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

\+ **ITA No.342 of 2011**

Reserved on :December 12, 2011
Date of Decision : February 15, 2012.

COMMISSIONER OF INCOME TAX .... Appellant
Through: Mr.Deepak Chopra, Advocate

VERSUS

NOVA PROMOTERS & FINLEASE (P) LTD. …..Respondent
Through Mr. C.S.Aggarwal, Sr.Advocate with
Mr.Prakash Kumar and Mr.Arta Trana
Panda, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

R.V. EASWAR, J.:

This is an appeal filed by the Commissioner of Income Tax under Section 260A of the Income Tax Act,1961 ("the Act" for short) against the order passed by the Income Tax Appellate Tribunal ("Tribunal", for short) on 14th May, 2010 in ITA No.3368/Delhi/2009, relating to the assessment year 2000-2001.

2. The assessee is a private limited company. In respect of the assessment year 2000-2001, for the previous year ended on 31st March, 2000, it filed a return of income declaring loss of Rs.2,800/-. The return was processed under Section 143(1) and the loss was accepted. Subsequently, the Assessing Officer received a letter dated 3rd March, 2006 from the Director of Income Tax (Investigation), New Delhi which furnished detailed information regarding entry operators/accommodation providers. The letter informed the Assessing Officer that there were 16 entry operators who had given accommodation entries to several persons of which the assessee was also one. There were also statements recorded from persons confirming the facts. According to the information contained in the letter, the assessee had obtained accommodation entries from these proceedings in the garb of share application monies. The total amount received from such persons as share application monies was Rs.1,18,50,000/- during the relevant year.

3. Based on the aforesaid letter, the Assessing Officer issued notice under Section 148 of the Act on 22nd September, 2006 reopening the assessment of the assessee and called upon it to file return of income in response to the notice. The assessee stated that the return filed by it earlier may be treated as compliance with the notice. It also requested the Assessing Officer to furnish the reasons for reopening the assessment, which were provided under cover of letters dated 1st June, 2007 and 14th June, 2007.

4. In the course of the reassessment proceedings pursuant to the notice issued under Section 148, the Assessing Officer issued a questionnaire to the assessee. In order to comply with the same the assessee sought for the documents/material in the possession of the Assessing Officer and also requested him to produce the person incharge of the 16 companies for cross examination with regard to the contents of the statements recorded from them. In response to the assessee's request, the Assessing Officer provided the assessee with the following:-

> "*1. Copy of statement of Sh. Rajan Jassal S/o Sh. Surinder Kr. Jassal R/o WZ, 134 Plot No. 170, Vishnu Gareden, New Delhi.*
>
> *2. Copy of statement of Sh. Mukesh Gupta S/o Sh. R.D.Gupta – R/o WZ-414, Naraina Village, New Delhi.*
>
> *3. Printed contents of CD received from Investigation Wing showing transaction made with various parties.*
>
> *4. Copy of letters written to Addl. Commissioner of Income Tax Unit-I. New Delhi, by Sh. Mukesh Gupta and Sh. Rajan Jassal claiming various Benami accounts maintained by them.*"

5. In order to examine the genuineness and the creditworthiness of the companies which gave the entries to the assessee, the Assessing Officer issued summons to Mukesh Gupta and Rajan Jassal on 23rd October, 2007 and 26th November, 2007 respectively. It appears that the Assessing Officer had also issued summons to the companies on 14th September,

2007. He has recorded in the assessment order that some of the summons sent to the companies were received back unserved and the other summons remained uncomplied with. The summons issued to Mukesh Gupta and Rajan Jassal were served but remained uncomplied with.

6. In the meantime, it would appear that the assessee had raised objections to the reopening to the assessment which were disposed of by the Assessing Officer vide letter dated 19th November, 2007. The further objections raised on 26th November, 2007 were also disposed of by the Assessing Officer vide order dated 28th November, 2007.

7. Since there was no response to the summons which were served and some of them had been returned unserved, the Assessing Officer sent an Inspector of Income Tax to the addresses to which summons were issued. The Inspector reported that no such person or company was available or existing at the addresses to which summons were issued. On the basis of the report of the Inspector, the Assessing Officer issued notice to the assessee on 23rd October, 2007 to produce the persons and companies from whom it had received share applications monies. This also was not complied with by the assessee. On 5th December, 2007 the assessee filed a letter with the Assessing Officer along with the affidavits of Rajan Jassal and Mukesh Gupta in which both of them had stated that the transactions with the assessee were genuine and the earlier statements recorded from them by the investigation wing were given under pressure.

A copy of this letter is filed at page 6 of the paper book filed by the learned counsel for the assessee.

8. On the aforesaid facts, the Assessing Officer came to the conclusion that the independent enquiries carried out by him disclosed that the assessee was unable to prove the genuineness of the transactions with the companies and that it also proved that the assessee company had introduced its own monies through non-existing companies using the banking channel in the shape of share application monies. He accordingly invoked Section 68 of the Act and added the amount of Rs.1,18,50,000/- to the income of the assessee.

9. In addition, the Assessing Officer also made an addition of Rs.2,96,250/- representing the commission paid to the parties who facilitated the transactions. He noted that normally the commission in such transactions varied from 2% to 3%. He, therefore, adopted the average of 2.5% which came to Rs.2,96,250/- on the amount of Rs.1,18,50,000/-. This amount was also added to the income of the assessee, making the total addition to Rs.1,21,71,250/-.

10. The assessee filed an appeal before CIT(Appeals) and challenged the jurisdiction of the Assessing Officer to reopen the assessment under Section 147 and also challenged the addition of Rs.1,21,71,250/-. The CIT(Appeals) rejected the assessee's contention against the validity of the reopening of the assessment. He observed that the information received

from the investigation wing of the department was not general or vague, as claimed by the assessee, but was specific and pertained to the transactions with the assessee. He further noted that the information set out the name of the person issuing the cheque, the date and amount thereof etc. He, therefore, held that the Assessing Officer was justified in forming the prima facie belief that income chargeable to tax had escaped assessment. The challenge to the jurisdiction of the Assessing Officer to reopen the assessment was thus rejected.

11. As regards the merits, the CIT(Appeals), taking note of the statement of the assessee that the affidavits from Rajan Jassal and Mukesh Gupta, who were Directors in the three companies as well as the affidavits of Raj Kumar, Harish Kumar and Pramod Kumar who were the directors in other companies which provided the share capital, were not considered by the Assessing Officer, directed the Assessing Officer to examine the contents of the affidavits and verify the veracity and genuineness thereof. The Assessing Officer was also directed to examine the genuineness of the transactions.

12. The Assessing Officer submitted a remand report dated 30th April, 2009 which is reproduced in pages 41 to 45 of the order of the CIT(Appeals) and for the sake of brevity it is not reproduced here. However, we may briefly notice the findings recorded in the remand report which are as under:-

(a) The assessee did not produce the deponents of the affidavits despite repeated opportunities and, therefore, they could not be examined by him.

(b) The affidavits were not sworn to by the deponents and, therefore, they are not admissible in evidence.

(c) All the deponents had earlier given statements under Section 131 of the Act before the Addl. Director of Income Tax (Investigation) in which they had admitted that they were not doing any actual business but were only providing entries.

(d) The summons issued to the principal officers of the companies who contributed the share application monies to the assessee were not complied with and the independent enquiry made by the Inspector also resulted in the finding that no such companies existed at the addresses furnished by the assessee.

(e) To verify the genuineness of the transactions as directed by the CIT (Appeals) summons were issued to the principal officer of the companies, namely, Mukesh Gupta, Rajan Jassal, Raj Kumar and Pramod Kumar on 24th April, 2009 (in the remand proceedings) and these summons were also not complied with and none of the persons attended the proceedings.

On the basis of the above findings, the Assessing Officer reported that the transactions have not been proved to be genuine and they were only instruments used by the assessee to mislead the income tax authorities.

13. The CIT(Appeals) after considering the facts of the case, the statements of the assessee, the remand report of the Assessing Officer as well as the rejoinder of the assessee to the remand report, concluded that the Assessing Officer was not justified in making the addition of Rs.1,18,50,000/- under Section 68 of the Act. Consequently, he also deleted the addition of Rs. 2,96,250/- made for commission paid to the entry providers for obtaining the entries, which had been added under Section 68. In arriving at this conclusion the CIT(A) recorded the following findings: -

(a) The Assessing Officer has disregarded the documentary evidence adduced by the assessee such as confirmation from the share applicants, their income tax file numbers, certificate of incorporation of those companies, records of the Registrars of Companies (ROC) generated from the website, affidavits filed in support of the fact of advancing share applications monies etc.

(b) The Income Tax Inspector, who reported that the share applicant companies did not exist at the given addresses, did

not make any further effort to find out the latest whereabouts of the companies. The Assessing Officer could have found the latest addresses through the postal department.

(c) Even though the summons served on some of the investor companies remained uncomplied with, the Assessing Officer did not initiate any action against them for non-compliance, despite possessing enough powers to enforce their attendance.

(d) The subscription for the shares were received through cheques.

(e) The Investor-companies were active as per the website of the Ministry of Corporate Affairs and they were duly registered with ROC.

(f) Those companies were also having their income tax PAN numbers and regularly filed returns of income.

(g) No material was brought on record by the Assessing Officer to show that the affidavits filed by the Directors of the investor- companies were not genuine. No enquiries were conducted about the contents of the affidavits. Even during the remand proceedings the Assessing Officer did not make any attempt to discredit the affidavits and merely stated that the summons issued to the deponents on 24th April, 2009 (in

the course of the remand proceedings) remain uncomplied with. The result is that the contents of the affidavits have not been disproved. It also shows that the parties (deponents) were present at the given addresses against whom action could have been taken.

(h) No material was brought on record by the Assessing Officer independently of the information received from the investigation wing of the Income Tax Department to show that the monies represented the assessee's undisclosed income.

After recording the aforesaid factual findings, the CIT (Appeals) embarked upon a dissertation of the legal position with regard to additions made under Section 68 of the Act, including the order of the Supreme Court in ***CIT vs. Lovely Export***, 216 ITR 198 SC and the judgment of this Court in ***Divine Leasing and Finance Limited***, (2008) 299 ITR 268. On the basis of the authorities referred to by him, the CIT (Appeals) held that in the case of money received towards share capital only the identity of the share holders needs to be proved and once that is established and it is also shown that the money did in fact come from them, it is not for the assessee to prove as to how the share applicants came to be in possession of the money. In this view of the matter, he concluded as follows: -

"*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 In 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 1,18,50,000/-, made by the AO u/s 68 of the I.T. Act, 1961*."

14. As consequence to the above, the addition of Rs.2,96,250/- made for commission paid to the entry providers was also deleted by the CIT(Appeals).

15. The revenue filed an appeal before the Tribunal in ITA No.3368/Del/2009 challenging the decision of the CIT (Appeals) to delete the addition of Rs.1,18,50,000/-. The assessee preferred a cross objection in CO.No.63/Delhi/2010 challenging the decision of the CIT (Appeals) upholding the validity of the reopening of the assessment under Section 147/148 of the Act. The Tribunal passed a common order disposing of the appeal of the revenue and the cross objections filed by the assessee passed on 14th May, 2010. In paragraphs 28 to 30 of the said order, the Tribunal held, dismissing the cross objections filed by the assessee, that the Assessing Officer had rightly assumed jurisdiction under Section 147 of the Act to reopen the assessment. It was observed that the reason to believe that income chargeable to tax had escaped assessment had a rational nexus with the material placed before the Assessing Officer by

the investigation wing of the income tax department. As regards the appeal filed by the Revenue challenging the relief granted by the CIT (Appeals) on merits, the Tribunal concluded as follows: -

> *"In view of the above, the only requirement in a case where share capital is received is the establishment of the identity of the shareholder whereby the names of the shareholders are to be given to the AO. Even if the shareholders are unable to explain the source of funds, the addition if any can be made in their individual hands only. In the instant case, the finding recorded by the CIT(A) with regard to identity of the shareholder has not been controverted by the learned DR. The Revenue has also not taken any ground that CIT(A) has relied on the additional evidence while deleting the addition, we therefore do not find any reason to interfere in the finding of the CIT(A) who has deleted the addition after applying the proposition of law laid down by the Hon'ble Supreme Court in the case of lovely Exports to the facts of instant case."*

16. The revenue is in appeal against the order of the Tribunal confirming deletion of the addition of Rs.1,18,50,000/- as well as the addition of Rs.2,96,250/-, both made under Section 68 of the Act. The following substantial questions of law arise in the appeal:

> *"(1) Whether the Tribunal was right in law in confirming the order of the CIT(Appeals) deleting the additions of Rs.1,18,50,000/- and Rs.2,96,250/- both made under Section 68 of the Act, on the ground that the identity and creditworthiness of the share-applicants as well as the genuineness of the transactions were proved?*

(2) Whether the order of the Tribunal confirming the deletion of the addition of the aforesaid two amounts was perverse having regard to the evidence and the material on record?"

17. The assessee company claimed that it received monies from several persons as share application monies on various dates during the accounting year ended on 31st March, 2000. The assessee is a Private Limited Company. The dates, the names of the companies and the amounts received from each of them are set out in the form of a table:-

S.No.	**Date**	**Name of Company**	**Amount received (in Rs.)**
1.	20/01/2000	Tashi Contractors (P) Ltd.	10,00,000
2.	20/01/2000	M. V. Marketing (P) Ltd.	10,00,000
3.	22/01/2000	Maestro Marketing & Advg (P) Ltd.	10,00,000
4.	22/01/2000	Fair 'N' Square Exports (P) Ltd.	10,00,000
5.	09/02/2000	Ethnic Creations Pvt. Ltd.	3,00,000
6.	15/02/2000	Ethnic Creations Pvt. Ltd.	3,00,000
7.	16/02/2000	Ethnic Creations Pvt. Ltd.	3,00,000
8.	16/02/2000	SGC Publishing Pvt. Ltd.	6,00,000

9.	17/02/2000	SGC Publishing Pvt. Ltd.	4,00,000
10.	18/02/2000	Arun Finvest Pvt. Ltd.	7,00,000
11.	31/01/2000	Rajkar Electrical & Electronics	7,00,000
12.	05/11/1999	Satwant Singh Sodhi Cons (P) Ltd.	30,00,000
13.	09/02/2000	Satwant Singh Sodhi Cons (P) Ltd.	3,00,000
14.	07/02/2000	Baldev Harish Electricals (P) Ltd	4,00,000
15.	11/02/2000	Baldev Harish Electricals (P) Ltd.	5,00,000
16.	11/03/2000	Harpal Associates Pvt. Ltd.	7,50,000
Total			1,18,50,000

The aforesaid amounts were added by the Assessing Officer by invoking Section 68 of the Act. He also added an amount of Rs.2,96,250/- as commission allegedly paid to the above companies for obtaining the accommodation entries. The whole case of the Assessing Officer, articulated before us by the learned Standing Counsel for the revenue, is that there was enough material on record to show that the companies named above were mere entry providers for consideration and that the transactions were not genuine, though documentary evidence was adduced by the assessee to show to the contrary. The case of the assessee on the other hand, briefly stated, is that the documentary evidence was

adequate to establish all the three ingredients required to be established by the assessee under Section 68, namely, the identity and creditworthiness of the share applicants and the genuineness of the transactions. It is also contended that the Assessing Officer has not disproved or discredited any of the evidence adduced by the assessee in support of the fact that it had received monies from the above named companies' as share subscriptions.

18. In the course of the assessment proceedings, the assessee had adduced documentary evidence in an attempt to prove all the three ingredients of Section 68 viz. (i) identity of the creditor, (ii) creditworthiness of the creditor and (iii) the genuineness of the transaction. But the question before us cannot be resolved merely on the basis of the documentary evidence. The evidence adduced by the assessee has to be examined not superficially but in depth and having regard to the test of human probabilities and normal course of human conduct. Before we proceed to note the findings of the Tribunal and decide whether they have been properly arrived at, it is relevant to note a few judgments of the Supreme Court. In ***Commissioner of Income-Tax, West Bengal II v. Durga Prasad More***, (1971) 82 ITR 540 Hegde J. speaking for the Supreme Court observed as under: -

> "*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 b e 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.*"

In ***Commissioner of Income-Tax (Central), Calcutta v. Daulat Ram Rawatmull***, (1973) 87 ITR 349, the Supreme Court dealt with the question as to when the findings of facts recorded by the Tribunal can be interfered with in a reference made under Section 66 of the Indian Income Tax Act, 1922. The Supreme Court referred to the leading case of ***Edwards (Inspector of Taxes) v. Bairstow,*** (1955) 28 ITR 579 (H.L.) decided by the House of Lords in which Viscount Simonds observed as under: -

> "*For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be* "

In the same case Lord Radcliffe expressed himself in the following words:

> "*If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.*"

Reference was also made to the observations of Bhagwati, J. (speaking for the majority) in the case of ***Mehta Parikh & Co. v. CIT***, (1956) 30 ITR 181, which are as under: -

> "*It follows, therefore, that facts proved or admitted may provide evidence to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law. The court would be entitled to intervene if it appears that the fact-finding authority has acted without any evidence or upon a view of the facts, which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law would have come to the determination in question.*"

In ***Director of Income-Tax v. Bharat Diamond Bourse***, (2003) 259 ITR 280, the Supreme Court again reiterated the aforesaid position and held as under: -

> "*As a principle, this court does not disturb findings of fact unless the findings of fact are perverse. It appears to us this is one of those exceptional cases where the correct conclusion recorded by the Assessing Officer, and affirmed*

by the appellate authority, has been reversed by the Tribunal on account of perverse reasoning, as we shall presently see."

19. The position thus is that even where a reference of a question of law is made to the High Court under Section 66 of the Indian Income Tax Act, 1922 or Section 256 of the Income Tax Act, 1961 over which the High Court exercises advisory jurisdiction, and not appellate jurisdiction, where normally the findings of fact recorded by the Tribunal are binding on the High Court, it has been held by the Supreme Court that the findings are not binding on the High Court if they are perverse or if the findings are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. The position in an appeal under Section 260A of the Act is "a fortiori" as the judgment of the Supreme Court in the case of ***DIT v. Bharat Dimond Bourse***, (supra) would show. We shall demonstrate in the following paragraphs as to how both the CIT (Appeals) and the Tribunal have failed to appreciate the evidence in the proper perspective and on the lines indicated by the Hegde J. in the case of ***Durga Prasad More*** (supra). The present case is also not one, as we shall show presently, where the conclusion of the Tribunal is a reasonable conclusion which should not normally be disturbed even if the appellate court would have taken a different view on the same evidence and material. In the present appeal the evidence and material on record, properly considered in the light of the surrounding circumstances and without attaching weight to neutral circumstances or circumstances of no relevance, point to only one

conclusion, namely, that the monies introduced by the assessee as share subscriptions from 15 companies were its own unaccounted monies.

20. We now summarize the findings of the Tribunal as follows: -

(a) The Assessing Officer has made the addition on the basis of the report of the investigation wing.

(b) The share application monies were received through account payee cheques from companies duly registered with ROC and as per the website of the Ministry of Corporate Affairs, all these companies were active.

(c) The assessee has filed confirmations, certificate of incorporation of the companies who applied for the shares, data generated from the website of the ROC, bank statements from the companies/Directors for payment of money to the assessee company as share application money.

(d) The Assessing Officer has not brought any material which can prove that the share capital emanated from the coffers of the assessee company.

(e) As per record, Mukesh Gupta and Rajan Jassal, who gave statements to the investigation wing on the basis of which the Assessing Officer had made the addition, were concerned only with four companies out of the 16 companies who

advanced monies to the assessee. In respect of the other 12 companies the Directors were different.

(f) The summons issued to Mukesh Gupta and Rajan Jassal and the Directors of 12 companies both during the assessment and the remand proceedings were duly served on them and, therefore, their existence and identity stood established.

(g) No opportunity was allowed to the assessee to cross examine Mukesh Gupta and Rajan Jassal despite the assessee having specifically requested for cross examination before the Assessing Officer. Even in the reply given by the assessee to the reopening of the assessment, such a request had been made. The opportunity to cross examine was again denied during the remand proceedings. Since the assessee has been refused the opportunity to cross examine Mukesh Gupta and Rajan Jassal for a number of times, no purpose would be served in remanding the matter again to enable the cross examination.

(h) In the affidavits filed by Mukesh Gupta and Rajan Jassal the earlier statements given to the investigation wing were retracted and they confirmed that the companies with which they were concerned did advance monies to the assessee companies as share capital.

(i) Even the affidavits filed by the Directors of the assessee company remained unverified and were supported by corroborative evidence in the form of audit balance sheets and profit and loss accounts, bank statements of the share holders which reflected the issue of cheques to the assessee company, PAN details etc. The affidavits were not examined by the Assessing Officer even during remand proceedings despite specific direction given by the CIT(Appeals).

(j) The share holders have transferred their shares since long and were no longer the share holders of the assessee company.

(k) The bank accounts of the share holders show that there were no cash deposits therein and there was nothing to show that the share capital was in fact money which flowed from the coffers of the assessee company.

21. It is not in dispute in the present case that the assessment was reopened on the basis of information received from the investigation wing of the department about the existence of accommodation entry providers and their "modus operandi" in which the assessee was also found to be involved. Even the Tribunal has recorded, while dealing with the assessee's cross objections challenging the jurisdiction of the Assessing Officer to reopen the assessment, that the information was specific, not general or vague, and referred to transactions entered into by the assessee

during the year under consideration. It has further been recorded by the Tribunal that as per the information of the investigation wing, the names of the persons issuing the cheques, the cheque amounts, dates etc., were also mentioned providing a link between the entry providers and the assessee. We are aware of the legal position that at the stage of issuing the notice under Section 148 the merits of the matter are not relevant and the Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax at escaped assessment. However, once that stage is crossed and the reassessment proceedings are set in motion, the material on the basis of which the requisite belief was formed by the Assessing Officer has to be appraised and examined. That material on the basis of which the notice under Section 148 was issued becomes relevant in the course of the reassessment proceedings. It is only because of this position that the assessee in the present case has been provided that the copies of the statement made by the Rajan Jassal and Mukesh Gupta as also copies of the printed contents of the CD received from the investigation wing containing the transactions made with various parties including the assessee. The Assessing Officer had also provided to the assessee the copies of the letters written by Mukesh Gupta and Rajan Jassal to the Additional CIT, Unit-1, New Delhi admitting various benami accounts maintained by them. It is in the light of this copious material that we have to proceed to make an assessment of the credibility of the evidence adduced by the assessee in the course of the reassessment proceedings. We may reiterate, at the cost of the repetition, that in the

statements recorded from Rajan Jassal and Mukesh Gupta by the investigation wing, they had implicated the assessee company also, inter alia. The material, as noted earlier, contained specific information relating to the assessee as found by the Tribunal. In the letters written by the aforesaid two persons to the Additional CIT, Unit-1, New Delhi, on 11th May, 2004, copies of which are placed at pages 74 to 80 of the paper book filed by the assessee before us, they have referred to their earlier statements and have stated that 22 companies named in Annexure A to the letter, were operating accounts in 12 banks, the names of which were given in the letter. These names include Vijaya Bank, Ram Nagar Branch and Bank of Punjab, Rohini Branch, New Delhi. The names of 22 companies have been given in the aforesaid letter dated 11th May, 2004 who are operating the bank accounts, numbering 12, mentioned in the letter. A perusal of the names of the entities from whom the assessee bank has received share application monies shows that except the name of Harpal Associates Pvt. Ltd. (the last item in the table set out earlier), all the other 15 names appear in the list of 22 companies mentioned in Annexure A to the letter. This establishes the link between the material which was present before the Assessing Officer both at the time when reasons for reopening the assessment were recorded and when the reassessment proceedings were made. Mukesh Gupta wrote another letter to the Additional CIT Investigation Unit-1, New Delhi, which appears to have been dated 15th April, 2004, admitting that he was operating several accounts in various banks in the names of Jayanti Lal & Sons, Mukesh &

Co. and in his own name as well as in the benami names of Preeti Arora, Babita Gupta, Manju Gupta, Rajesh Kumar Gupta, Hukum Chand and Ashok Kumar Gupta. In this letter, against the names in which the accounts were operated, the names of the banks and the branches were also given. A similar letter was written also by Rajesh Jassal to the Additional CIT, Investigation Unit-1, New Delhi giving details of the bank accounts operated by him. In the letter written by Mukesh Gupta, the names of Vijaya Bank, Ram Nagar Branch, New Delhi and Bank of Punjab, Rohini Branch, New Delhi also figure. The former account is in the name of Babita Gupta and Manju Gupta, admittedly benamis of Mukesh Gupta.

22. It is in the aforesaid background that we have to vet the evidence adduced by the assessee in the course of the reassessment proceedings, which form the bedrock of the appellate order. So far as the affidavits of Rajan Jassal and Mukesh Gupta are concerned, copies are placed at pages 85 & 86 of the paper book submitted on behalf of the assessee before us. These affidavits are dated 4th December, 2007. In the affidavit of Rajan Jassal, he has stated that he is connected with M.V.Marketing Pvt. Ltd., Fair "N" Square Exports Pvt. Ltd. and Ethnic Creations Pvt. Ltd. These three companies figure as item Nos. 2, 4 & 5 to 7 in the table set out above. In the affidavit by Mukesh Gupta he has stated that he is connected with Satwant Singh Sodhi Constructions Pvt. Ltd, M.V. Marketing Pvt. Ltd., Fair "N" Square Exports Pvt. Ltd., Ethnic Creations

Pvt. Ltd and Maestro Marketing and Development Pvt. Ltd. These companies figure as item Nos.12, 2, 4, 5 to 7 and 3 respectively in the table set out above. They have referred to the connection between them and the above mentioned companies. Both Rajesh Jassal and Mukesh Gupta, in identically worded affidavits proceed to state that in their earlier statements they have stated that the above companies issued cheques to various companies or entities and in turn received back cash from them and thus the transactions were not genuine and bonafide transactions, that the statements as above were got recorded from them under pressure and coercion and absolutely against their wishes and that such transactions including the transactions of giving cheques to the assessee company (Nova Promoters and Finlease Pvt. Ltd.) were absolutely genuine and bonafide transactions wherein no cash had been received from assessee company in exchange of cheuqes issued to them. It has been stated in the affidavits that the cheques were issued to the assessee company for share application money for allotment of shares and subsequently shares were also issued.

23. It seems to us that in finding fault with the Assessing Officer for not accepting the above affidavits, both the CIT (Appeals) as well as the Tribunal have committed a serious error in appreciating the evidence. The affidavits were presented before the Assessing Officer in the course of the assessment proceedings on 4th December, 2007. In the appeal filed before the CIT (Appeals) he called for a remand report from the Assessing

Officer. In doing so, he directed the Assessing Officer to examine the contents of the affidavits and verify the genuineness of the averments made therein. The Assessing Officer submitted a remand report dated 30th April, 2009. In this report he stated that despite repeated opportunities the deponents of the affidavits were not produced before him for examination. It may be noted at this juncture that the assessee filed affidavits not only from Mukesh Gupta and Rajesh Jassal but also from several other persons who were in charge of some of the companies which had subscribed to the shares of the assessee company. Their names are Raj Kumar, Pramod Kumar, Harish Kumar etc. In the remand report, the Assessing Officer stated that as per the directions of the CIT(Appeals), summons were issued to all the deponents of the affidavits on 24th April, 2009 but they remained uncomplied with and none of the persons attended before him. When the remand report was given to the assessee for rejoinder, it is rather surprising to note that the assessee had nothing to say as to why the deponents of the affidavits, which were all in its favour, could not present themselves before the Assessing Officer for being examined on the affidavits. On the other hand, the assessee raised a legal plea that if the Assessing Officer is unable to verify the contents and correctness of the affidavits filed on oath, the same shall be treated as accepted by the department. The judgment of the Supreme Court in the case of ***Mehta Parekh and Company v. CIT (1956)30 ITR 181*** was cited in support of the plea. Beyond this the assessee did not state anything by way of explanation as to why the deponents of the affidavits, who were its

witnesses, could not present themselves before the Assessing Officer in response to summons issued on 24th April, 2009 and be examined.

24. The copies of the affidavits of other persons, namely, Raj Kumar, Harish Kumar, Pramod Kumar and Baldev Raj have also been filed before us on behalf of the assessee. Those affidavits are also identically worded and the deponents, who are Directors in various companies from whom the assessee has taken share application monies, have stated that they had subscribed to the shares issued by the assessee company through cheques and that the cheques were not given in return of any cash and that the transactions were genuine and bonafide which had taken place in the normal course. These affidavits, we find, have not been notarized. Further, the names of all the companies in which the deponents of the affidavits were Directors, figure in the letter written by Mukesh Gupta and Rajan Jassal jointly before the Additional CIT, Investigation Unit-1, New Delhi. Thus the link between the material gathered by the investigation wing and the assessee company stands not only established at the stage at which notice under Section 148 was issued, but also in the course of the reassessment proceedings. It is significant to note that the letter dated 11th May, 2004 was written jointly by Mukesh Gupta, Surender Pal Singh and Rajesh Jassal referring to the list of 22 companies and stating that they were operating the accounts of these companies.

25. In the light of the above facts, the evidentiary value of the affidavits is open to serious doubts. The Indore Bench of the Madhya Pradesh High

Court in the case of ***Smt.Gunwati Bai Rati Lal vs. CIT(MP) 146 ITR 140*** explained the judgment of the Supreme Court in the case of ***Mehta Parikh and Company vs. CIT*** (Supra) and held that the said decision cannot be considered to have laid down the proposition that unless the deponents of the affidavits are cross-examined, the affidavits cannot be rejected. It was explained that the decision of the Supreme Court lays down "that if there is no material whatsoever on record for doubting the veracity of the statements made in the affidavits and if the deponents have also not been subjected to cross-examination for bringing out the validity of their statements, then the Tribunal would not be justified in doubting the correctness of the statement made by the deponents in the affidavits." Thus the affidavits need not be accepted as reliable when there is enough material on record to doubt the veracity of the transaction. In such a case it cannot be said that the affidavits can be rejected only after cross examination. In the present case, there is enough material on record to negate the claim of genuineness of the transactions and in the light of over-whelming material, the plea that the Assessing Officer should not have rejected the affidavits without cross-examination of the deponents has no force. The said exercise has resulted in complete miscarriage of justice.

26. The affidavits retracting their earlier statements, filed by Mukesh Gupta and Rajan Jassal were filed in December, 2007, that is after more than three years after they wrote letters to the Addl. CIT, Investigation

Wing, Unit-1, Delhi sometime in May, 2004 admitting to their role as entry providers. No reason has been advanced by the assessee for such long delay in retracting the earlier letters. Reliance on the said affidavits ignoring the apparent, ex facie and factual aspects has vitiated the impugned order. Several aspects have not been kept in view by the Tribunal. Though it was aware of the fact that the retraction was made after a considerable period of time, the Tribunal failed to address this aspect. Failure to appear and answer questions was equally relevant but again ignored.

27. So far as the request of the assessee for cross-examination of Mukesh Gupta and Rajan Jassal is concerned, the same sounds hollow. The Assessing Officer, as we have already noted, issued summons to them as well as the directors of the companies which allegedly advanced the share subscription monies to the assessee, but they were either returned or remained uncomplied with. In the case of summons to the above two persons, it is recorded in the assessment order that summons were issued to them on 23-10-2007 and 26-11-2007 but though they were served they did not respond to the summons. When they did not appear before the Assessing Officer in response to the summons, it would be unfair to expect the Assessing Officer to offer them for cross examination to the assessee. It is however noteworthy that within one or two months thereafter, on 4-12-2007 the assessee was able to obtain affidavits from them and produce the same before the Assessing Officer. Even when the

AO complied with the direction of the CIT (A) to issue summons to these two persons and the directors of the companies who allegedly subscribed to the shares, they did not appear in response to the summons issued on 24-4-2009. In light of this, the argument that the AO ought to have afforded the assessee an opportunity to cross examine these two witnesses loses force and it is rather odd for the assessee to rely on these affidavits. It is also not factually correct to say that the Assessing Officer did not furnish the copies of the statements of Mukesh Gupta and Rajan Jassal given by them to the investigation wing in May 2004 to the assessee-company. It has been recorded in the assessment order that after the change of counsel made by the assessee on 12-11-2007 a request was made for supply of the statements and all other documents/adverse material collected by the investigation wing and these were supplied to the assessee. It is quite strange that despite the efforts taken by the Assessing Officer to enforce the attendance of Mukesh Gupta and Rajan Jassal and the directors of the companies who have allegedly paid the monies to the assessee, the CIT(A) has observed that if summons had been served it would mean that the parties were present at the addresses and even if they were not found by the inspector at the addresses furnished by the assessee, it was for the Assessing Officer to have made enquiries from the post office regarding the whereabouts of the addressees. We do not think that there was, in this case, any such duty cast on the Assessing Officer.

28. It is rather unfortunate that the assessee seems to have sent the Assessing Officer on a vain chase. It was first pleaded that the statements of Mukesh Gupta and Rajan Jassal should be given to it for rebuttal. They were given along with other material available with the Assessing Officer. When the assessee made a request for cross examination by letter dated 16-11-2007 (after the change of counsel) the Assessing Officer took efforts to issue summons to them. They were served, but those persons did not appear. On 4-12-2007 affidavits from them, along with affidavits from some other persons connected with the subscriber-companies were filed before the Assessing Officer. In these affidavits the earlier statements were retracted and the advancing of monies to the assessee as share application monies was confirmed. The Assessing Officer did not accept the affidavits. On appeal, the CIT(A) issued a direction to the Assessing Officer to examine the deponents of the affidavits. The Assessing Officer issued summons on 24-4-2009 but nobody appeared. He therefore reported to the CIT(A) that examination of the deponents on their affidavits was not possible. The CIT(A) held that the affidavits remain uncontroverted and therefore ought to have been accepted. The aforesaid conclusion is fallacious. The Tribunal, however, endorsed the finding of the CIT(A). The attempt of the assessee is there to see. It had been blocking any enquiry by the Assessing Officer at every stage on some plea or the other, including a frivolous plea even before the CIT (Appeals) that no cross-examination of Mukesh Gupta and Rajan Jassal was allowed, overlooking that once they filed the affidavits retracting

from their earlier statements the plea loses force. There is no explanation as to why the deponents could not be produced and did not appear.

29. The findings of the Tribunal cannot be upheld as they are based on irrelevant material or have been entered by ignoring relevant material. The finding that the share application monies have come through account payee cheques is, at best, neutral. The question required a thorough examination and not a superficial examination. If anything, in the light of the material gathered by the investigation wing about the modus operandi followed by the entry providers, the statements of Mukesh Gupta and Rajan Jassal the plea that the money was sent through banking channels loses all force. The Tribunal ought to have seen that the modus operandi involves receipt by the entry providers of equivalent amount of cash from the assessee. The fact that the companies which subscribed to the shares were borne on the file of the ROC is again a neutral fact. Every company incorporated under the Companies Act, 1956 has to comply with statutory formalities. That these companies were complying with such formalities does not add any credibility or evidentiary value. In any case, it does not *ipso facto* prove that the transactions are genuine. The finding that Mukesh Gupta and Rajan Jassal were involved with only 4 out of the 16 companies which advanced monies is only part of the picture. They had stated before the investigation wing that their operations were routed through 22 companies whose names were also given. Fifteen out of those 22 companies have subscribed to the shares of the assessee. Therefore

even if they were not directors of 12 companies, the fact remains, as admitted by them, that their entry providing operations were carried out through 22 companies, 15 of which have subscribed to the shares of the assessee-company. The Tribunal has ignored this vital aspect and has examined the issue rather superficially. Compliance with statutory norms and requirements is only one aspect, but in the present case a deeper scrutiny was required and the camouflage adopted was the primary aspect that required adjudication. This aspect has been ignored. Bonafide and genuineness of the transactions was the issue.

30. The finding that since the summons issued to Mukesh Gupta, Rajan Jassal and the directors of 12 companies both during assessment and remand proceedings were served on them, their existence or identity stood established, even if this finding is assumed to be correct in the technical sense overlooks their non-appearance. They were even otherwise not ready and willing to appear before the Assessing Officer. The genuineness of the transactions cannot be said to have been established for the same reason. The genuineness of the transaction critically hinges on the true and veracity of the claim made by the assessee. Material was gathered by the investigation wing and made available to the Assessing Officer, who in turn had made it available to the assessee. Nothing has been said by the Tribunal about the said material. Thus the Tribunal, with respect, seems to have ignored relevant material.

31. The Tribunal also erred in law in holding that the 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.

32. Since strong reliance was placed by the assessee on the order of the Supreme Court in the case of ***CIT v Lovely Exports P. Ltd.***, (2008) 216 CTR (SC) 195 it would be necessary to examine the facts of that case and the ratio laid down therein in order to decide the applicability of that case to the one before us. It would also be necessary to examine the string of decisions of this court on the question of applicability of section 68 of the Act to monies received as share capital.

33. The facts of ***CIT v Lovely Exports (P) Ltd.*** (supra) have been set out in the judgment of this court in that case, reported as ***CIT vs (1) Divine Leasing & Finance Ltd. (2) General Exports and Credits Ltd. and (3) Lovely Exports P. Ltd.*** in (2008) 299 ITR 268. In that case, the share capital subscription was received through banking channels and complete records were maintained by Divine Leasing & Finance Ltd. The Assessing Officer issued summons u/s.131 and thereafter impounded the shareholders' register, share application forms and share transfer register.

It was contended by the assessee in that case that because of the action of the Assessing Officer, it was not able to furnish any details about the share subscribers. The Tribunal found that the allotment of shares was made as per the relevant rules of the Securities Contracts (Regulation) Act, 1956 as well as those of the Delhi Stock Exchange. No evidence had been brought on record by the Assessing Officer to indicate that the shareholders were either benamidars of the assessee-company or fictitious or that the share application monies were the unaccounted income of the assessee-company. The Tribunal accordingly held that the onus that lay on the assessee under sec.68 stood discharged.

34. In respect of the other assessee, namely, General Exports & Credits Ltd., the monies were received by the said company on issue of rights shares to five companies pursuant to the renunciation of rights by several individual shareholders. A search had been conducted on the premises of the assessee, but those renunciation forms were not found with the assessee. As in the case of Divine Leasing & Finance Ltd., the five companies were registered in Sikkim at the same address. They all filed replies to the department asking for further time to provide the details of their investments. They had also filed returns of income under the Sikkim Taxation Manual and had subscribed to the shares through banking channels. Moreover, the investigations carried out into those companies by the income-tax department at Calcutta and the adverse findings therein had been struck down as being without jurisdiction in appeals filed by

those companies and therefore the Assessing Officer having jurisdiction over General Exports and Credits Ltd. in Bulandshahar could not rely upon them. In these circumstances, the Tribunal had deleted the addition made u/s.68 on the ground that the identity of the shareholders had been proved. This court did not approve of the ground on which the Tribunal had cancelled the addition and observed that the judgment of the Full Bench of this court in ***Sophia Finance*** (1994) 205 ITR 98 (Delhi) could not be understood to have enunciated that once the identity of the shareholders is proved there can be no addition in the hands of the company which received the share monies. The court however refused to attach any importance to the violation of the provisions of the Companies Act, 1956 in the matter of renunciation of the right to subscribe to the shares and held that it was a matter of concern only of the appropriate authority under that Act. Accordingly, the ultimate decision of the Tribunal cancelling the addition was upheld.

35. The facts of ***Lovely Exports P. Ltd.***, as noted by this court, are these. The assessee-company in that case had furnished the necessary details such as PAN No./income tax ward no./ration card of the share applicants and some of them were assessed to tax. The monies were received through banking channels. In some case, affidavits/confirmations of the share applicants containing the above information were filed. The Assessing Officer did not carry out any inquiry into the income tax records of the persons who had given their file numbers in order to

ascertain whether they were existent or not. He neither controverted nor disapproved the material filed by the assessee. Further, the assessee had specifically invited the Assessing Officer to carry out an enquiry and examine the assessment records of the share applicants whose income tax file numbers were given. Though the Assessing Officer had sufficient time to carry out the examination, he did not do so, but put forth an excuse that the assessee was taking several adjournments. This court observed that it is for the Assessing Officer to manage his schedule and he should have ensured that because of the adjournments he did not run out of time for discharging the duties cast on him by law. It was held that when details were furnished by the assessee, the burden shifted to the Assessing Officer to investigate into the creditworthiness of the share applicants which he was unable to discharge. Thus, the order of the Tribunal deleting the addition was held not giving rise to any question of law, much less any substantial question of law.

36. It is not only relevant to note the above facts, which distinguish those three cases (supra) from the case before us, but it is also relevant to note the following observations made by this court in the above three cases:

> "*There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessed it should not be*

> *harassed by the revenues insistence that it should prove the negative. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the AO for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Sections 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessed; if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound, to carryout thorough investigations. But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company.*"

We may also note that a reference was made by this court to several authorities, including at least seven judgments of this court on the question of applicability of section 68 to share application monies, and the position was pithily summed up as follows at page 282 (of 299 *ITR*):

> "*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."

37. The judgment of this court in the above three cases was carried in appeal to the Supreme Court by the revenue which filed SLP No.11993/2007. The petition for leave to appeal was dismissed by the Supreme Court observing as below: -

"*Delay condoned.*

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.

Subject to the above, Special Leave Petition is dismissed."

38. 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 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 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 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.

39. The case of ***Orissa Corporation*** (1986) 159 ITR 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 ***Dolphin Canpack*** (2006) 283 ITR 190, ***CIT v Makhni and Tyagi P. Ltd.*** (2004) 267 ITR 433, ***CIT v Antartica Investment P. Ltd.*** (2003) 262 ITR 493 and ***CIT v Achal Investment Ltd.*** (2004) 268 ITR 211. 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 self-confessed "accommodation entry providers".

40. 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 Private Limited***, (2011) 333 ITR 119. 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.*** (ITA Nos.2093 & 2095/2010), the other cases fall under the category of Orissa Corporation (supra). However, in the case of Oasis Hospitalities P Ltd., 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: -

> "*The Assessees filed copies of PAN, acknowledgement 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 AO 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 AO 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 AO. 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. (supra). 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.

41. In the case before us, not only did the material before the Assessing Officer show the link between the entry providers and the assessee-company, but the Assessing Officer had also provided the statements of Mukesh Gupta and Rajan Jassal to the assessee in compliance with the rules of natural justice. Out of the 22 companies whose names figured in the information given by them to the investigation wing, 15 companies had provided the so-called "share subscription monies" to the assessee. There was thus specific involvement of the assessee-company in the

modus operandi followed by Mukesh Gupta and Rajan Jassal. Thus, on crucial factual aspects the present case stands on a completely different footing from the case of ***CIT v Oasis Hospitalities P. Ltd.*** (supra).

42. In the light of the above discussion, we are unable to uphold the order of the Tribunal confirming the deletion of the addition of Rs.1,18,50,000 made under section 68 of the Act as well as the consequential addition of Rs.2,96,250. We accordingly answer the substantial questions of law in the negative and in favour of the department. The assessee shall pay costs which we assess at Rs.30,000/-.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

FEBRUARY 15, 2012
Bisht