



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

RESERVED ON : 03.12.2012
PRONOUNCED ON: 21.12.2012

+ **ITA NOS. 134/2012**

COMMISSIONER OF INCOME TAX
 DELHI-V

.....Appellant

Through : Ms. Suruchi Aggarwal, Sr. Standing
 Counsel.

Vs.

M/S. N.R. PORTFOLIO PVT. LTD. Respondent

Through : Dr. Rakesh Gupta, Ms. Rani Kiyala, Sh.
 Piyush Singh and Ms. Ayushi Pareek, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. The revenue claims to be aggrieved by the order of the Income Tax Appellate Tribunal (IT AT) dated 22-07-2011 in IT a No. 2177/DEL/2010 by which its appeal was dismissed. The following question of law arises for consideration:

“Did the Tribunal fall into error in directing the deletion of the sum brought to tax by the AO as unexplained income under Section 68 of the Income Tax Act?”



2. Briefly the facts are that the assessee filed its return for AY 2004-05 declaring a loss to the extent of ₹ 42793/-. Its case was later reopened when the AO issued notice under Section 148. Eventually the AO framed the assessment under Sections 147/144 and added back the sum of ₹ 35,00,000/- under Section 68. The assessee felt aggrieved and appealed to the Commissioner of appeals. In the appellate proceedings, the Commissioner sought for a remand report which was furnished to him. The remand report dated 06-11-2009 - a fairly elaborate document which analyzed in meticulous detail the contentions of the assessee and the materials on the record, to the extent it is relevant for disposal of the present appeal reads as follows:

“Vide the said summons u/s 131 the said parties were required to furnish the following details/information on 07.11.2009;

- 1. personal deposition*
- 2. To produce books of account alongwith complete bills & vouchers for the period 01.04.2003 to 31.03.2004.*
- 3. Statement of all the bank accounts related to your company for the period 1.1.2003 to 31.3.2004.*
- 4. Please explain whether you still in possession of the shares allotted by M/s N.R. Portfolio Pvt. Ltd. If not then to whom the said shares have been sold and the date and details thereof alongwith the supporting document.*

On 23.10.09 the A.R. of the assessee appeared but Shri Chaurasia did not attend. On 30.10.09 Shri Prakash Gupta, A.R. attended and sought adjournment to file reply and he was asked to produce Shri Vicky Chaurasia on 05.11.09 along with all the details as asked for. On 5.11.09 the A.R. of the assessee appeared along with Shri Vicky Chaurasia and a letter dated 3.11.09 but no books of



accounts as asked for were produced. Statement of Shri Vicky Chaurasia was recorded, copy of which is enclosed herewith as annexure-A for your kind perusal.

It is brought to your kind notice that the summons u/s 131 so sent to the parties, summons have come back unserved on 27.10.09 in respect of 4 parties mostly with the postal remarks "NO SUCH FIRM/COMPANY/PERSON", OR A FEW `LEFT WITHOUT ADDRESS". Out of the remaining 3 parties, neither anybody attended in person, nor filed any application for adjournment nor filed the details asked for in the summons u/s 131. Thus, these parties have not discharged their duty to the department as required u/s 131 of the I.T. Act and these persons will never come before any Income-tax Authority as already discussed in details that they are only entry operators and either absconding or evading service of any kind of notice from the Income tax Department or avoiding appearance before any Income-tax Authority because they do not have any real identity, creditworthiness and business.

As regards compliance of letter dated 12.10.2009 sent to the assessee, the A.R. of the assessee has filed a letter dated 29.10.2009 on 30.10.2009 seeking adjournment upto 04.11.2009.

The assessee company filed its reply dated 03.11.2009 on 04.11.2009 in support of its contention and the same are discussed as under"

In para 2 of its letter dated 3.11.2009 the assessee stated that "vide letter dated 10.10.2006 it informed the Department about the change of address from A-46, Mohan Co-op Industrial Estte, Mathura Road, New Delhi to A-15, B-1 Extn. Mohan Co-op Industrial Estate, Mathura Road, New Delhi and enclosed a copy of the said letter.

In this connection it is pointed out that the assessee has not filed any evidence that this letter was filed in the office of the Income-tax Officer Ward 13(1), New Delhi. On the one hand it is saying that it has changed its corporate office from A-46, Mohan Co-op, Industrial Estate to A-15, B-1 Extn., Mohan Co-op Industrial Estate on 10.10.2006 and



on the other hand it has stated in its submissions before the learned CIT(A) that “Admittedly, the appellant company on 18.4.2007 had shifted its Regd. Office from A-46 Mohan Co-op Industrial Estate to A-15, B-1 Extn. Mohan Co-op Industrial Estate. These contradictory versions are not reliable and the contention of the assessee made before the CIT(A) that it had shifted its corporate office from A-46 Mohan Co-op during the period when the proceedings u/s 147/148 were initiated is not acceptable at all.

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From a perusal of these shares allotment letters it is seen that these letters of allotment of shares are dated 18.2.2004 but the same have been sent to these parties only on 15.6.2004 i.e. after a period of about 4 months from the alleged date of allotment of shares to these parties

In para 4(g) the assessee has stated that “it has not paid any dividends to the shareholders”.

It is quite interesting to note that the assessee company is receiving interest and dividends on investment and loans made by it but it has not paid any dividends to the alleged shareholders.

In para 4(h) the assessee has stated that “in support of identity of Corporate share applicants, it has already furnished master details as available on MCA site of Govt. of India which proves without any doubt existence and identity of the share applicants all being corporate bodies...”

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The above submission is also not reasonable for the detailed discussion made in earlier paras of this report and the assessee has not given any substantiating evidence to



prove the identity, creditworthiness and genuineness of the transactions with them. It is pointed out that the summons issued u/s 131 to the said 7 parties, summons have been received back unserved in respect of four parties and in respect of remaining three parties neither any application for adjournment has been received nor any reply has been received till date.

The bank statement of the assessee shows major amounts as Funds transferred (Dr) and (Cr) and cash deposits. In view of the above facts can it be said that

- i) Identify of the above said company/firm/individuals has been proved, whereas their identities are proved only on papers. It is noticed that all the documents obtained by the entry operator like PAN, ITR, ROC, No independent verification is undertaken is to provide accommodation entries and nothing else.*
- ii) These entry operators do not have any business of its own. All the monies appearing in its Bank account originate from some other accounts down the line in which cash is deposited. The entities in which cash is deposited are obviously only paper entities and there could be no justification of deposit in cash in the said account. These entities are not into any activity or business in which cash is deposited other than the activity of being accomplice in providing accommodation entries.*

.....

In view of the above, it is thus clear that the above said entities in which cash was deposited, of which assessee is one of the beneficiaries, are absconding and were never into a business in which so much cash can be legally generated.”



3. The Commissioner of Appeals was of the opinion that the assessee had furnished all the relevant particulars of the share applicants who had invested in its company. These particulars included PAN details which revealed that the investors were filing income tax returns. The Commissioner also concluded that during the course of remand proceedings the AO could not prove with certainty that the investors were entry providers and that the transactions entered by the assessee with them were bogus. The Commissioner also was of the opinion that they are assessing officer had not made any enquiries to establish that the investors had given accommodation entries to the assessee and that the money received from them was the assessee's own undisclosed income, rooted back to it in the guise of share application amounts. Furthermore, the Commissioner was of the opinion that no opportunity to cross-examine the deponents who had made statements during the course of investigation proceedings had been furnished. On account of these perceived infirmities in the approach and order of the AO, the adding back under Section 68 was directed to be set aside. The revenue appealed to the ITAT; the assessee also filed cross objections on the ground that the reopening of assessment was unwarranted. The revenue's appeal was rejected by the impugned order; the cross objections were held to be infructuous and dismissed. The relevant discussion by the tribunal in its impugned order directed itself towards application of the Supreme Court ruling in *Commissioner of Income Tax v Lovely Exports* 216 CTR 195 and held as follows:

“5. We have heard the rival contentions in the light of materials produced and precedents relied upon. We find that the assessee in this case has duly filed copies of share



application forms. The names and addresses, PAN, bank details and confirmations of the investors have been filed, therefore, the assessee has discharged its onus. Hence, we find considerable justification in the CIT(A)'s order in holding that the assessee has provided the PAN and other documentary evidence to prove the identity and creditworthiness of the share applicants and the addition u/s 68 is not warranted.

9. From the above paragraphs of the Hon'ble Jurisdictional High Court decision, it is seen that it has been held by the Hon'ble High Court that when assessee has proved the identity of the share applicants by either furnishing their PAN number or income tax assessment number and shown the genuineness of transaction by showing money either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the revenue. In the present case, assessee has discharged its onus to prove the identity of the share applicants."

4. Learned Counsel for the revenue argued that the Tribunal fell into error in not appreciating that corroborative evidence furnished and relied upon by the assessee was worthless. In this regard particular reliance was placed upon the remand report called for by the Commissioner (Appeals). It was highlighted that summons under Section 131 was sent to the seven parties whose particulars had been furnished but all of them were received back un-served on 27-10-2009 and 03-11-2009 in respect of six parties with the remark that no such firm or company existed and that in the case of the others the remark was that they had left without any forwarding address. Learned counsel also argued that the remand report had clearly brought out



that the assessee, a stock in share broker had not traded in any stocks and shares but shown interest income and dividend income on investments made by it and the loans and advances given by it to other parties. In such event, there was no necessity of raising such huge amount of share capital and year after year. Another important aspect, submitted Counsel, was that the assessee continued to receive dividends upon its investments but did not pay dividends to the so-called shareholders from whom it received capital. Counsel relied on *Commissioner of Income Tax v Divine Leasing and Finance Ltd* 2008 (299) ITR 268, especially the following observations:

“13. 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 assessed it should not be harassed by the Revenues 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 AO 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 Section 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessed; if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the AO 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.”



5. Resisting the submissions of the revenue, it was contended on behalf of the assessee that the Commissioner (Appeals) and the ITAT correctly deduced that the findings of the AO regarding unexplained income were unsustainable. It was emphasized that *Lovely Exports* had declared the law, which is that the initial onus lies on the assessee to discharge its source of income, which in this case was done, by furnishing the addresses and other details such as PAN particulars, list of directors, bank account particulars, etc of the share applicants, who were income tax payees. The burden of proving that the amounts received were unexplained income, or unaccounted money of the assessee, lay upon the revenue, which it did not discharge. In these circumstances, the appellate authorities acted within their rights and jurisdiction in directing the addition to be set aside.

6. Before a discussion on the merits, it would be worthwhile to notice the relevant discussion by this Court, in its judgment in *Lovely Exports*, which was carried in appeal to the Supreme Court. The relevant extracts are produced below:

"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 assessed it should not be harassed by the revenues 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 AO for his



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Several judgments on applicability of Section 68 to Share Application amounts, were adverted to, and the position was summed up as follows:

"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."

The judgment of this Court was affirmed in a brief order, by the Supreme Court; it reads as follows:

"Delay condoned.

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.

Subject to the above, Special Leave Petition is dismissed."

7. In the present case, the assessee claimed that it received ₹ 35 lakhs from seven share applicants. Its assessment was reopened. The assessee did not attend the reassessment proceedings, and suffered an adverse order. On its moving an appeal, the Commissioner sought a remand report. The remand report, an exhaustive 41 page document, discusses threadbare the opportunities granted to the assessee, to establish the identity and creditworthiness of the share applicants. The report highlights, among other facts, the following salient features:

- (1) Share applications were received on 18.2.2004 but the shares were sent to the parties only on 15.6.2004;
- (2) The share applicants did not attend the proceedings despite summons under Section 131; most of the notices were received unserved;



- (3) The assessee, which was a stock broker, did not show any transactions in that activity, but was receiving dividends. However, it did not declare any dividend, to its investors. Its financial condition was such that there was no need to infuse fresh share capital;
- (4) The assessee's bank accounts showed large amounts of cash debits and credit entries.

8. This court is conscious of a view taken in some of the previous decisions that the assessee cannot be faulted if the share applicants do not respond to summons, and that the state or revenue authorities have the wherewithal to compel anyone to attend legal proceedings. However, that is merely one aspect. An assessee's duty to establish that the amounts which the AO proposes to add back, under Section 68 are properly sourced, does not cease by merely furnishing the names, addresses and PAN particulars, or relying on entries in a Registrar of Companies website. One must remember that in all such cases, more often than not, the company is a private one, and share applicants are known to it, since they are issued on private placement, or even request basis. If the assessee has access to the share applicant's PAN particulars, or bank account statement, surely its relationship is closer than arm's length. Its request to such concerns to participate in income tax proceedings, would, viewed from a pragmatic perspective, be quite strong, because the next possible step for the tax administrators could well be re-opening of such investor's proceedings. That apart, the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are



further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under Section 68. This court recollects the robustness with which the issue was dealt with, in *A. Govindarajulu Mudaliar v CIT*, (1958) 34 ITR 807, in the following terms: -

"Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."



9. Having regard to the totality of facts and circumstances, particularly the remand report, which was not considered by the Commissioner (Appeals) and the ITAT in its proper perspective, this Court is of the opinion that the question of law requires to be answered in favour of the revenue, and against the assessee. The appeal is therefore, allowed, but without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

December 21, 2012