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

12.

\+ ITA 911/2010

COMMISSIONER OF
INCOME TAX-IV ..... Appellant

Through: Mr. N.P. Sahni, Senior Standing Counsel

versus

M/S. DWARKADHISH
INVESTMENT (P) LTD. ..... Respondent

Through: None

AND

13.

\+ ITA 913/2010

COMMISSIONER OF
INCOME TAX-IV ..... Appellant

Through: Mr. N.P. Sahni, Senior Standing Counsel

versus

M/S. DWARKADHISH
CAPITAL (P) LTD. ..... Respondent

Through: None

Reserved on : 23rd July, 2010

% Date of Decision: 2nd August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

CM 12293/2010 in ITA 911/2010

Allowed, subject to all just exceptions.

CM 12294/2010 in ITA 911/2010 & CM 12296/2010 in ITA 913/2010

For the reasons stated in the applications, delay in re-filing the appeals is condoned.

Applications stand disposed of.

ITA 911/2010 & ITA 913/2010

1. The present appeals have been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the common order dated 29th May, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA Nos. 4799/Del/04 and 4800/Del/04, for the Assessment Year 2001-2002. Since similar issue is involved in both the appeals, we are passing a common order. However, for the purpose of noting the facts, we are referring to ITA No. 911/2010.

2. The relevant facts are that the respondent-assessee was incorporated on 23rd March, 1985. It was engaged in the business of financing and trading of shares. On 22nd October, 2001, assessee filed a return declaring NIL income. The return was initially processed under Section 143(1) of Act, 1961. However, subsequently on 21st October, 2002 the case was selected for scrutiny and notice under Section 143(2)

of Act, 1961 was issued to the respondent-assessee. On scrutiny accounts, the Assessing Officer (in short "AO") found an addition of Rs. 71,75,000/- in the share capital of the assessee. The AO sought an explanation of the assessee about this addition in the share capital. The assessee vide letter dated 13th August, 2003 offered a detailed explanation.

3. However, according to the AO, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, AO made an addition of Rs. 35,50,000/- with the aid of Section 68 of Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income Tax (Appeals) [in short "CIT(A)"] deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The relevant portion of the order passed by the CIT(A) is reproduced hereinbelow :-

> *"2.12 The authorized representative of the applicant has stated that in the written submission that following documents have been filed to prove the identity of share applicants:*
>
> *1. Copies of Certificate of incorporation in respect of the corporate applicants.*
>
> *2. Copy of Memorandum and Articles of Association of the corporate applicants.*
>
> *3. Copies of acknowledgement of returns filed/income tax orders in the case of the applicants.*
>
> *4. Sworn affidavits from the applicants regarding investment in the appellant company.*

5. Copy of Bank accounts of shareholders.

6. Copies of documents obtained from Registrar of Companies.

7. Copies of annual returns filed under the Companies Act.

8. Other relevant documents, wherever available, evidencing the existence and genuineness of the applicants.

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2.21 I have considered the submission made by the authorized representative of the appellant and the facts stated in the assessment order. It is observed that the addition made by the assessing officer on account of unexplained share application money cannot be sustained for the following reasons:-

(i) The applicants concerned were identified.

(ii) The applicants confirmed the payment of money to the appellant for purchase of shares.

(iii) The transactions in question were by cheques.

(iv) The affidavit of the subscribers were filed indicating their full address, details of deposits made with the appellant and sources where from money was obtained to make the deposits. Copies of bank accounts were furnished. These affidavits were notarized. There was no ground for disbelieving the contents of the affidavits.

(v) Most of the subscribers were companies incorporated with the Registrar of Companies. Proper inquiries would have revealed the true facts of the case. The appellant cannot be faulted if there was no time to give them an opportunity to rebut the Inspector's report made at the back of the appellant.

(vi) The deposits were not of an order that could not be believed.

(vii) The shares have been allotted to the shareholders and letter of allotment have been submitted to the Registrar of Companies.

> *(viii) The existence of these companies (i.e. depositors of shares application money) has also been verified from the website of Department of Companies Affairs. The existence of the shareholders, therefore cannot be doubted.*
>
> 2.22 *In the interest of justice, I scrutinized all the available information and I am of the view that in the facts and circumstances, this is not a fit case for not accepting the genuineness of the deposits. The identity of the subscribers and the genuineness of the transactions have been established….."*

4. The ITAT confirmed the order of the CIT(A) as it was also of the opinion that the assessee had been able to prove the identity of the share applicants and the share application money had been received by way of account payee cheques. In reaching this conclusion, the ITAT had relied upon a Division Bench judgment of this Court in ***Commissioner of Income Tax Vs. Divine Leasing & Finance Ltd., (2008) 299 ITR 268 (Delhi)***.

5. Mr. N.P. Sahni, learned standing counsel for the Revenue submitted that the ITAT had erred in law in deleting the addition made by the AO under Section 68 of Act, 1961 as the assessee had failed to discharge the burden in respect of the identity of the share applicants, genuineness of transaction and creditworthiness of share applicants. In support of his submission, he relied upon following judgments :-

A) ***CIT Vs. Rathi Finlease Ltd., 215 CTR 167 (M.P.)*** wherein it has been held as under :-

> *"17. ……S.68 of the Act enjoined the assessee to offer an explanation about the nature and source of the sum found credited in his books and if the explanation was not satisfactory, the amount can be credited and charged to income-tax as income of the assessee. Since the assessee, though tried to explain the genuineness of the credit on the basis of letters of confirmation, it could not be explained as to how the transaction was materialized when the companies were not in existence and the amount was paid by cheque only on the date on which the amount was credited to the account of the company. It was for the assessee to discharge this burden…………"*

B) ***CIT vs. Kundan Investment Ltd., 263 ITR 626 (Cal.)*** wherein it has been held as under :-

> *"……….Under Section 68, the Income-tax Officer is empowered to lift the veil of corporate identity and find out as to whether the apparent is real. It is the assessee on whom the onus lies. Unless sufficient materials are produced, the onus does not shift on the Revenue. But once the materials are scrutinized and the result of the scrutiny is communicated to the assessee, the onus shifts from the Revenue to the assessee. Then the assessee has to take appropriate steps for proving its case. Unless there are sufficient materials after such communication, produced by the assessee, the Income-tax Officer can do no further."*

C) ***Commissioner of Income Tax vs. Sophia Finance Limited, 205 ITR 98 (Del)*** wherein it has been held as under :-

> *"………..As we read Section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income tax Officer*

may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name lender or not. Be that as it may, it is clear that the Income tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in section 68 indicates that the said section is very widely worded and an Income tax officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money.

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…………..On the basis of the language used under Section 68 and the various decisions of different High Courts and the Apex Court, the only conclusion which could be arrived at is: (i)that there is no distinction between the cash credit entry existing in the books of the firm whether it is of a partner or of a third party, (ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee, (iii) if the cash credit is not satisfactorily explained the Income Tax Officer is justified to treat it as Income from "undisclosed sources", (iv) the firm has to establish that the amount was actually given by the lender, (v) the genuineness and regularity in the maintenance of the account has to be taken into consideration by the taxing authorities, (vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by Section 68 can be invoked. In these circumstances, we are of the view that simply because the amount is credited in the books of the firm in the partner's capital account it cannot be said that it is not the undisclosed income of the firm and in all cases it has to be assessed as an undisclosed income of the partner alone. In these circumstances, we are of the view that the Tribunal was not justified in holding that the cash credits of Rs.11,502 in the account of Shri Kishorilal, one of the partners, could not be assessed in the hands of the firm and in deleting the same. Since the matter was not considered by the Tribunal on the merits, the Tribunal would be free to hear the arguments of both the parties and decide afresh in view of the observations made above. Accordingly, the reference is answered in favour of the Revenue and against the assessee.

D) ***CIT vs. Korlay Trading Co. Ltd., 232 ITR 820 (Cal)*** wherein it has been held as under :-

"……….There should be a genuine transaction. The income tax file number has been given but that is not enough to prove the genuineness of the cash credit. Admittedly, there is no affidavit to this effect, by the creditor, on record. Considering these facts, we find that the finding of the Tribunal in this regard is perverse. The assessee has failed to prove the genuineness of the cash credit……

E) ***CIT vs. Shiv Shakti Timber, 229 ITR 505 (MP)*** wherein it has been held as under :-

"……Therefore, from the series of decisions of various High Courts, it is well established that in such a situation where there is a credit entry in the books of account of the assessee and there is no satisfactory explanation, then it will be deemed to be the income of the firm and will be added to the income of the firm and can be accordingly taxed. The view taken by the Tribunal appears to be erroneous of the face of it."

F) ***Sumati Dayal vs. CIT, 214 ITR 801 (SC)*** wherein the Apex Court has held as under :-

"It is no doubt true that in all cases in which a receipt is sought to be taxed as Income, the burden lies upon the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of provind that it is not taxable because it falls within the exemption provided by the Act lies upon the assessee. (See Parimisetti Seetharamamma [1965] 57 ITR 532 at page 536). But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz. the receipt of money, and if he fails to rebut it the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably.

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…………..This raises the question whether the apparent can be considered as the real. As laid down by this Court the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding

> *circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities…….*
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> *xxxx xxxx xxxx xxxx*
>
> *This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities…………..*

G) ***CIT Vs. Divine Leasing and Finance Ltd.*** (supra) wherein it has been ruled thus :-

> *"There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Sections 68 and 69 of the Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company."*

6. In our opinion, as Section 68 of Act, 1961 has been interpreted as recently as 2008 by a Division Bench of this Court in ***Divine Leasing & Finance Ltd.*** (supra) after considering all the relevant judgments, we do not have to reconsider all the judgments referred to by Mr. Sahni which are prior in date and time to the aforesaid judgment. In fact, a

Special Leave Petition filed against the said Division Bench judgm was dismissed by the Supreme Court by way of a speaking order in ***Commissioner of Income Tax Vs. Lovely Exports (P) Ltd., 216 CTR 195 (SC)***. The Supreme Court in ***Lovely Exports (P) Ltd.*** (supra), has held as under:-

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

7. Consequently, the doctrine of merger would apply and the judgment of the Supreme Court in ***Lovely Exports (P) Ltd.*** (supra) would cover the field with regard to interpretation of Section 68 of Act, 1961.

8. In any matter, the onus of proof is not a static one. Though in Section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68. One must not lose sight of the fact that it is the Revenue which has all the power

and wherewithal to trace any person. Moreover, it is settled law the assessee need not to prove the *'source of source'*.

9. We also find that in the case of the respondent-assessee itself, a Division Bench of this Court in ***Commissioner of Income-tax v. Dwarikadhish investment (P.) Ltd. (2008) 167 Taxman 321 (Delhi)*** had dealt with a similar issue with regard to the Assessment year 1997-98. The relevant portion of the order passed by the Division Bench in the said judgment is reproduced hereinbelow:-

> *"3. The Assessing Officer required the assessees to furnish details and documents. The assessees produced copies of sale and purchase bills of the share brokers through whom the transactions took place and photocopies of confirmations of persons who had contributed the fresh share application money. The assessees furnished the PAN (GIR) numbers of the applicants, the details of the cheque numbers and dates. The assessees contended that letters sent to the shareholders had not been responded to.*
>
> *4. The Assessing Officer required the Assessee to furnish bank statement to substantiate the money availability with the Assessee and also to prove the genuineness of the transactions. This not having been done, the Assessing Officer got enquiries made through an Income Tax Inspector who found that none of the applicants were found to exist at the address given in the confirmations. However, the report of the Income Tax Inspector was furnished to the assessees on 22nd February 2000 and the Assessment order was passed on the very next day, that is, 23rd February 2000 giving the assessees no time to respond.*
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> *5. Before the CIT (A) the assessees furnished additional evidence, copies of which were sent by the CIT (A) to the Assessing Officer for comments. Despite reminders, no response was received from the Assessing Officer by the CIT(A) on the additional evidence. The CIT(A) then admitted the additional evidence. After examining the entire record,*

the CIT(A) deleted the addition on account of the unexplained share application money for……….

6. In the appeal by the Revenue, the Tribunal found that the facts of the case were no different from those in the case of the group company of the present Assessee namely M/s. Dwarikadhish Financial Services. In the said case the Tribunal had deleted the addition made by the Assessing Officer on account of unexplained share application money. The said decision was upheld by this Court in its order in CIT v. Dwarkadhish Financial Services [2005] 148 Taxman 54.

7. That apart, the Tribunal again examined the documents giving the details of each of the applicants. It noted that ?the above documents were available on the file of the AO.? Accordingly it dismissed the Revenue's appeals. Learned counsel for the Revenue sought to distinguish this Court's decision in the case of the group company of the assessees, on the ground that the facts there were different. However, we find that the findings of the CIT(A) as extracted hereinabove are sufficient to show that the additions made by the Assessing Officer were not justified. The reasoning and conclusions arrived at concurrently by the CIT(A) and the Tribunal suffer from no perversity and are consistent with the law as explained by this Court in Commissioner of Income Tax v. Divine Leasing and Finance Limited (ITA No. 53/2005 decided on 16th November, 2006) reported in (2007) 207 CTR (Del) 38 and in particular para 16 which reads thus:

> *"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 credit worthiness 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 credit worthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation." (p. 453)*

> *9. We are of the view that no substantial question of law arises in these appeals. Accordingly, these appeals are dismissed."*

10. We are also informed that a Special Leave Petition against the aforesaid Division Bench judgment in the case of the respondent-assessee has been dismissed by the Supreme Court. Accordingly, we are of the opinion that no question of law arises in the present cases as the matter is fully covered by the judgment of the Supreme Court in ***Lovely Exports (P) Ltd.*** (supra) as well as the Division Bench judgment of this Court in the case of the respondent-assessee itself.

11. Consequently, we are of the view that the present appeals amount to relitigation. The Supreme Court in ***K.K. Modi Vs. K.N. Modi and Ors., (1998) 3 SCC 573*** has held, *"It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of*

the court.....”.

12. Though we were initially inclined to impose costs yet we are of the opinion that ends of justice would be met by giving a direction to the Revenue to be more careful before filing appeals in a routine manner. In our view, appeal should not be filed in matters where either no question of law arises or the issue of law is a settled one. We give this direction because the ‘judicial capital’ in terms of manpower and resources is extremely limited.

13. Registry is directed to communicate copies of this order to all the Chief Commissioners of Income Tax in Delhi for necessary action. With the aforesaid direction, the present appeals are dismissed in limine but without any order as to costs.

MANMOHAN, J.

CHIEF JUSTICE

August 02, 2010
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