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

\+ ITA 1469/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Prem Lata Bansal, Advocate

versus

M/S. NEW AGE INFOSYS PVT. LTD. ..... Respondent
Through: None

% Date of Decision: 27th September, 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?	No
2. To be referred to the Reporter or not?	No
3. Whether the judgment should be reported in the Digest?	No

MANMOHAN, J

CM No.16966/2010

This is an application for condonation of delay in refiling the appeal.

For the reasons stated in the application, delay in refiling the appeal is condoned.

Accordingly, the application stands disposed of.

ITA 1469/2010

1. The present appeal has been filed under Section 260A of Income

Tax Act, 1961 (for brevity "Act") challenging the order dated 20th July 2009 passed by the Income Tax Appellate Tribunal (in short "Tribunal") in ITA No. 1931/Del/2009, for the Assessment Year 2004-2005.

2. Ms. Prem Lata Bansal, learned counsel for the Revenue submitted that the Tribunal had erred in law in deleting the addition of ₹ 12,81,250/- made by the Assessing Officer (in short "AO") on account of unexplained share application money under Section 68 of Act. She further submitted that the Tribunal had deleted the said addition even though the respondent-assessee had not discharged its primary onus with regard to the identity, creditworthiness and genuineness of the transaction.

3. However, upon a perusal of the file, we find that the said addition was deleted by the Commissioner of Income Tax (Appeals) [in short "CIT (A)"] and Tribunal on the ground that the two share applicants were corporate entities who had filed documents like Permanent Account numbers, copy of return of income, affidavit from Directors, balance sheet, profit and loss account, bank statement, copy of the resolution passed in Board meeting, copy of the share application and copy of the share certificate thereby confirming the identity and genuineness of the transaction. In fact, CIT (A) in its order has observed as under:-

> *"In view of the factual position as well as the judicial pronouncement on the subject, discussed above, I am of*

the considered view that the appellant has discharged the initial onus of establishing the bonafides of the transactions and the AO was not justified in ignoring various evidences provided to him by the appellant. Nothing adverse has been brought on record by the AO to establish that the amount of share application money of Rs.12,50,000/- received by the appellant from the said two companies represents its own undisclosed income.

If there was doubt about the source of investment of the said company, then additions should have been made in the case of that company and not in the hands of the appellant company.

It is also seen that addition has been made by the A.O. solely on the basis of the information received from the Investigation Wing, without making any further investigation on the issue. Moreover, details about the investigation/enquiry conducted by him or the Investigation Wing on the basis of which it was held that the said company was involved in the business of providing accommodation entry has neither been confronted by the A.O. to the appellant during the course of assessment proceedings, nor it has been mentioned in the Assessment Order. The Hon'ble Delhi High Court in the case J.T. (India) Exports and another Vs. UOI and another (2003) 262 ITR 269 (Del-FB) has held that the Assessing Officer must pass a speaking order giving reasons for the conclusions arrived at and opportunity of being heard must be provided to the assessee, before passing any adverse order. It has been further held that in the notice issued by the A.O. specific requirement should be indicated and reasonable opportunity must be granted. It was held by the Hon'ble Delhi High Court that in absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated.

In the light of the above discussion, I am inclined to agree with the arguments and evidences provided by the appellant to substantiate that the transaction regarding Share Application Money received by it were genuine transactions and the same were not accommodation

entries, I also do not find any evidence collected by the A.O. which could prove otherwise. Accordingly, the AO was not justified in treating the amount of share application money received by the appellant as its undisclosed income.

In view of our aforesaid discussion, I delete the addition of 12,50,000/- made by the AO u/s 68 of the I.T. Act, 1961."

4. The Tribunal in its order has also observed as under:-

"3. The revenue has brought the issue in appeal before the Appellate Tribunal. Ld. DR relied upon the assessment order. However, in the light of decisions of Hon'ble Supreme Court in the case of Stellar Investment Ltd. 251 ITR 63(SC) and CIT Vs. Lovely Export 216 CTR (SC) 195 and facts and circumstances of the case as elaborately discussed by ld. CIT(A) in the impugned order, we see no justification for interfering in the impugned order. Transfer of share application money from the bank account of the shareholders to the assessee company is fully established and not in doubt. Therefore, even if it is accepted that applicants had hawala entries in their account, the revenue has to proceed against the applicants and not against the company. This follows from the decisions of their Lordships of Supreme Court in the case of Lovely Export (supra) in which it is held as under:

> *"The assessee had given details of the subscribing share applicants. In case the Department alleged that applicants were bogus, it was free to proceed against the applicants. The share application money received could not be regarded as undisclosed income of the assessee company."*

3.1 We must hasten to add that it is not our finding that share applicants in the present case are bogus. Genuineness of the applicants and transfer of money from them has been clearly established. In case source of funds in the hands of applicants is doubted, which case revenue is seeking to make at present, then revenue has to proceed against the applicants in accordance with law. Addition in the hands of the company u/s 68 of the I.T. Act is not justified at all. On facts and circumstances of the case, we see no error in the approach of the ld.

CIT(A) in deleting the addition disputed in the two grounds of appeal by the revenue. These grounds of appeal are accordingly rejected."

5. In our considered opinion, the approach adopted by CIT(A) and Tribunal is in consonance with the decision of Supreme Court in ***Commissioner of Income Tax Vs. Lovely Exports (P) Ltd., 216 CTR 195 (SC)*** wherein it has been 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……"

6. Keeping in view the aforesaid mandate of law and the concurrent findings of fact arrived at by the two authorities below, the share application money cannot be regarded as undisclosed income of assessee under Section 68 of the Act.

7. Accordingly, present appeal is dismissed *in limine*.

MANMOHAN, J

CHIEF JUSTICE

SEPTEMBER 27, 2010
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