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

Reserved on: 18th December, 2012
% *Date of Decision: 28th February 2013*

\+ **ITA 263/2012**

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

versus

TITAN SECURITIES LTD. ..... Respondent
Through: Mr. S. Krishnan, Advocate.

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

R.V. EASWAR, J.

This is an appeal by the revenue under section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). It is directed against the order dated 14.06.2011 passed by the Income Tax Appellate Tribunal ('Tribunal', for short) in ITA No.2654/Del/2009 for the assessment year 2001-02. The following questions, stated to be the substantial questions of law have been proposed by the revenue: -

> "I. Whether Hon'ble ITAT was correct in deleting the addition of Share Application Money u/s 68 of Income Tax Act, 1961 when the Assessing Officer had comprehensively proved that the applicants had no creditworthiness and their genuineness & identity was also doubtful?
>
> II. In light of cash deposits in accounts of applicants, their own admittance of providing accommodation entries & in light

of observation in Para 13 of Hon'ble High Court in case of Oasis Hospitalities whether Hon'ble ITAT was correct in holding that genuineness of the transactions was established?

III. Whether in view of report of Investigation Wing, the onus of assessee gets discharged in normal course by merely paper documents like PAN card, ROC documents, IT returns etc.?

IV. Whether on the facts and circumstances of the case, findings of the ITAT are perverse?"

2. The assessee is a company. We are concerned with the assessment year 2001-02. A return of income was filed declaring income of ₹26,440/- which was first accepted under section 143(1). The return was later taken up for scrutiny and an assessment order under section 143(3) was passed on 30.03.2002 on an income of ₹41,290/-. Subsequently, the assessment was reopened on the basis of information received from the investigation wing of the income tax department and a notice on 28.03.2008 under section 148, was issued after duly recording the reasons and obtaining the sanction of the CIT as required by section 151 of the said Act. Though the notice was issued in March, 2008, there was no response from the assessee and, therefore, a notice under section 142(1) of the said Act was issued on 16.10.2008. There was no response to this notice nor to the subsequent show-cause notice issued on 03.11.2008. Finally the assessee contended before the assessing officer on 02.12.2008 and asked for the reasons for reopening the assessment. The reasons were provided to the assessee who filed its objections which were rejected by an order which was served on the assessee on 10.12.2008. On 20.12.2008, barely 10 days before the assessment was going to be barred by

limitation, the assessee furnished the new addresses of the persons who subscribed to the share capital of the assessee-company. On account of the fact that hardly any time was left for the completion of the assessment, the assessing officer requested the assessee to produce the principal officers of the companies which allegedly subscribed to the share capital of the assessee-company to the extent of ₹35 lakhs. The assessee, however, did not produce those persons but on 24.12.2008 sought to make its final submissions against the proposed additions of ₹35 lakhs.

3. The assessing officer thereafter noted that the companies who subscribed to the share capital were established entry operators who gave accommodation entries to several persons and this fact was also admitted by them in a sworn statement filed before the investigation wing. In letters written to their respective assessing officers in connection with the assessment proceedings for the assessment year 2001-02, these companies admitted to have provided accommodation entries to persons requiring the same in consideration of a commission. These letters are reproduced in the re-assessment order. A specimen letter would suffice: -

"**Letter by Director of Ethnic Creations**

27.11.2008

To,
The Income Tax Officer
Ward 11(2), New Delhi
Sir,

Sub: - Assessment Proceedings in the case of M/s Ethnic Creations (P) Ltd. Assessing Year 2001-02-regarding.

Reference above and in response to your show cause notice dated 17.11.2008. It may be submitted that your proposal as to why commission on accommodation entries given by the assessee company for the year under consideration @ 0.8% i.e. 80 Paisa per hundred should not be treated as income from undisclosed sources. That the proposal for

application of 0.8% i.e. 80 paisa per hundred on the accommodation entries given by the assessee company appears to be on the higher side and the this cannot be treated as income from undisclosed sources as the assessee company earned commission on providing accommodation entries during the course of its business activities and it earned commission ranging from 0.25% to 0.30%. It may also be mentioned that in case like that of the assessee the commission rate had been applied at 0.45%. That in the case of the assessee for the assessment year 2000-2001 the net rate of 70 paisa per hundred was applied on the accommodation entries provided to various parties.

Thanking you

Yours faithfully
(Surender Pal Singh)
Director"

4. Nevertheless the assessing officer, apparently in compliance with the rules of natural justice and the need to give a fair opportunity, issued notices to the above companies which evoked no response; some of the letters issued were returned unserved. It was only after this that the assessee appeared before the assessing officer on 20.12.2008 and gave the new addresses of subscriber-companies. It was in these circumstances, and considering the fact that the assessment was shortly going to be time barred, that the assessing officer asked the assessee to produce the shareholders along with their bank accounts so that the applicability of the provisions of section 68 could be examined. The assessing officer has reproduced the bank accounts of the subscriber-companies in the assessment order covering about 13 pages. He attempted to trace the source of the monies and found, for instance, that in the case of M/s. Polo Leasing & Finance P. Ltd., the amount received by the assessee-company as share subscription was transferred to the account of the share subscriber by another company by name M. V. Marketing P. Ltd. in whose account cash was deposited on the same day. Similarly, amounts were

transferred into the account of M/s. Polo Leasing & Finance P. Ltd. from another company by name FNS Consultancy Ltd. Since there was no standing balance in this account, money was received by clearing cheque and then the proceeds were transferred to M/s. Polo Leasing & Finance P. Ltd. to be further transferred to the assessee as share subscription. Monies were also transferred from the account of one Satwant Singh Sodhi to M/s. Polo Leasing & Finance P. Ltd. to the assessee.

5. The assessing officer has brought out similarly the trail of money flowing into the bank accounts of the subscriber companies and sought to establish that the first transfer of monies was always preceded by an equivalent amount of cash deposited in the account of the transferor. He has also sought to establish that there are series of money transfers before the money goes into the bank account of the subscriber-company making it rather cumbersome for the income tax authorities to follow the trail. Ultimately his inferences from an examination of the bank account details were as under: -

> "*a) The person giving the money could not even maintain minimum balance in its account. The status, creditworthiness and nature of the transaction are amply reflected from all the bank accounts mentioned above – none of the account would show a credit balance of even ₹10000 for a period.*
>
> *b) All the accounts have huge cash deposits during the year. With no business being done by them. The source of cash deposit is not explainable at all by the person in whose accounts the same is deposited. It is reiterated that these persons do not have any business or profit making apparatus other than by providing services to interested persons like the assessee to deposit their unaccounted cash and to give it back through banking channel in the garb of share capital etc. Thus the source of the said cash deposit which found destination in the account of the assessee remained unexplained.*

c) The money found its destination from the source in cash to the account of the assessee on the same day. This proves that the all such accounts are controlled by same persons.

d) It is interesting to note that such persons are playing with these accounts to baffle the authorities to track the source. If the ultimate source was to be cash only and such cash was explainable then why would a person route it through number of accounts."

6. In view of the above facts and in order to verify the genuineness of the transaction and the identity and creditworthiness of the subscriber-companies, the assessing officer issued summons under section 131 of the said Act which were not complied with. In the course of the assessment proceedings the assessee would appear to have filed written submissions stating that the share subscription was confirmed by the shareholders and their income tax returns, statement of affairs, balance sheets, share application forms, etc. have been filed which discharged the onus placed on the assessee to establish the ingredients of the section 68 of the said Act i.e. the identity and creditworthiness of the shareholders and the genuineness of the transactions. The assessing officer did not accept these materials as having discharged the onus placed on the assessee by section 68 of the said Act. He reiterated that the shareholders did not appear before him despite a specific direction, that they did not respond to the summons issued under section 131 of the said Act and in these circumstances he could not accept the genuineness of the share subscriptions.

7. The assessee would appear to have questioned the sworn statement of the directors of the subscriber-companies submitted to the investigation wing of the income tax department and wanted to know whether such statements actually implicated the assessee. The response of the assessing officer to this, in the assessment order, was that these statements corroborated the

accommodation entry business carried on by those companies and that when they have stated in the sworn statement as well as in the letters written to the respective assessing officer and that in this background it was not necessary that those companies should have implicated the assessee-company by name. For these reasons the assessing officer added the amount of ₹35 lakhs under section 68 of the said Act as income from undisclosed sources.

On appeal the CIT (Appeals), after noticing the facts, held that the assessing officer has not carried out any verification of the details furnished and the income tax records of the share applicants, that the assessee has discharged its burden and that therefore the case fell within the ratio of the judgment of the Supreme Court in the case of ***CIT v. Lovely Exports (P) Ltd., (2008) 216 CTR 195***. According to him the assessee has produced the best evidence that was available with it. He accordingly deleted the addition.

8. The revenue carried the matter in appeal before the Tribunal. The Tribunal after referring to the facts in brief, agreed with the CIT (Appeals) by observing as under: -

> "*6. We have heard the rival contentions in light of the material produced and precedent relied upon. We find that assessee has received share application money from Private Limited companies. The assessee has also submitted copy of application for shares, income tax return, acknowledgement, profit and loss account, balance sheet and confirmation letter, date of incorporation and PAN numbers. Thus, it is clear that assessee has provided necessary details to establish the identity of the share applicants. However, Assessing Officer has not verified these details and he has also not disputed these details. Thus, we are in agreement with the finding of the Ld. Commissioner of Income Tax (Appeals) that the assessee has provided necessary details including the Ward/ Circle where the share applicants were assessed to income tax and discharged the onus cast on it. We find that Hon'ble Apex Court in the case of C.I.T. vs. Lovely Exports P. Ltd. (216 CTR*

195) held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to reopen their individual assessments in accordance with law, but cannot be regarded as undisclosed income of the assessee."

9. We have carefully considered the facts and the rival contentions. The following substantial questions of law are framed: -

(a) Whether the Tribunal was right in law in agreeing with the CIT (Appeals) that the assessee has discharged its onus under section 68 of the Income Tax Act, 1961?

(b) Whether the order of the Tribunal confirming the deletion of the addition of ₹35 lakhs made under section 68 of the said Act is based on any evidence or material or reflects an unreasonable or perverse view?

10. We are satisfied that the Tribunal has not disposed of the appeal in the meanwhile required of it. It failed to note that this is not a case which would fall within the parameters laid down by the Supreme Court in ***Lovely Exports (P) Ltd.*** (*supra*). In the case of ***Nova Promoters and Finlease P. Ltd. (2012) 342 ITR 169***, a Division Bench of this Court made a distinction between the cases where the assessing officer makes no inquiry into the evidence/ material adduced by the assessee in support of the share subscription received by it and cases where an inquiry is made into the evidence/ material adduced by the assessee, in the course of which he finds that the assessee has no satisfactory explanation regarding the nature and source of the share capital. The former type of cases have also to be distinguished from cases where the department is in possession of some evidence and requires the assessee to explain the share capital in the light of such evidence and also carries out further inquiries and

investigation which are sought to be blocked by the assessee. The following passage from ***Nova Promotors*** *(supra)* makes the distinction in the following manner: -

> "*The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income-tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register, etc., are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under section 68 and the remedy open to the Revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the Revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan-a smokescreen-conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. 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 section 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.

The case of CIT v. Orissa Corporation [1986] 159 ITR 78 (SC) 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 CIT v. Dolphin Canpack [2006] 283 ITR 190 (Delhi), CIT v. Makhni and Tyagi P. Ltd. [2004] 267 ITR 433 (Delhi), CIT v. Antartica Investment P. Ltd. [2003] 262 ITR 493 (Delhi) and CIT v. Achal Investment Ltd. [2004] 268 ITR 211 (Delhi). 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 selfconfessed "accommodation entry providers".

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 P. Ltd. [2011] 333 ITR 119 (Delhi). 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. (I. T. A. Nos. 2093 and 2095 of 2010) since reported in [2011] 333 ITR 119 (Delhi), the other cases fall under the category of Orissa Corporation [1986] 159 ITR 78 (SC). However, in the case of Oasis Hospitalities P. Ltd. [2011] 333 ITR 119 (Delhi), 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 (page 133):

> *"The assessees filed copies of PAN, acknowledgment 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 Assessing Officer 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 Assessing Officer 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 Assessing Officer. 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. [2011] 333 ITR 119 (Delhi). 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."

11. Again in a Division Bench judgment of this Court in ***CIT v. Fair Finvest Ltd.***, in ***ITA No.232/2012 dated 22.11.2012***, has held as follows: -

"*8. The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the assessing officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators; such a link was shown to be present in the case of Nova Promoters & Finlease (P) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under section 68, the ratio of Lovely Exports (supra) is attracted, irrespective of the facts, evidence and material.*"

12. In another judgment of a Division Bench of this Court in ***CIT vs. Nipun Builders and Developers Pvt. Ltd., ITA 120/2012***, this Bench brought out the distinction between two types of the cases as follows: -

"In an appropriate case, if the facts and circumstances justify, it would be open to the AO to seek information from the assessee as to the creditworthiness of the creditor/share subscriber which may include information as to the sources of the creditor/share subscriber. If proving the creditworthiness of the creditor/subscriber is now judicially accepted as one of the ingredients of the onus cast on the assessee under Section 68, we do not see how proof of the resources of the creditor/share subscriber can be completely excluded from the sweep of the burden. It may not be required of the assessee to give in-depth particulars and details about the resources of the creditor or the share subscriber, but the minimum required of him would be, in our opinion, information that will prima face satisfy the AO about the creditworthiness. Mere furnishing of the bank statements of the share subscribers without any explanation for the deposits in the accounts may not meet the requirements of Section 68. It may be necessary to know the business activities of the share-subscribers in order to ascertain whether they are financially sound and are able to purchase shares for substantial amounts; if they have borrowed monies for making the investment, whether they were capable of repaying them having regard to the nature of their business, volume of the business, etc. These are very relevant, in our opinion, to

> *establish the creditworthiness of the investors. It is for this purpose that it is necessary for the assessee, in appropriate cases where the facts and surrounding circumstances justify, to seek the assistance of the principal officer of the subscribing companies and present him before the AO so that he will be in a position to explain in detail the source from which the shares were subscribed. A curious aspect of the matter which cannot be lost sight of is that the record reveals the assessee's ability to procure the share applicant's bank statement. This speaks volume about its conduct, and belies the argument about its inability to ensure the presence of such company's principal officers."*

13. In the aforesaid judgment this Court has brought out the reasons why it is necessary in certain circumstances for the assessee to ensure the attendance of the share subscriber-companies and these circumstances exist in the present case too.

14. In the present case the Tribunal, with respect, appears to have approached the matter rather superficially and mechanically. It ought to have adverted to the attempts made by the assessing officer to probe into the matter deeper by issuing notices/ summons to the subscriber-companies which evoked no response. It also failed to note that the assessee started participating in the assessment proceedings only from 02.12.2008, though the reassessment notice was issued in March, 2008. The conduct of the assessee is a matter to be taken note of in such cases. The assessee no doubt submitted documentary evidence to show that the companies which subscribed to its shares were income tax assesses and they had also prepared profit and loss account, balance sheet, etc. but the evidentiary value of these on which the Tribunal has relied, ought to have been examined in the light of the stand taken by those companies in their assessment proceedings for the same assessment year. We have extracted a specimen letter written by the Director of Ethnic Creations Pvt. Ltd. wherein it has been admitted that the company

carries on the business of providing accommodation entries for commission. Identically worded letters were written by the other companies to their respective assessing officer, which are all reproduced in the assessment order. The money trail which the assessing officer has sought to trace and the definite pattern which he has termed as a pattern typically as that of entry operators has not been adverted to at all by the Tribunal. It seems to us that the Tribunal has looked at only the evidence adduced by the assessee and has not adverted to the attempts made by the assessing officer in the course of the assessment proceedings to examine the evidence and discredit the same in ***CIT v. Walchand And Co. Private Ltd., (1967) 65 ITR 381*** the Supreme Court held as under: -

> "*It is necessary to emphasize that, though the Tribunal is not a court, it is invested with judicial power to be exercised in manner similar to the exercise of power of an appellate court acting under the Code of Civil Procedure. Authority to "pass such orders thereon as it thinks fit" in section 33(4) of the Income-tax Act, 1922, is not arbitrary: the expression is intended to define the jurisdiction of the Tribunal to deal with and determine questions which arise out of the subject-matter of the appeal in the light of the evidence, and consistently with the justice of the case. In the hierarchy of authorities the Appellate Tribunal is the final fact-finding body : its decisions on questions of fact are not liable to be questioned before the High Court. The nature of the jurisdiction predicates that the Tribunal will approach and decide the case in a judicial spirit and for that purpose it must indicate the disputed questions before it with evidence pro and con and record its reasons in support of the decision. The practice of recording a decision without reasons in support cannot but be severely deprecated*".

The same Bench of three learned Judges reiterated the aforesaid observations in ***Udhavdas Kewalram v. CIT, (1967) 66 ITR 462*** in the following words: -

> "*The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act: it is invested with*

> *authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.....The Tribunal was undoubtedly competent to disagree with the view of the Appellate Assistant Commissioner. But in proceeding to do so, the Tribunal had to act judicially, i.e., to consider all the evidence in favour of and against the assessee. An order recorded on a review of only a part of the evidence and ignoring the remaining evidence cannot be regarded as conclusively determining the questions of fact raised before the Tribunal.*"

15. We are of the view that the Tribunal has not disposed of the appeal in the manner required by law. It is not taken into account the relevant material and the evidence which was brought on record by the assessing officer. Its findings are, therefore, vitiated and cannot be acted upon.

16. For the above reasons we set-aside the impugned order of the Tribunal and restore the appeal to its file to be disposed of afresh in accordance with law. Whatever observations we have made with regard to the facts of the present case are only for the purpose of disposal of this appeal.

17. The substantial questions of law are answered in favour of the revenue. The appeal, however, as stated earlier is remitted to the Tribunal for being disposed of afresh.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

February, 28, 2013
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