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

RESERVED ON: 29.08.2012
PRONOUNCED ON: 20.09.2012

\+ **ITA 1247/2011**

COMMISSIONER OF INCOME TAX-III ..... Appellant
Through: Sh. Kamal Sawhney, Sr. Standing Counsel.

versus

M/S. SHRI SIDHDATA ISPAT (P) LTD. ..... Respondent
Through: Dr. Rakesh Gupta with Ms. Rani Kiyala and Mr. Rishabh Jain, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. The Revenue is aggrieved by the impugned order of the Income Tax Appellate Tribunal (ITAT) dated 31.03.2011 in ITA No. 4577/Del/2009 by which the finding of the CIT (Appeals), directing the penalty imposed upon the assessee to be set-aside, was upheld. The question of law sought to be urged is:

> *"Is the impugned order of the ITAT deleting the penalty order of Rs. 3,51,47,523/- passed under Section 271B, justified in law?"*

2. The assessee company was incorporated on 25.10.2002. It filed returns, showing loss of Rs. 1,63,68,608/- on 28.11.2006. The assessment

order was framed under Section 143(3), on 26.12.2008 by which the total income determined was Rs. 2,06,78,913/-. The appellant was aggrieved by the addition of Rs. 1,48,82,000/- and Rs. 98,30,000/-. The latter amount received under Section 269SS of the Income Tax Act, 1961 (hereafter referred to as "the Income Tax Act") and the former received towards share application amounts in cash, were disallowed. Its appeal was allowed by the CIT (Appeals). The relevant part of the reasoning of the CIT (Appeals) is extracted from his order:

> *"From the part of explanation reproduced by the AO himself in the assessment order, it is clear that the manufacturing had started towards the end of the August 05. There are a few instances of cash received toward share capital after that also but mostly the cash was received during the construction period. I agree with the appellant's contention that merely because the amount of shares capital was received in cash it cannot be said to be unexplained. The identity of the payer is established beyond doubt. The cash has been paid mostly by directors and their relative who belong to the promoter family. It is not unusual or uncommon to receive cash and deposit in the bank for urgent need. The point is that receipt of cash as share application money is not prohibited by law. It is also settled position that the appellant company need not to explain source of source. If the AO had any doubts or suspicion at all about the creditworthiness of the share holders he could have passed on the relevant information to the concerned AO for further verification. So far as the appellant's case is concerned, the identity of the share holder has been fully established and they have confirmed the transaction of making payment towards share capital. Therefore in view of ratio of Supreme Court decision in the case of Lovely Exports Pvt. Ltd. It is held that the addition made in the case of appellant in respect of share capital is not justified. It also appears that there was some calculation mistake in the amount of share capital and loan.*

Whereas the loan about was less than what was actual amount stated by the appellant, the share capital added by the AO is much higher than what is actual amount received by the appellant. In any case since the AO has made addition of Rs. 1,48,82,000/- which is deleted. The AO is however directed to pass on the information to the AOs having jurisdiction over the concerned share holders."

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"4.2 In the appeal proceedings the appellant's AR filed, as part of paper book the documents that were furnished before the AO in support of the transaction. It was explained that all the five parties from whom share application money is received, are existing share holders of the appellant company. In fact three of them were promoter directors and other two are wives of two directors. In the affidavit filed, they have confirmed the share capital as well as share application money paid to the appellant company. The allotment of shares towards the amount paid by them could not be completed till the end of the year because of which this amount is reflected as share application money. In support of the transaction not only affidavit but acknowledgement of return, statement of income and balance sheet of the share applicants have been filed. It was submitted that all of them were separately assessed to tax and investments in the appellant company were duly reflected in their own balance sheet. These documents were filed before the AO but he neither called these persons for examination nor made any other enquiries. The AO simply stated that it was not believable that such persons would contribute huge amount towards share capital. However these observations of the AO were merely in the nature of surmise and conjecture which cannot be the basis of making addition. More over it was also contended that these amounts were towards share application money and not loan. Accordingly once the identity of the share applicant was proved, there cannot be any addition in the case of the company as held by the Supreme Court in Lovely Exports.

4.3 I have carefully considered the submissions made on behalf of appellant. From the documents filed by the appellant in support of the transaction it is seen that not only the income statement but even the balance sheet of these persons have been filed. Even if the income of these persons was in the range of 1 to 1.5 lacs, they had sufficient capital and other resources on the basis of which the source of share application money as well as share capital was established. The three directors of the appellant company were partners in other family firms like Kamdenu Metal Indus. And Shri Sidhata Steel Tubes etc. They have taken loan from these firms, which was reflected in their balance sheets. It may be noted that the AO has merely expressed his doubts and suspicion about the creditworthiness of these parties on the basis of income declared by them in their returns. But he did not bring on record any cogent material to support his doubts. The AO also had doubts about investment in the appellant company because it was running into heavy losses. However he again did not appreciate that this was a family concern and the current year was the first year of its manufacturing operation where it worked only for the part of the year. In any case such doubts or suspicions alone cannot be the basis of addition under Section 68. Otherwise also the identity of the parties has been established beyond doubt and even their sources explained. The amount has been received towards share application money. Therefore no addition can be made in the hands of the appellant company. The AO may pass on the information about quantum of investment to the concerned AOs having jurisdiction over the investors. However, the addition of Rs. 98,30,000 is deleted."

3. In the meanwhile, on the basis of the original assessment order, the AO had initiated penalty proceedings under Section 271D which culminated in a penalty order for Rs.31,70,47,523/-. This amount was reduced by the CIT (Appeals) who took into consideration the fact that a sum of Rs. 19,00,000/- had been received by the assessee through cheque towards share

capital. After deducting the amount, the penalty upheld by the CIT(Appeals) was Rs. 3,51,47,523/-. The Revenue carried the matter in appeal both against the quantum assessment as well as the penalty order. The Tribunal upheld the CIT (Appeals)'s order as regards the merits. The CIT (Appeal)'s order imposing the penalty was consequently dismissed.

4. It was argued on behalf of the Revenue that the Tribunal ought to have seen that the inclusion of a huge amount of Rs.3,70,47,523/- automatically attracted Section 271D. It was also urged that this included the share application money of Rs. 98.3 lakhs. Learned counsel for the Revenue urged that the assessee did not show whether any share had ever been allotted during the period under consideration. Consequently, the assessee had clearly violated Section 269SS, exposing itself to penalty action under Section 271D of the Act.

5. The Tribunal noticed that during the assessment proceedings, it had been contended by the assessee that an amount of Rs. 53,18,200/- out of the unsecured loans in the last year had been converted into share capital. This was stated by way of letter dated 01.12.2008. The assessee had also furnished a list of persons who had made cash payments for the purchase of shares. The Tribunal took note of CIT(Appeals) order that the AO had been furnished with various documents – affidavit, acknowledgement of returns, balance sheet and in some cases, bank statements and copies of cheques from various parties. The PAN No. and names of parties who had given the amounts and who had also confirmed by their affidavits, were furnished during the assessment proceedings. In lieu of these payments, the shares had actually been allotted to them. Having regard to these, the CIT(Appeals) directed the deletion of Rs. 98.3 lakhs received in cash from five individuals

towards the share application amount. The Tribunal's findings are as follows:

> *"16. We have heard the rival contentions and perused the relevant records. We find that the identity of the share applicants has been established. This has not been disputed even by the Assessing Officer, the claim of share application money has been rejected on the ground that the share applicants did not have adequate income. In such situation, in our considered opinion the ratio of Hon'ble Apex Court in the case of Lovely Exports 216 CTR 195 clearly applies. In the said case it was held 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, but it cannot be regarded as undisclosed income of the assessee."*

6. In the appeal, the Tribunal again noticed the reply filed by the assessee on 22.12.2008. In that letter, the assessee stated that its directors and others had deposited cash. The total amount of penalty imposed under Section 271D for infringement of Section 269SS was Rs. 3,70,47,523/-. The Tribunal held as follows:

> *"25. As regards the rest of the share capital money are concerned, we find that Ld. Commissioner of Income Tax (Appeals) has relied upon the decision of the Hon'ble High Court of Jharkhand in the case of Bhalotia Engineering Works (P) Ltd. V. CIT (supra).*
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> *26. In this connection, ld. Counsel of the assessee has placed reliance upon the decision of the Hon'ble Madras High Court in the case of CIT v. Rugmini Ram Raghav Spinners Pvt. Ltd. 304 (ITR) 417 wherein it has been held that the share application money was not deposit or loan under the provisions of Section 269T and therefore, the penalty u/s 271E was liable*

to be deleted. On the strength of this ruling, ld. Counsel of the assessee referred the decision of the Hon'ble Apex Court in the case of CIT v. Vegetable Products 88 ITR 192 for the proposition that when two views are possible, the view which is in favour of the assessee should be adopted.

27. Respectfully, following the aforesaid Hon'ble Apex Court decision, in our considered opinion, on the strength of Hon'ble Madras High Court decision stated above, the assessee is liable to get relief from the levy of penalty in this regard. Hence, respectfully following the Hon'ble Madras High Court decision cited above, we hold that the penalty on cash receipts of share application money is liable to be deleted. Hence, we set aside the order of the Ld. Commissioner of Income Tax (Appeals) and delete the levy of penalty in this case. Hence, assessee's appeal is allowed."

7. The question which this Court has to consider is whether the view of the Tribunal, following the Madras High Court judgment and setting-aside the penalty is justified. In *Commissioner of Income-Tax v. Rugmini Ram Ragav Spinners P. Ltd.* [2008] 304 ITR 417 (Mad), the Madras High Court was of the view that if the explanation of an assessee is plausible, then in terms of Section 273B, no penalty can be imposed for infringement of various provisions, including Section 271D. The relevant discussion in this regard is as follows:

"The above section provides that if the assessee proves that there is a reasonable cause, he is not subject to levy of penalty. The case of the assessee is that, the amount received by the assessee is only for the purpose of allotment of shares and it is not a deposit or loan. In this case, the reasonable cause is that the assessee was under the bona fide belief that the money received is only for the purpose of allotment of shares. Also, there is no material or

> *evidence or any compelling reason produced by the Revenue to prove that the money received is a deposit or loan. The first appellate authority as well as the Tribunal have come to a correct conclusion after accepting the explanation offered by the assessee. It is a question of fact and the order of the Tribunal is not a perverse one. The concurrent finding given by both the authorities below is based on valid materials and evidence. In the case of CIT vs. P. Mohanakala (2007) 291 ITR 278 (SC), the Supreme Court held that whenever there is a concurrent finding by the authorities below, no interference should be called for by the High Court. Under these circumstances, we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference."*

8. The decision in *Bhalotia Engineering Works Private Limited v. CIT* 2005 (275) ITR 399 (Jharkhand) concerned a fact situation where the nature of payment by the third parties to the assessee were for the purpose of share allotment. The specific question that the Court answered was as to the nature and character of amounts received by the company till the share allotment took place. The Court took into consideration Section 269T and proceeded to hold that till allotment, the amount partakes the position of attracting Section 269SS of the Act.

9. As may be seen from the above discussion, the share applicant's identities were disclosed and the requisite confirmations and all the material particulars were revealed to the assessing officer; thus, there were clearly two views possible on the merits. The question, therefore, in the judicial view itself would be whether the assessee is liable for penalty proceedings. In *CIT v. Vegetable Products Limited,* (1973) 88 ITR 192, the Supreme Court had to deal with a situation where two High Courts had confirmed a

view acceptable to the assessee where as two other High Courts had taken a diametrically opposite view. The Court held that if two High Courts adopt one interpretation which is favourable to the assessee, that cannot be considered as an unacceptable or untenable one, at least for purposes of penalty and that the consequence of accepting the Revenue's contention that the one favourable to it ought to have been adopted by the assessed would lead to harsh and inequitable results.

10. In view of the above discussion, it is held that there is no infirmity in the order of the Tribunal since there were two possible views – one directly in favour of the assessee [*Rugmini Ram* (supra)]. Consequently, the appeal has to fail and is dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 20, 2012