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

Decided on: 13.02.2014

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ITA 31/2013

ONASSIS AXLES PRIVATE LIMITED Appellant
Through: Sh. Salil Aggarwal and Sh.
Prakash Kumar, Advocates.

versus

COMMISSIONER OF INCOME TAX Respondent
Through: Sh. Balbir Singh, Sr. Standing
Counsel with Sh. Abhishek Singh Baghel,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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C.M. APPL. 933/2013 (for exemption)

Allowed, subject to all just exceptions.

ITA 31/2013

1. This is an assessee's appeal, directed against an order of the Income Tax Appellate Tribunal (ITAT), of 18.05.2012 in I.T.A. No.1637/Del/2011. The assessment year concerned is 2007-08. The following question of law arises for consideration:



“Did the Tribunal fall into error of law in setting aside the order of the CIT (A) accepting the assessee’s contention that share application amount, to the extent of ₹80 lakhs, received by it, had been properly explained and it could not be included under Section 68?”

2. The assessee, during the relevant period (A.Y. 2007-08) claimed that a sum of ₹1.8 crore had been received by it towards shares, as application money. The amount in dispute is ₹80 lakhs. The Assessing Officer (AO) asked the assessee during the assessment to explain the amounts received from three applicants viz. M/s. Hub Services P. Ltd. (₹25,00,000/-); M/s. R.S. Associates P. Ltd. (₹30,00,000/-) & M/s. Transaction India P. Ltd. (₹25,00,000/-). The AO asked the learned AR of the assessee to file details regarding genuineness of the transactions, identity and creditworthiness with regard to share application money received. The assessee in response thereto filed photo copies of the following documents: (i) Share Applications containing the details of pay orders; (ii) Undated confirmations; (iii) Undated affidavits of the companies from whom share application money was received; (iv) Undated copy of Resolution; (v) Memorandum and Article of Association; (vi) Acknowledgement of return for Assessment Year 2005-06; (vii) PAN Cards in respect of Hub Services P. Ltd. and Transaction India P. Ltd.

3. The AO asked the assessee to furnish copies of bank accounts for the F.Y. 2006-07 of all three share applicants along with their balance-sheet, profit and loss account, income-tax returns, tax audit report and auditor's report for Assessment Year 2007-08. The AO



issued summons under Section 131 of the Act to the said three parties, which came back unserved with the postal remarks, “No such person”. The AO communicated this fact to the learned AR of the assessee by an order-sheet entry dated 16.12.2009 and he was asked to file either the latest address of these three companies or to produce the directors of those companies along with details already asked for by him. The case was thereafter adjourned to 21.11.2009 and again adjourned to 24.12.2009. The assessee’s representative by a letter dated 24.12.2009 stated that all other details relating to share application monies were filed. All the three share applicants were existing entities and had filed their necessary returns with ROC. The assessee filed the necessary communication with the ROC for the Assessment Year 2007-08 by all the three companies. As all the three applicants were existing and assessed to income-tax, it was argued that the share applicants were genuine. The assessee, however, failed to provide bank statements for F.Y. 2006-07 of the aforesaid three companies.

4. Acting on the basis of the materials furnished by the assessee, the AO found that all the three pay orders were obtained from Mahamedha Urban Cooperative Bank Ltd., Noida. He issued summons to the said bank, requiring it to send the bank statements of the three companies from 01.04.2006 till the date of summons. From the information received from the bank, the AO found that M/s. Hub Services P. Ltd. opened bank account No.1002014026499 on 31st March, 2007 whereas the pay order was dated 29.09.2006. M/s. R.S. Accessories P. Ltd., also opened account No 1002014026502 on 31st



March, 2007 whereas the pay order was dated 29.09.2006. The assessee's contention that the pay orders were made from the accounts on 29.09.2006 was, therefore, not accepted. M/s. Transaction India P. Ltd. had two accounts bearing No. 1002014026258 and No. 10020140025746. Both these accounts were opened during F.Y. 2006-07. On considering account No. 1002014026258, the AO held that the pay order for ₹25,03,125/- was issued on 29.09.2006 and on the same date cash amounting to ₹25,04,000/- was deposited in the account raising doubts about the genuineness of transaction. The assessee was asked to show cause how the amount of ₹80,00,000/- claimed to have been received by it as share application money from the share applicants should not be treated as its income under Section 68 of the Act.

5. The AO considered the assessee's contentions and observed that the mere furnishing of particulars was not enough. The creditors were not only to be identified, but moreover, there should also be some evidence of their creditworthiness. There should also be proof of genuineness of transaction. Furnishing of the income-tax file number was not sufficient to prove the genuineness of cash credit. Since the assessee had failed to discharge its onus to prove the identity and creditworthiness of the creditors and genuineness of transaction, the AO came to the conclusion that the assessee had failed to discharge its onus. As regards affidavits filed of the three parties, the AO observed that the statements made in affidavits can be treated as unreliable if there is other material discrediting the deponents. The affidavit could



also be rejected if the assessee failed to produce other supporting evidence when called upon to do so. The AO, therefore, rejected the affidavits as self-serving evidence. The AO consequently, made the addition of ₹80,00,000/-.

6. The assessee, in its appeal before the CIT(A), complained that the AO had not doubted the identity of the shareholders from whom share application money was received. The AO had not pointed out any discrepancy in the income-tax particulars of the shareholders filed by the assessee giving their PAN numbers, complete addresses, as also copies of their acknowledgements. The AO also did not point out any discrepancy in the facts that all the shareholders were assessed to income-tax in Delhi. In spite of these facts, he erred in holding that the three companies were not genuine share applicants who had invested in the share capital of the assessee. The assessee had filed confirmations from all the three companies. The assessee relied on several decisions including the decision of Supreme Court in *CIT v. Lovely Exports Pvt. Ltd.*, 216 CTR 195 (SC). The CIT (A) deleted the addition relying on the decision of the Supreme court in *Lovely Exports Pvt. Ltd.* (supra) and other decisions on the issue.

7. The Tribunal, in its impugned order set aside the appellate Commissioner's findings, holding that:

“10. We have heard both the parties and gone through the material available on record. During the course of hearing the assessee filed photo copies of share



applications containing Pay Order numbers, Photo copies of undated confirmations, photocopies of undated affidavits of the companies from whom share application money claimed to have been received, photo copy of undated resolution, photo copy of Memorandum & Article of Association and copies of acknowledgement of returns for Assessment Year 2005-06 in the cases of all the three parties. The assessee by filing these evidences has claimed that initial onus has been discharged. Since the identity of the share applicants has been established, the contention of the assessee is that no addition can be made in the hands of the assessee. The AO had conducted enquiry from Mahamedha Urban Cooperative Bank Ltd., Noida. We have gone through the information obtained from the bank. It is seen that the bank account in the case of M/s. Hub Services P. Ltd. having Account No.1002014026499 was opened on 31st March, 2007. The assessee received share application money of Rs.25,00,000/- by Pay order No.011784 dated 29.09.2006. Therefore, when A/c No.1002014026499 was opened on 31st March, 2007, the Pay Order could not be made from the bank account of M/s. Hub Services P. Ltd. with Mahameda Urban Cooperative Bank Ltd., Noida. Similarly the Bank account of M/s. R.S. Accessories P. Ltd. bearing No.1002014026502 was also opened on 31st March, 2007, whereas the amount of Rs.30,00,000/- was received by Pay Order No.011785 dated 29th September, 2006. This Pay Order cannot be made from the account of M/s. R.S. Accessories P. Ltd. as on the date of Pay Order the said account was not in existence. As regards pay order of Rs.25,00,000/- in the name of Transaction India P. Ltd., it was issued on 29.09.2006. As per the information received from the Bank A/c Nos. 2002014026258 & 10020140025746 were opened during the F.Y. 2006-07. The pay order was made from the A/c No.1002014026258 on 29.09.2006. On this date the amount of Rs.25,04,000/- was deposited out of which pay order of Rs.25,03,125/- was made. From these facts it is



evident that in first two cases the pay orders have not been made from the Bank Account of the said parties. In the case of third party i.e. M/s. Transaction India P. Ltd. the pay order was made after depositing cash in the bank. Thus it is not a case where the AO had not made any enquiry in the matter. The assessing officer brought this fact to the notice of the assessee and asked him to produce either the directors of the share applicants or give their new addresses as summons sent on the addresses given in the information supplied by it were received back as un-served. The assessee, however, did not comply with the said requirement of the assessing officer.

11. Another important and interesting feature of pay orders is that the pay orders have been made in same series on same date from the same Bank i.e. Pay Order No.011783 dated 29.09.2006 in the name of M/s. Transaction India P. Ltd.; Pay Order No.011784 dated 29.09.2006 in the name of M/s. Hub Services P. Ltd. and Pay Order No.011785 dated 29.09.2006 in the name of M/s. R.S. Accessories P. Ltd. M/s. Hub Services P. Ltd. is located at 204, Himalaya Complex, A-65, Laxmi Nagar, New Delhi. The offices of M/s. R.S. Accessories P. Ltd. and M/s. Transaction India P. Ltd. are located at 5/7B, Pusa Road, New Delhi. It is not mere co-incidence that all the three parties located at two different places in Delhi went to the same Bank on the same day at the same time and got the Pay Orders for requisite amounts in the same series. It will not be possible in the ordinary course of business that all the three persons would go to Noida for purchase of pay orders from the same bank at the same time and with the same running serial numbers. M/s. Hub Services P. Ltd. is located at Laxmi Nagar, New Delhi. There is no dearth of banks in Laxmi Nagar or Pusa Road Delhi. It has to be understood as to why anyone would go for purchase of pay orders from a bank located at long distance in Noida. When the AO



confronted the assessee vide order-sheet entry dated 24.12.2009 by issuing show cause notice as to why the amount of Rs.80,00,000/- claimed to have been received by the assessee as share application money from three companies, should not be treated as income of the assessee u/s 68 of the Act, the assessee vide letter dated 29.12.2009 filed reply reiterating that the identity of all the three applicants was established, their PAN number and confirmations were filed. It was also contended that they were existing income-tax assesseees and were filing returns with ROC.

12. It is also interesting to note that the assessee filed photo copies of undated photo copies of affidavits of the share applicants, undated copy of Resolution, and undated confirmations. On one hand the assessee files confirmations and affidavits and on the other hand the parties are not found at the addresses when the assessing officer issues summons to them. The logical conclusion is that the assessee do not wants to produce them before assessing officer for best reasons known to him. Thus it is a case where conduct of the assessee and human probabilities has to be taken into account while deciding the issue. The logical conclusion flowing out of above facts is that undated confirmations and affidavits must have been obtained by the assessee when pay orders were received from these entities. Therefore, the contention of the assessee that share application money was genuinely received by the assessee is not proved.”

8. The assessee contends that the Tribunal fell into error in holding that the addition made was on account of accommodation entries. It was urged that neither the AO nor the CIT (Appeals) had drawn the correct inferences. It was submitted that the AO was adversely influenced by the fact that the bank account particulars given when the assessment was framed could not be complete. The Commissioner, it



was urged, called for a remand report, which elaborately dealt with all relevant aspects. Counsel took exception to the adverse inference drawn against the assessee. It is submitted that the inference was drawn only on the basis of suspicion without bringing on record any material to show that the amount of ₹80 lakhs was either assessee's own money or that it was not received as share capital contribution from the three shareholder companies. It is urged that the impugned addition has been made by the learned AO arbitrarily by brushing aside the explanation of the assessee and by disregarding the evidence filed by the assessee to prove the identity and existence of the shareholder companies. Counsel also further submits that the complete income tax particulars of these shareholder companies were filed before the learned AO and it was explained that all the three shareholder companies are assessed to income tax at Delhi. The assessee also furnished the latest addresses of the shareholder/applicants, whose particulars could also be verified from the Registrar of Companies. Instead of proceeding to make any inquiry, the AO brushed aside these explanations and wrongly made the additions.

9. Relying on the judgment in *Lovely Exports Pvt. Ltd. (supra)*, it was urged that the assessee's responsibility was to adduce acceptable evidence about the identity of the share applicant and the genuineness of the transaction. This duty did not extend to actually producing the share applicants. If the AO wished, he could easily summon them to attend the proceedings. Counsel highlighted that as against the share



application money of ₹1.8 crores received, the AO made an addition only of ₹80 lakhs, implying that the transactions in respect of the sum of ₹1 crore was accepted. Therefore, the addition was based purely on an unverified assumption. Learned counsel invited the attention of the Court to the remand report called for and considered by the CIT (Appeals) and underlined the fact that the impugned order entirely overlooked these circumstances.

10. It was argued that the Supreme Court, in *CIT v. Stellar Investment Ltd.*, (2001) 251 ITR 263 (SC), has held that mere inability to ensure the presence of the share applicants/investors does not justify a conclusion of bogus investment. Likewise, the decision of the Madras High Court in the case of *CIT v. Electropolychem Ltd.*, (2007) 294 (ITR) 661 (Mad) has been relied on.

11. In this case, the AO had sought for details of the bank accounts of the share applicants. The assessee's grievance is that he drew adverse inference from the details furnished to him, without giving an opportunity to it to rebut any queries which could have arisen. Particularly, the assessee sought to urge that the AO did not take into account the correct bank statements for the relevant period and took note of only a part of it. It was argued that in the remand report furnished to the CIT (A), full particulars were made available and he considered it proper to grant relief to the assessee, which was then overturned by the ITAT.

12. It is a fact that during the pendency of the first appeal before the Commissioner (Appeals), a remand report was called for by the



latter. The remand report contains certain important facts and conclusions, which are extracted below:

“(f) Now, see the financial worth of the alleged three applicant companies from whom the assessee is alleged to have received the share application money. Despite repeatedly asked for, the assessee did not file copies of their audited balance sheet, P& L Account, Income-tax Return, Tax Audit Report and Auditors’ report for the assessment year 2007-08, though the assessee had filed copies of their undated confirmations, undated application for allotment of shares, undated affidavit and Memorandum And Articles of Association of these companies and copies of acknowledgement of return for asst year 2005-06 of two of these companies during the course of assessment proceedings. Even during the course of remand proceedings, the assessee was apprised vide this office letter dated 27.10.2010 that it has not filed the copies of Balance-sheet, P & L account alongwith schedules of these so claimed share subscribers. But the assessee expressed its inability to file the same by stating in its letter dated 08. 11.2010 that “Since the said three applicants are in. no way related to the assessee company and the management of the said share applicant companies are also not under the control of the assessee company, therefore the assessee cannot obtain and file the copies of their Balance-sheets, P & L accounts and its schedules as required by you in the said letter and also cannot produce the directors of the said three companies.”

It is quite strange to note that on one hand the assessee has filed copies of the Bank Statements of all the three applicant companies and copies of acknowledgment of return of R.S. Accessories P Ltd. and of M/s Transactions India P.Ltd. for the assessment year 2007-08 vide its letter dated 27.9.2010 before the learned CIT(A) and on



the other hand it is expressing its inability to file the same in its letter dated 08.11.2010 (reproduced above).

In the copies of acknowledgement of returns of these two companies (acknowledgment of return of the third not filed) the gross income for assessment year 2007-08 has been shown as under:-

M/s R.S. Accessories Pvt.Ltd Rs. 40,194/-(Return filed on 31.3.09)

M/s Transaction India Pvt.Ltd Rs. 7,31,619/-(Return filed on 31.3.09)

As per ROC site, all these three companies have been shown as defaulters of filing DIN 3 and Form 32. The Authorised/ Issued paid up share capital of these companies as per ROC site is as under:

| <i>Name of Company</i> | <i>Authorized capital</i> | <i>Issued/ Paid up capital</i> |
|--------------------------------------|---------------------------|--------------------------------|
| <i>M/s R.S. Accessories P. Ltd.</i> | <i>2,00,000/-</i> | <i>1,00,000/-</i> |
| <i>M/s Huba Services P. Ltd.</i> | <i>3,27,000/-</i> | <i>2,000/-</i> |
| <i>M/s Transaction India P. Ltd.</i> | <i>10,00,000/-</i> | <i>3,79,000/-</i> |

The assessee company claimed to have received the share application money from the above said three companies as under: .

- 1 . M/s Huba Services P. Ltd Rs.25,00,000/-*
- 2. M/s RS. Accessories P. Ltd. Rs.30,00,000/-*



3. *M/s Transaction India P. Ltd. : Rs.25,00,000/-*

From the above facts can it be said that the above said companies were of such a worth in investing substantial amount in the share capital of a Private Limited company and that too without any hope of receiving any dividends thereon. Even the assessee company (Onassis Axles Pvt. Ltd) is not showing enough profit. As per P L account, the Net profit for assessment year 2006-07 has been shown at Rs.1,97,707/- and for 2007-08 at Rs.2,47,734/-. No shrewd businessman will invest such a huge amount in the share capital of a private limited company. Can it be accepted that after investing such a huge amount, the investor company will not contact the investee company? Thus the contention of the assessee as mentioned in its reply dated 08.11.2010 that “Since the said three applicants are in no way related to the assessee company and the management of the said share applicant companies are also not under the control of the assessee company, therefore the assessee cannot obtain and file the copies of their Balance sheets, P & L accounts and its schedules as required by you in the said letter and also cannot produce the directors of the said three companies” has no force. Had these companies were of such a worth, they would have given the money as loans and advances to earn interest income and would certainly have been in contact of the assessee.”

13. Previously, in the remand report, the Commissioner (Appeals) had been informed that the bank statements sought for were given in respect of a limited period. Thereafter, the bank statements of the three companies for the same period – over a year – were sought. These established a clear pattern. The accounts did not disclose large volume of transactions. In two cases, the amounts which were ultimately used



to subscribe to the shares were deposited in cash on 29.06.2006. In the third case, the sum of over ₹24 lakhs was deposited in a span of a month. All these cash deposits were made into accounts the same day or on proximate days, and the pay orders given to apply to the shares were issued from a far-off bank branch in NOIDA. These, together with the share applicants' lack of resources and the woefully inadequate share capital, as well as the authorized and subscribed share capital of the assessee (₹50 lakh being the authorized capital, and the paid up capital being ₹70 lakh, as against it the reserves being over ₹2 crores, for reason of the premium received), showed that the transaction claimed to have resulted in receipt of share money was dubious.

14. *Lovely Exports Pvt. Ltd. (supra)* is an authority for the proposition that the assessee is under an obligation to dispel any doubts regarding the genuineness of an investor and the genuineness of the transaction. Here, though the assessee furnished particulars relating to three share applicants, the further inquiry made by the AO raised more questions than answers. The share applicants' lack of resources, the assessee's position vis-à-vis share amounts received and its commercial condition all pointed to the amount received by it falling within the mischief of Section 68 as unexplained amounts. That the AO or ITAT chose to treat the amount, as bogus share capital, is a matter of inference which the Court would be loath to interfere with.



15. For the above reasons, this Court answers the question framed, in favour of the revenue and affirms the view of the ITAT. The appeal is, therefore, dismissed, with no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

FEBRUARY 13, 2014

**R.V. EASWAR
(JUDGE)**

