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

Date of decision: 22.11.2012

+ ITA 232/2012

COMMISSIONER OF INCOME TAX IV Appellant
 Through Mr. Kamal Sawhney, Sr. Standing Counsel
 versus
 FAIR FINVEST LTD Respondent
 Through Mr. Ved Jain, Adv.

CORAM:**MR. JUSTICE S. RAVINDRA BHAT****MR. JUSTICE R.V. EASWAR****S. RAVINDRA BHAT,J: (OPEN COURT)**

The revenue claims to be aggrieved by order dated 28.10.2011 of the ITAT in ITA No.1795/Del/2011. The question of law sought to be urged by it is whether the Tribunal fell into error in confirming the order of the Commissioner (Appeals) whereby the addition made under Section 68 of the Income Tax Act, 1961 on assessee's return in re-assessment proceedings, were deleted.

2. The facts of the case are that in the reassessment proceedings for assessment year 2002-03, the revenue sought to tax the income which had escaped assessment. This resulted in addition to the tune of ₹55,01,125/-. This was on account of share application money which was received during the previous year in question. The proceedings under Section 148 have been initiated on 26th March, 2009. An investigation report received by the assessing officer which implicated on the basis of, *inter alia*, statement by one Mr. Mahesh Garg and other materials revealed that the assessee was involved in



accommodation entry transactions. The assessing officer's order was carried in appeal to the CIT(A). The CIT(Appeals) allowed the same. The revenue unsuccessfully appealed against the decision before the ITAT.

3. It is argued on behalf of the revenue that the Tribunal and the CIT(Appeals) fell into error in citing a mere technicality i.e. the failure to cross-examine Mr. Mahesh Garg and a suitable opportunity to assessee as a ground for setting aside the addition. Ld. counsel laid great stress on the investigation report as well as the statement dated 22.9.2003 of Mr. Mahesh Garg. Both, especially the latter, had pointed to the respondent's role as recipient or as beneficiary of the income generated through various accommodation transactions. Ld. Counsel relied upon *CIT vs. Nova Promoters & Finlease (P) Ltd* decided on 15.2.2012 (ITA No.342/2011). It was highlighted that in that case too similar and identical investigation report had been relied upon which interalia had many common names including that of Mr. Mahesh Garg and one entry provider i.e. Tashi Contractors (P) Ltd. which is also involved in the present case. Counsel for the assessee contended that no question of law arises in this case and that the initial burden cast upon it by virtue of the judgment of the Supreme Court in *CIT Vs. Lovely Exports Pvt. Ltd.* 216 CTR (SC) 195 had been discharged and that the assessing officer was free to satisfy himself as to the veracity and genuineness of the transactions by examining the bank accounts or the accounts of the companies who had applied for shares in the present case.

4. The CIT(Appeals) while dealing with the facts at hand sought a remand report in the present case. The relevant extracts of his order are as follows :



“From the remand report dated 17.09.10 it is observed that the error in making an addition of ₹55,01,125/- instead of ₹52,51,125/- has been admitted by the AO, which is due to some totaling mistake. Thus in effect the AO has admitted that the addition u/s 68 should have been for an amount of ₹52,51,125/- only. Further to this the appellant has through his submissions dated 31.01.2011 and copy of bank accounts for the relevant period further stated that the total share application money received during the financial year from the 7 companies is only for ₹45 lacs and that the amount of money shown as received on 07.09.01 for ₹7,51,125/- from one Vishnu Kumar Jain has been wrongly added. This fact has been examined through the entries in banks accounts in which narration have been provided by the appellant and the closing balance of which is verified from the copy of balance sheet. It is noted that there has been no money received for ₹7,51,125/- on 07.09.2001 or at any time during the financial year from Shri Vishnu Kumar Jain. Accordingly the total amount with respect to which the present appeal is to be decided is for ₹45 Lacs and not ₹55,01,125/-.

On this issue it is seen from the submissions and paper book filed by the appellant that in order to substantiate the claim that the above mentioned 7 share applicant companies are existing and the transactions are genuine, the appellant had filed the following documents before the AO: -

- a. Copy of share application Form.*
- b. Confirmation of share capital contribution from the above shareholders, giving copies of the cheques and Bank accounts through which the share application has been made.*
- c. PAN details and assessing officers jurisdiction of the shareholders.*
- d. IT returns copies of the share holders.*



- e. *Copy of resolution passed by Board of share applicant companies in respect of authorization to invest in shares in the appellant company.*
- f. *Copy of Bank Statements of the share applicant companies & also of the appellant evidencing the share application money transfer through banking channels.*
- g. *Certificate of Incorporation of share holder companies.*
- h. *Memorandum and articles of association of the share holder companies as well as their Balance Sheet.*
- i. *Certificate from the Auditor of share applicants certifying that their company has invested in shares of assessee company.*
- j. *Confirmation & Affidavit of the then Directors of share applicant companies to the effect that as per company's records investment had been made during FY 2001-02.*
- k. *Affidavit filed during the appellate proceedings from the present Directors of the share applicant companies with respect to confirming the share application made and the fact of shares being allotted.*
- l. *Form of annual return in Form 2-B filed with ROC. (filed during appellate proceedings, where 4,50,000/- shares have been allotted to the 7 companies referred to above).*

Thus from the above details and placing reliance on the latest decision of jurisdiction High Court in the case of Dwarkadhish Investment P. Ltd. 2010 Indlaw Del 1969, in which various earlier decisions of High Court and that the S.C. has been considered it is observed that the appellant has discharged the initial burden placed on it to prove the identity and existence of the share applicants, whose PAN details and Income Tax Returns have also been filed on record. The fact that the share application money from the applicants have been received through banking channel and the fact that the shares have been allotted to these companies on 31.03.02 as evidenced from the Return of Allotments in Form No.2 filed with the Department of



Company Affairs further goes to substantiate the identity of the share applicants and genuineness of the transaction in case of the investor.

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It is observed in the facts of the case that the Assessing Officer has simply referred to certain information received from Investigation Wing wherein the subscriber companies have on the basis of statement of one Shri Mahesh Garg been held/ found to providing accommodation entries. This statement/ information which have been collected at the back of the assessee have not been confronted to he appellant and neither any cross-examination has been provided to the assessee. The AO has also rejected the confirmation & affidavits and also the statement on oath of the present Directors of 7 share applicant companies.

In this connection the observation of the jurisdictional High Court in case of Dwarkadhish Investment (Supra) are quite relevant where the court has observed that it is the revenue which has all the power and wherewithal to trace any person. Further in the case of CIT vs. Victor Electrodes Ltd. 329 ITR 271 it has been held that there is no legal obligation on the assessee to produce some Director or other representative of the Director or other representative of the applicant companies before the A.O. Therefore failure on part of the assessee to produce the Directors of the share applicant companies could not by itself have justified the additions made by the AO particularly when the 7 share applicant companies through their present Directors have now again filed fresh affidavits confirming the application and allotment of shares with respect to the total amount of ₹45 Lacs. It is observed that no attempt was made by the AO to summon the Directors of the share applicant companies. Moreover, it is settled law that the assessee need not prove the "source of source". Accordingly it was incumbent upon the department to have enforced attendance of Shri Mahesh Garg or the erstwhile Directors of the share applicant companies and confronted them with the evidences & affidavits relied upon by the appellant and



thereupon given opportunity to the assessee to cross examine these applicants.

Reliance in this regard is also placed on the decision of Delhi H.C. in case of CIT vs. Ashwani Gupta (322 ITR 396), CIT vs. SMC Share Brokers Ltd. (288 ITR 345) and DCIT vs. GSV Investment P. Ltd. 146 ITR 36 (ITAT) where the addition made by the AO has been deleted as the AO has passed the assessment order in violation of the principles of nature justice in as much as no cross examination was allowed to the assessee on basis of whose statement the said addition was made. Moreover the facts of the case the appellant has in this case submitted that the copy of the statement of Shri Mahesh Garg was given to them on 24.12.09, while the assessment order was passed on 21.12.09 which goes to show that the principles of natural justice has not been adhered to.”

5. The ITAT impugned order as follows :

“9. It may be mentioned here that after going through the facts of the case, it was found that the assessee has issued aforementioned shares on the face value of 10 and no premium has been charged. It was stated by Id. Counsel of the assessee that even fresh affidavits of all the share applicants were filed. It was observed from the record that fresh affidavits in respect of shares allotted to M/s. Royal Credits (P) Ltd. were not placed on record. The learned AR was requested to furnish the same on record. The learned AR was also directed to submit the certificate from the director of the assessee company to show the latest position of the shares which have been allotted to the aforementioned share applicants. Accordingly, the learned AR has furnished the affidavit of the Directors of M/s. Royal Credits (P) Ltd. in which it has been stated that they had applied for 80,000 shares and had provided share application money of ₹8 Lac on 4th August, 2001 through cheque/ DD P.O. No.011357 from the current account maintained by the said concern with the State Bank of Patiala, Darya Ganj, New Delhi. The said affidavit is notarized on 7th August, 2010. The learned AR has also filed certificate dated 24th October, 2011 given by the Director of the assessee company in which it has been certified that the aforementioned seven share applicants are holding the shares till date i.e., as on 24th October, 2011. A copy of the said certificate and affidavit was also given to the learned DR.



10. We have carefully considered the rival submissions in the light of the material placed before us. It has already been mentioned that the shares are not issued at premium. The evidence relating to all the share applicants was filed before the Assessing Officer the details of such evidence have already been described in the above part of this order. Apart from that the assessee had also filed recent affidavits of all the share applicants. Those shares continue to be held by those share applicants till date. Keeping in view all these facts and the evidence filed by the assessee on record, we find no infirmity in the order of the CIT (A) vide which the aforementioned addition has been deleted. We decline to interfere.”

6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68.



7. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in *Lovely Exports* (supra).

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.

No substantial question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

NOVEMBER 22, 2012
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