before the Court in this case is entirely factual. Counsel submitted

that the assessee had not been given the opportunity to cross examine the individuals who were alleged to have made statements to the income tax authorities in the course of investigation. This violation of a principle of natural justice vitiated the proceedings of the AO and the order had to be corrected by the higher, appellate authority. That apart, submitted the counsel, that the decision of the Supreme Court in *Lovely Exports* had expressly clarified that in proceedings arising out of proposed application of Section 68 if any assessee is to give the details and particulars of the individuals or concerns which had given the funds, he is deemed to discharge the initial burden cast on him. In this case, so long as the initial burden of giving an explanation as to the source of such amounts is satisfied, the assessee cannot be made to suffer addition of such amounts on the ground that further information is not forthcoming or that the information is unreliable.

10. In the decision reported as *Commissioner Income Tax v Oasis Hospitality (P) Ltd* (2011) 333 ITR 119 a Division Bench of this Court considered the previous decisions on the question of the appropriate procedure and approach which every Assessing Officer has to adopt while deciding if income has to be added back under Section 68 of the Act. The relevant observations are in the following terms:

“20. The observations of the Supreme Court in the case of Lovely Exports (supra) go to suggest that the Department is free to proceed to reopen the individual assessment in case of alleged bogus shareholders in accordance with law and, thus, not remediless. It is, thus, for the AO to make further inquiries with regard to the status of these parties to bring on record any adverse findings regarding their creditworthiness. This would be moreso where the assessee is a public limited company and has issued the share capital to the public at large, as in such cases

the company cannot be expected to know every detail pertaining to the identity and the financial worth of the subscribers. Further initial burden on the assessee would be somewhat heavy in case the assessee is a private limited company where the shareholders ITA Nos.2093, 2094, 2095 of 2010, 514 of 2007 & 539 of 2008 Page 11 of 27 are family friends/close acquaintances, etc. It is because of the reason that in such circumstance, the assessee cannot feign ignorance about the status of these parties.

21. We may also usefully refer to the judgment of the Supreme Court in the case of Commissioner of Income Tax Vs. P. Mohanakala [(2007) 291 ITR 278 (SC)]. In that case, the assessee had received foreign gifts from one common donor. The payments were made to them by instruments issued by foreign banks and credited to the respective accounts of the assessee by negotiations through bank in India. The evidence indicated that the donor was to receive suitable compensation from the assessee. The AO held that the gifts though apparent were not real and accordingly treated all those amounts which were credited in the books of account of the assessee, as their income applying Section 68 of the Act. The assessee did not contend that even if their explanation was not satisfactory the amounts were not of the nature of income. The CIT (A) confirmed the assessment. On further appeal, there was a difference of opinion between the two Members of the Appellate Tribunal and the matter was referred to the Vice President who concurred with the findings and conclusions of the AO and the CIT (A). On appeal, the High Court re-appreciated the evidence and substituted its own findings and came to the conclusion that the reasons assigned by the Tribunal were in the realm of surmises, conjecture and suspicion. On appeal to the Supreme Court, the Court while reversing the decision of the High Court held that the findings of the AO, CIT (A) and the Tribunal were based on the material on record and not on any conjectures and surmises. That the money came by way of bank cheques and was paid through the process ITA Nos.2093, 2094, 2095 of 2010, 514 of 2007 & 539 of 2008 Page 12 of 27 of banking transaction as not by itself of any consequence. The High Court misdirected itself

and erred in disturbing the concurrent findings of fact. While doing so, the legal position contained in Section 68 of the Act was explained by the Supreme Court by assessing that a bare reading of Section 68 of the Act suggests that (i) there has to be credit of amounts in the books maintained by the assessee; (ii) such credit has to be a sum of money during the previous year; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the AO, is not satisfactory. It is only then that the sum so credited may be charged to income tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on the record. The opinion of the AO is required to be formed objectively with reference to the material on record. Application of mind is the sine qua non for forming the opinion. In cases where the explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory there is, prima facie, evidence against the assessee, viz., the receipt of money. The burden is on the assessee to rebut the same, and, if he fails to rebut it, it can be held against the assessee that it was a receipt of an income nature. The burden is on the assessee to take the plea that even if the explanation is not acceptable, the material and attending circumstances available on record do not ITA Nos.2093, 2094, 2095 of 2010, 514 of 2007 & 539 of 2008 Page 13 of 27 justify the sum found credited in the books being treated as a receipt of income nature."

11. The decision in *Nova Exports (supra)* – also by a Division Bench, is later in point of time, and has considered the different fact situations which have arisen before Courts in the context of an enquiry conducted by an AO to arrive at a finding. It was held that:

“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.

39. The case of Orissa Corporation (1986) 159 ITR exemplifies the category of cases where no action is taken by the Assessing Officer to verify or conduct an enquiry into the particulars about the creditors furnished by the assessee, including their income-tax file numbers. In the same category fall cases decided by this court in Dolphin Canpack (2006) 283 ITR 190, CIT v Makhni and Tyagi P. Ltd. (2004) 267 ITR 433, CIT v Antartica Investment P. Ltd. (2003) 262 ITR 493 and CIT v Achal Investment Ltd. (2004) 268 ITR 211. To put it simply, in these cases the decision was based on the fundamental rule of law that evidence or material adduced by the assessee cannot be thrown out without any enquiry. The ratio does not extend beyond that. The boundaries of the ratio cannot be, and should not be, widened to include therein cases where there exists material to implicate the assessee in a collusive arrangement with persons who are self-confessed "accommodation entry providers".

40. Reference was also made on behalf of the assessee to the recent judgment of a Division Bench of this court in CIT v. Oasis Hospitalities Private Limited, (2011) 333 ITR 119. We have given utmost consideration to the judgment. It disposes of several appeals in the case of different assessees. Except the case of CIT v Oasis Hospitalities P Ltd. (ITA Nos.2093 & 2095/2010), the other cases fall under the category of Orissa Corporation (supra). However, in the case of Oasis Hospitalities P Ltd., there is reference to information received by the Assessing Officer

from the investigation wing of the revenue on the basis of which it was found that six investors belong to one Mahesh Garg Group who were not carrying on any real business activity and were engaged in the business of providing accommodation entries. They were entry operators and the assessee in that case was alleged to be a beneficiary. While disposing of these appeals, this court observed: -

"The assessees filed copies of PAN, acknowledgement of filing income tax returns of the companies, their bank account statements for the relevant period, i.e., for the period when the cheques were cleared. However, the parties were not produced in spite of specific direction of the AO instead of taking opportunities in this behalf. Since the so-called Directors of these companies were not produced on this ground coupled with the outcome of the detailed inquiry made by the Investigating Wing of the Department, the AO made the addition. This addition could not be sustained as the primary onus was discharged by the assessee by producing PAN number, bank account, copies of income tax returns of the share applicants, etc. We also find that the Assessing Officer was influenced by the information received by the Investigating Wing and on that basis generally modus operandi by such Entry Operators is discussed in detail. However, whether such modus operandi existed in the present case or not was not investigated by the AO. The assessee was not confronted with the investigation carried out by the Investigating Wing or was given an opportunity to cross-examine the persons whose statements were recorded by the Investigating Wing."

These quoted observations clearly distinguish the present case from CIT v Oasis Hospitalities P Ltd. (supra). Except for discussing the modus operandi of the entry operators generally, the Assessing Officer in that case had not shown whether any

link between them and the assessee existed. No enquiry had been made in this regard. Further, the assessee had not been confronted with the material collected by the investigation wing or was given an opportunity to cross examine the persons whose statements were recorded by the investigation wing.”

12. It would be clear that the nature of enquiry undertaken by the income tax authorities would vary from case to case, depending on the nature of the material furnished to them by the assessee, when called upon to do so. In this case, the material in the form of addresses and documents pertaining to the share applicants of the assessee were enquired into thoroughly by the AO. He found a pattern in the way funds were moved into the accounts of those investors. The pattern was common to each of them; the amounts were received within a few days or weeks before the shares were allotted; there was no material to show how they knew that shares could be purchased. Furthermore, the AO's efforts to get them involved, through summons were unsuccessful. The applicant made no attempt to assist the AO in these proceedings. While it is true that the AO did look into the investigation report and did not allow cross examination of the individuals who made the statement under Section 131 of the Act, that alone cannot be termed as a fatal infirmity in his order. Even if that material were to be ignored, the pattern of share money infusion was the same; amounts were usually deposited in the account of the share applicants a few days before the issue of the shares. Moreover, the material provided about the share applicants' financial and fiscal standing was sketchy; they did not respond to summons under Section 131. Under these circumstances, the inferences drawn by the AO were justified and warranted. The Appellate Commissioner and the Tribunal fell into error in directing their deletion.

13. For the above reasons, this Court is of opinion that the revenue's appeal has to succeed. The questions framed are answered in the affirmative, in favour of the revenue; the impugned order (and that of the Appellate Commissioner), are hereby set aside and the order of the AO is restored. The Appeal is therefore allowed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JULY 30, 2012