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

% **DECIDED ON: 27.01.2014**

\+ ITA 493/2013

THE COMMISSIONER OF INCOME TAX-IV ..... Appellant
Through: Mr. Sanjiv Sabharwal, Sr. Standing Counsel with Mr. Ruchir Bhatia, Jr. Standing Counsel.

versus

EMPIRE BUILTECH PVT LTD ..... Respondent
Through: Mr. V.N. Jha, Advocate.

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

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The following substantial question of law arises for consideration : -

> "Did the Tribunal fall into error of law in upholding the deletion of Rs.31.94 lakhs which had been added under Section 68 by the Assessing Officer in respect of AY 2006-07 in the circumstances of the case?"

2. With the consent of counsel for the parties, the matter is heard for disposal.

3. The facts in brief are that the assessee filed its income tax return for the year 2006-07. It is a matter of record that the assessee was incorporated on 20.10.2005 and commenced business thereafter.

The assessee had reported receipt of share capital to the tune of ₹11 lakhs; it sold them at 1000% premium and claimed to have received ₹1.1 crores on that count. During the enquiry made at the time of assessment proceedings, the AO required the assessee to furnish various particulars which have been set out in pages 21-23 of the paper book and contained in about 10 columns. He also proceeded to make further enquiry to that end and issued notices under Section 133 (6) of the Income Tax Act, 1961 to the individuals and entities who had applied as shareholders directly. This yielded certain information. 28 of the 39 investors responded to the queries. Out of the balance of 11, 2 of them did not receive the notice and 9 received the notices and apparently had responded. Based on the materials on record, the AO framed the assessment adding the entire amount under Section 68. The assessee claiming to be aggrieved approached the Commissioner (Appeals) and successfully argued that once the identity of the investors had been disclosed, it had discharged the burden imposed upon it by law and that the amount could not be added back under Section 68. The Commissioner of Income Tax (Appeals) directed the deletion of ₹1.10 crores holding that since these individuals had responded and furnished the particulars elicited, the AO should not have added the amount as income. Almost similar approach was adopted in respect of the other 11 investors on the reasoning that the assessee did all that was required of it under the law by disclosing the identity of investors. The ITAT confirmed the order of the CIT (A). The Revenue, therefore, is in appeal before us.

4. It is argued on behalf of the Revenue before us that the

impugned order is in clear error of law in upholding the reasoning of the CIT (A) that the assessee had discharged the burden imposed upon it and disclosed the particulars and identity of the investors. It is pointed out that a bare reading of the chart prepared by the Assessing Officer, during the course of his investigation, reflected in the impugned order would show that apart from the Section 133 (6) notices, independent enquiries had been made on the basis of the materials disclosed by way of income tax returns from the relevant assessing authorities. The AO concluded that the amounts claimed by the subscribers to be *bona fide* investors could not have been so having regard to the quantum of the income reported by them during the relevant assessment years. Counsel, therefore, submitted that even the requirement of the assessee having to discharge the burden imposed upon him was not in fact discharged in the facts of this case. Counsel highlighted that the decision in *CIT v. Lovely Exports* (2008) 299 ITR 268 (SC) has to be read with *CIT v. Nova Promoters & Finlease (P) Ltd.* (2012) 342 ITR 169 (Del). It is submitted that the Assessing Officer in this case not only issued notice to the investors but also carried on further enquiry which led into the conclusion that such persons or individuals could not have made the extent of investment that was claimed and that in these circumstances the addition under Section 68 was justified.

5. Counsel for the respondent submitted that the impugned order should not be interfered with given that it has concurrently upheld the decision to set aside the addition under Section 68. It was stressed that once the assessee disclosed the identity of the investors - as it did

in the present case - the onus clearly shifted to the Revenue which then had to record its satisfaction based only on some objective material. In the present case, 28 investors had responded to the notices issued; 11 did not submit any confirmation. Having regard to the fact that the assessee was a company and the investors were shareholders, it could do only that much as was reasonably possible for it. In the present case, it responded to the questions put to it by the AO; that the investors or third parties did not respond or that some of them did but did not fully satisfy the AO, would not be a matter of concern to the assessee. Learned counsel relied upon the judgment of the Division Bench of this Court reported as *Commissioner of Income Tax v. Dwarkadhish Capital P. Ltd.*, (2011) 330 ITR 298 (Delhi) to the following effect: -

> *"In any matter, the onus of proof is not a static one. Though in Section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the source of source".*

6. It was submitted that all the investors were known individuals or entities subject to taxation. Counsel, therefore, submitted that this Court should not interfere with the impugned order.

7. In *Lovely Exports* (*supra*), the Supreme Court emphasized that the initial burden is upon the assessee to show as to the genuineness of the identity of the individuals or entities which seek to subscribe to the share capital. Once the relevant facts are furnished, the onus, stated the Supreme Court, shifts to the Revenue. In the present case, what this Court is to determine, therefore, is whether the burden had been fully discharged and whether the AO recorded its conclusion on the basis of the material on record. The AO in its order has produced the tabular statement describing the number of shares subscribed by the investors, the amounts paid by them, the individuals who paid the amount towards such capital and the gross income reported by each of such investors to the Revenue. A look at that chart - the contents of which have nowhere been disputed - would show that the investors had by and large reported amounts far less as compared to the sums invested by them, towards share capital. Furthermore, the AO had during the course of the assessment issued notices under Section 133 (6) to the investors - 28 of them responded; 2 did not receive the notice and 9 of them received the notices and responded, but did not submit any confirmation. While entertaining this appeal on 12.11.2013, the Court had issued notice restricting to the addition of ₹31,94,000/-, i.e., so far as it pertained to 11 subscribers/investors whose particulars could not be verified and who did not respond to the notices issued by the AO.

8. Having regard to the circumstances, particularly, the fact that these investors not only did not submit any confirmation and had concededly reported far less income than the amounts invested, this Court is of the opinion that the assessee could not under the circumstances be said to have discharged the burden which was upon it in the first instance in view of the

law declared in *Lovely Exports* (*supra*) matter. It is not sufficient for the assessee to merely disclose the addresses or identities of the individuals concerned. The other way of looking at the matter is that having given the addresses, the inability of the noticees who are approached by the AO to afford any reasonable explanation as to how they got the amounts given the nature of their income which was disproportionally less than what they subscribed as share capital would also amount to the Revenue having discharged the onus if at all which fell upon it. This Court also notices that the assessee in this case was incorporated barely few months before the commencement of the assessment year, and there is no further information, or anything to indicate why its mark up of the share premium thousand folds in respect of the shares which were of the face value of ₹10 lakhs was justified.

9. In view of the above discussion, this Court is of the opinion that the Revenue's appeal has to be partly allowed.

10. The impugned order is accordingly set aside to the extent it deleted the addition of ₹31,94,000/-. The said amount is directed to be restored and added back to the assessee 's income under Section 68.

11. The appeal is partly allowed to the above extent.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 27, 2014
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