



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

+ **INCOME TAX APPEAL NO. 320/2012**

% **Reserved on: 17th July, 2014**
Date of Decision: 25th August, 2014

COMMISSIONER OF INCOME TAX Appellant
Through Ms. Suruchi Aggarwal, Sr. Standing
Counsel.

Versus

M/S NAVODAYA CASTLES PVT LTD. Respondent
Through Mr. Ved Jain and Mr. Pranjali
Srivastava, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

Revenue in this appeal, which relates to assessment year 2002-03, has raised the following substantial question of law:-

“Whether the ITAT fell into error in upholding the deletion of Rs.54 lakh, which was directed to be added back by virtue of section 68 of the Income Tax Act on the ground that assessee has discharged the onus of proving the identity and credit-worthiness of the share subscriber and the genuineness of the subscription?”



2. The appeal arises out of the impugned order dated 31st October 2011, passed by the Income Tax Appellate Tribunal, upholding the order passed by the Commissioner of Income Tax (Appeals) deleting addition of Rs.54,00,000/- made under Section 68 of the Income Tax Act, 1961 (Act, for short), by the Assessing Officer on account of share application.

3. The assessee, a company, had filed their return of income for the assessment year 2002-03 declaring loss of Rs.1,58,035/- on 20th October, 2002, which was processed under Section 143(1) of the Act. Subsequently, on the basis of a report submitted by the Investigation Wing that the assessee was a recipient of accommodation entries in form of share application money/share capital/share premium, notice under Section 147 read with Section 148 of the Act was issued and served on 25th March, 2009. The assessee, in response, pleaded that the return filed earlier under Section 139 (1) on 20th October, 2002, may be considered as a return, filed pursuant to the said notice. In response to the assessee's letter dated 18th April, 2009, reasons recorded for issue of notice under Section 147/148, were communicated to the respondent assessee on 2nd September, 2009.



4. Authorized representative of the assessee appeared on 1st September, 2009, and sought adjournment for providing documents, evidence etc. in response to the notice under Section 143(2), which was issued on 2nd September, 2009. The case was adjourned to 11th September, 2009, but no one attended the proceedings and belatedly on 14th September, 2009, request for adjournment was made on the ground that authorized representative was ill. To give further opportunity, proceeding was adjourned to 22nd September, 2009, and other details were sought. On 22nd September, 2009, again request for adjournment was made. On the said date, a questionnaire along with notice under Sections 142(1) and 143(2) was issued, fixing the hearing on 8th October, 2009. On 8th October, 2009, authorized representative of the respondent-assessee once again requested for time on the ground that the requisite information was under preparation/compilation. The assessee was required to furnish details of shareholders who were allotted shares in the year under consideration, their confirmations, copy of the income tax returns, bank accounts, copy of share certificate issued, allotment letter etc. The case was adjourned to 22nd October, 2009, but the said hearing yet again remained unattended. Belatedly, on 17th November, 2009, part information was furnished by the



authorized representative. Further details were required to be furnished.

5. On 17th November, 2009, the assessee raised objection to re-opening and submitted that reasons for re-opening were merely surmises and conjectures. It was stated that the five amounts aggregating to Rs. 47,00,000/-, which were mentioned twice in the list prepared by the Investigation Wing, did not relate them. However, the assessee accepted that they had received six amounts aggregating to Rs.54,00,000/- as per the details given below:-

<i>Bene-Ficiary Bank Name.</i>	<i>Bene-Ficiary Bank Branch</i>	<i>Value of Entry taken</i>	<i>Instrument No. by Which Entry taken</i>	<i>Date On Which Entry taken</i>	<i>Name of a/c Account Holder of Entry Giving A/c</i>	<i>Bank from which entry given</i>	<i>Branch of entry giving Bank</i>	<i>A/c No. of Entry giving Account.</i>
HDFC Bank	Rejender Nagar Mkt.,ND	700000	972521	7.3.02	Sekhawati Finance P.Ltd.	SBP	Daryaganj	50111
HDFC	Old Rajender Nagar, ND	1000000		13.3.02	D.K.Ispat & Timber Ltd.	SBP	- do-	50090
HDFC	--do--	650000		13.3.02	Kuberso Sales P.Ltd.	SBP	- do-	50084
HDFC	--do--	1200000		14.3.02	Dinanath Luhariwal Spinning Mills Ltd.	BP	- do--	50103
HDFC	-do--	850000	33834	16.3.02	Technocom Associates P.Ltd.	Innovative	Wazirpur	220



<i>HDFC</i>	<i>--do--</i>	<i>1000000</i>		<i>18.3.02</i>	<i>Chintpuri Credits</i>	<i>SBP</i>	<i>DG</i>	<i>50058</i>
	<i>Total</i>	<i>5400000</i>						

6. The assessee did not appear in the proceedings held on 25th November, 2009. However, the Assessing Officer wrote a detailed questionnaire for information and compliance and fixed the hearing on 2nd December, 2009.

7. Summons under Section 131 of the Act were sent to the alleged shareholders and they were asked to furnish details on 10th December, 2009. Directors/Principal officers were required to personally come and depose. The summons, as per the assessment order, were received back unserved. At the same time, the assessee filed details and confirmations of the alleged share capital. Earlier on 8th December, 2009, a detailed show cause notice was issued, fixing the hearing on 14th December, 2009. The assessee was asked to produce the shareholders along with their books of accounts to substantiate its claim of genuineness of the cash credits. In fact on 10th December, 2009, authorized representative had appeared and he was apprised that the summons issued to the shareholders under Section 131 had been received back unserved in five cases and he was requested to provide the present postal address of the parties. In the meanwhile, the



Assessing Officer managed to get hold of the bank statements of the shareholders, who had allegedly made deposits by way of cheques and pay orders. The assessment order specifically records that huge cash deposits in lacs were being regularly deposited in the said accounts and then pay orders/cheques were issued to the respondent assessee.

8. On 14th December, 2009, authorized representative appeared and stated that the assessee was unable to produce directors or principal officers of the six shareholder companies pleading that they were not shareholders now and seven years had passed since the transactions took place. The assessment order records and mentions about the transactions recorded in the bank accounts of the shareholder/entry operator companies to show and establish that there was immediate deposit of cash and then issue of cheques. It was further mentioned that these companies were under control of one Mahesh Garg and his group, who were operating various accounts. The Assessing Officer made addition of Rs.54,00,000/- under Section 68 of the Act and Rs.1,08,000/- as commission paid for procuring the said shares being 2% of Rs.54,00,000/-.

9. Commissioner of Income Tax (Appeals) deleted the aforesaid additions on merits. However, he upheld the issuance of notice under Section 147/148 of the Act. He observed that the respondent assessee



had submitted various letters/documents in support of genuineness the transactions towards share capital subscribed, but this was rejected by the Assessing Officer without adducing even a single instance of infirmity and shortcoming. The said evidence was in the form of share application forms, copy of bank statements of the share subscribers from where the share application amount was paid, confirmation of the companies towards investment in share capital, certificate of incorporation with copy of memorandum and articles of association, copy of PAN card, ITR etc. Thus, it was held that the assessee was able to prove the identity of the shareholders, genuineness of the transactions and there was no room for doubt and suspicion. The Assessing Officer, it was observed, had not made any inquiries regarding the fact that assessee had been given accommodation entries and had routed their undisclosed income in the guise of share application money. Reference was made to several decisions of the Delhi High Court in support.

10. Revenue preferred an appeal before the tribunal and cross-objections were filed by the assessee. Appeal of the Revenue has been dismissed. The cross objections filed by the respondent assessee to re-opening were disposed of as infructuous, observing that they have become academic and did not require adjudication.



11. We have heard the Senior Standing counsel for the Revenue, who has relied upon decisions of the Delhi High Court in ***Commissioner of Income Tax Vs. Nova Promoters and Finlease (P) Ltd.*** [2012] 342 ITR 169 (Delhi), ***Commissioner of Income Tax Vs. N.R. Portfolio Pvt. Ltd.***, 206 (2014) DLT 97 (DB) (Del) and ***Commissioner of Income Tax-II Vs. MAF Academy P. Ltd.***, 206 (2014) DLT 277 (DB) (Del). The aforesaid decisions mentioned above refer to the earlier decisions of Delhi High Court in ***Commissioner of Income Tax Vs. Sophia Finance Ltd.***, [1994] 205 ITR 98 (FB)(Delhi), ***CIT Vs. Divine Leasing and Finance Limited*** [2008] 299 ITR 268 (Delhi) and observations of the Supreme Court in ***CIT Vs. Lovely Exports P. Ltd.*** [2008] 319 ITR (St.) 5 (SC).

12. The main submission of the learned counsel for the assessee is that once the assessee had been able to show that the shareholder companies were duly incorporated by the Registrar of Companies, their identity stood established, genuineness of the transactions stood established as payments were made through accounts payee cheques/bank account; and mere deposit of cash in the bank accounts prior to issue of cheque/pay orders etc. would only raise suspicion and, it was for the Assessing Officer to conduct further investigation, but it



did not follow that the money belonged to the assessee and was the unaccounted money, which had been channelized.

13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.



14. Certificate of incorporation, PAN number etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor. It is in this context, the Supreme Court in ***CIT Vs. Durga Prasad More*** [1971] 82 ITR 540 (SC) had observed:-

“Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.”

15. Summarizing the legal position in ***Nova Promoters and Finlease (P) Ltd.***(supra), and highlighting the legal effect of section 68 of the Act, the Division Bench has held as under:-

“32. The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-



company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. In **A. Govindarajulu Mudaliar v CIT**, (1958) 34 ITR 807, this argument advanced by the assessee was rejected by the Supreme Court. Venkatarama Iyer, J., speaking for the court observed as under (@ page 810): -

“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.”

(emphasis supplied)

Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the



Tribunal could not have failed to draw the appropriate inference.

16. In the said case, the Division Bench had also examined the decision of the Supreme Court in ***Lovely Exports P. Ltd.*** (supra) and other cases in which the assessee had succeeded. It was noticed that in the case of ***Lovely Exports P. Ltd.*** affidavits/confirmations of shareholders were filed and income tax record numbers of the shareholders were made available, but the Assessing Officer, who had sufficient time, failed to carry out inquiry and examination. reference was made to the observations in ***Divine Leasing*** (supra) to the effect that there cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment as share capital must be firmly excoriated by the Revenue, but when there is preponderance of evidence to show absence of culpability, the assessee should not be harassed by the Revenue. A delicate balance must be maintained between the two interests. In ***Divine Leasing*** (supra), the following proposition was elucidated:-

“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.”

17. ***Nova Promoters and Finlease (P) Ltd.*** (supra) after referring to the dismissal of SLP against *Divine Leasing* case (supra) observed as under:-

“.....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 sec.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 assesseees 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 sec.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.”

18. ***Lovely Exports Pvt. Ltd.*** (supra) was also considered and



distinguished in *N.R. Portfolio Pvt. Ltd.* (supra) and it was held that the entire evidence available on record has to be considered, after relying upon *CIT Vs. Nipun Builders and Developers*, [2013] 350 ITR 407 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders' attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the creditor. It would be also incorrect to universally state that an Inspector must be sent to verify the shareholders/subscribers at the available addresses, though



this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain and get addresses from the Registrar of Companies' website or search for the addresses of shareholders themselves. Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders.

19. In ***N.R. Portfolio Pvt. Ltd.*** (supra), it has been held as under:-

“18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word “identity” as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the



person or a company was the business undertaken by them. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual *de facto* verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove



the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them."

20. Now, when we go to the order of the tribunal in the present case, we notice that the tribunal has merely reproduced the order of the Commissioner of Income Tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its coordinate bench in the case of *MAF Academy P. Ltd.*, a decision which has been overturned by the Delhi High Court vide its judgment in *C.I.T vs. MAF Academy P.Ltd* [(2014) 206 DLT 277]. In the impugned order it is accepted that the assessee was unable to produce directors and principal officers of the six shareholder companies and also the fact that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about



identity, creditworthiness of shareholders as well as genuineness of transactions.

21. In view of the aforesaid discussion, we feel that the matter requires an order of remit to the tribunal for fresh adjudication keeping in view the aforesaid case law. The question of law is, therefore, answered in favour of the Revenue and against the respondent-assessee, but with an order of remit to the tribunal to decide the whole issue afresh. One of the reasons, why we have remitted the matter is that the cross objections of the respondent-assessee questioning notice under Section 147/148 were dismissed as infructuous and even if we decide the issue on merits in favour of the Revenue, the cross objections would get revived and require adjudication. The appeal is accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

AUGUST 25th, 2014
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