

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

% **Reserved on : 3rd August, 2012.**
Date of Decision : 8th November, 2012.

+ **ITA No.497/2010**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr.Sanjeev Sabharwal, Sr.Standing Counsel with
Mr.Puneet Gupta, Advocate

VERSUS

YOUTH CONSRUCTION PVT. LTD.Respondent
Through: Mr.Somnath Shukla, Advocate

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

This is an appeal filed by the Revenue and it pertains to the assessment year 2000-01. It is directed against the order of the Income Tax Appellate Tribunal dated 17th April, 2009 in ITA No.398/Del/2006.

2. The Revenue has proposed the following questions as substantial questions of law arising under Section 260A of the Income Tax Act, 1961('Act', for short).

“2.1 Whether learned ITAT erred in deleting the addition of Rs.1.65 crores made under section 68 of the Income Tax Act, 1961?”

2.2. Whether the decision of the Hon'ble Supreme Court in a case reported at 216 CTR 195 (SC) in Re: Lovely Export is applicable in the present case?”

3. The facts giving rise to the appeal may be briefly noted. The assessee is a company. In respect of the assessment year 2000-01, for the previous year that ended

on 31st March, 2000, it filed a return of income on 23rd November, 2000 declaring an income of Rs.41,180/-, which was processed under Section 143(1) on 30th March, 2001. Subsequently, the Assessing Officer took proceedings under Section 147 of the Act on the ground of escapement of income on the basis of information received from the investigation wing of the Income Tax Department that the assessee took accommodation entries from three companies to the tune of Rs.3,30,000/- in the relevant accounting year. The names of the companies and the amounts taken from them as share capital are as follows:-

S. No.	Name of the person from whom accommodation entry received on various dates.	Amount
1.	M. Suma Finance & Investment Limited	2,40,00,000/-
2.	M/s Precision Agencies Pvt. Ltd.	60,00,000/-
3.	M/s. S. N. Electricals Pvt. Ltd.	30,30,00,000/-
	Total	3,30,00,000/-

Notice under Section 148 to reopen the assessment was, therefore, issued on 19th March, 2007. In response to the notice the assessee stated that the original return may be taken as the return filed in response to the notice. A copy of the reasons recorded for reopening the assessment under Section 148(2) was also supplied to the assessee. The assessee submitted its objections to the reasons recorded which were disposed of by the Assessing Officer by order dated 11th December, 2007. The Assessing Officer rejected the submissions and held that the reassessment proceedings were validly initiated.

4. In the course of the reassessment proceedings it was clarified that the assessee did not receive Rs.3,30,000/- as share capital from the three companies and that the correct figures were as under:-

S. No.	Name of the person from whom accommodation entry received on various dates.	Amount
1.	M. Suma Finance & Investment Limited	1,20,00,000/-
2.	M/s Precision Agencies Pvt. Ltd.	30,00,000/-
3.	M/s. S. N. Electricals Pvt. Ltd.	15,00,000/-
	Total	1,65,00,000/-

The Assessing Officer accepted the clarification and proceeded to examine whether the provisions of Section 68 were attracted to the aforesaid amounts. In order to verify the nature and source of the amount of Rs.1,65,000/-, in terms of Section 68, he called upon the assessee to produce the directors of the three companies on 26th December, 2007. This direction was not complied with and the assessee informed the Assessing Officer that summons may be issued to enforce the personal attendance of the directors at its cost. The Assessing Officer took the view that since under Section 68 it was for the assessee to establish the genuineness of the monies received as share application monies, it was the duty of the assessee to produce the persons who allegedly gave the money and since the assessee failed to do so, the identity of the companies, their creditworthiness and genuineness of the transaction did not stand established. It would appear, however, that the bank statements of the three companies were available to the Assessing Officer and from them he noted that the deposits therein were by way of clearing entries or by cash which were immediately transferred out, leaving a very low balance in the account on any given day. He further noted that all the transactions are intra-day transactions which indicated that

the account was being used only to route the monies. From the manner in which the deposits were made into and taken out of the accounts, the Assessing Officer inferred that the three companies had no business except to route the accommodation entries using the account. He was also informed by the Assessing Officer having jurisdiction over M/s Precision Agencies Pvt. Ltd., one of the three companies that reassessment proceedings were taken against that company in the course of which one Pradeep Kumar Jindal, who was one of the directors of that company, had admitted to providing accommodation entry to the assessee.

5. Having regard to the aforesaid facts the Assessing Officer came to the conclusion that the provisions of Section 68 were attracted to the share application monies amounting to Rs.1,65,000/-, the assessee having failed to establish the identity and creditworthiness of the share applicants and the genuineness of the transaction. He accordingly added the amount as the assessee's income under Section 68.

6. The assessee filed an appeal to the CIT(Appeals) against the reassessment order and challenged the jurisdiction of the Assessing Officer to reopen the assessment as also the addition on merits. The CIT(Appeals) rejected the objections to the jurisdiction to reopen the assessment. In the course of the appellate proceedings, the assessee would appear to have submitted additional evidence in the form of affidavits dated 28th December, 2007 from the directors of the three companies who provided the share application monies. It was contended, in support of the plea for admission of additional evidence under Rule 46A, that the affidavits were sought to be filed before the Assessing Officer but could not be filed because the reassessment proceedings were completed on 28th December, 2007 and that was the reason why they were being adduced as additional evidence before the CIT(Appeals). The CIT(Appeals) would appear to have forwarded the application for admission of additional evidence to the Assessing Officer for his objections and a remand report. The precise contents of the remand report have not been discussed in any detail in the order of the CIT(Appeals),

though there is a reference to the same in paragraph 3.3. of his order. After considering the assessee's submissions, the remand report of the Assessing Officer and the rejoinder to the same by the assessee, the CIT(Appeals) held as follows:-

- 1) All the transactions regarding the receipt of Rs.1.65 crores were routed through banking channels and there was no cash transaction.
- 2) Precision Agencies Pvt. Ltd. and S.N. Electricals Pvt. Ltd. took the money from M/s Express Securities Pvt. Ltd., which is a member of the Bombay Stock Exchange and registered with SEBI.
- 3) In the statement recorded from Pradeep Kr. Jindal, he has not mentioned the name of the assessee-company as one of the beneficiaries of the accommodation entries allegedly carried on by him and in the absence of such a categorical statement, no reliance can be placed on it. The statement may be true in respect of other companies but not in respect of the assessee-company.
- 4) Moreover one A.K.Kaul, the present director of Precision Agencies Pvt. Ltd. appeared before the Assessing Officer on 19th August, 2008 and stated in a letter that Pradeep Kumar Jindal, who was the former director of the company, was misusing the name of the company and operating an unauthorized account for providing bogus accommodation entries and that it was Pradeep Kumar Jindal who was an entry operator and had also given a statement before the Directorate of Investigation admitting to the said business. This statement of A.K.Kaul was rejected by the Assessing Officer in the remand report.
- 5) In the case of M/s Suma Finance and Investment Ltd., which also provided share application monies to the assessee, an assessment was made in its case for the assessment year 2000-01 by the Assessing Officer in Kolkata and in the said assessment order no addition had been made on the ground that the share

capital investment in the assessee's company is not genuine. A copy of the assessment order had been sent to the Assessing Officer by the CIT(appeals) along with the direction to file the remand report. In any case, Pradeep Kumar Jindal had no connection with Suma Finance and Investment Ltd.

- 6) All the necessary evidence such as the confirmation letters from the three companies, copies of audited balance sheet etc., copies of the cheques issued towards share capital were filed before the Assessing Officer.
- 7) The Assessing Officer has not confronted the assessee with the information received from the investigation wing. He has not examined the material and quantified the escaped income. He has not examined the submissions of the assessee explaining the nature of the entries. No evidence was brought on record to show that it was a case of false entries.

On the basis of the aforesaid findings and having regard to the judgment of the Supreme Court in the case of *CIT vs. Lovely Exports Pvt. Ltd. (Supra)*, the CIT(Appeals) held that there was no justification for the addition of the share capital under Section 68. He therefore deleted the same.

7. The Revenue preferred an appeal to the Tribunal in ITA 398/Del/2006. As seen from paragraphs 6 & 7 of the impugned order of the Tribunal, the Revenue disputed before the Tribunal the contention of the assessee that it had furnished the confirmation letters from the share applicants along with their income tax details, statement of bank accounts etc. The assessee, as seen from paragraph 5 of the impugned order had contended that the share subscribers were assessed to tax and since their identity stood established, no addition can be made in the hands of the assessee, having regard to the judgment of the Supreme Court cited above.

8. The Tribunal referred to the judgment of the Supreme Court in *CIT vs. Stellar Investment Ltd* (2001) 251 ITR 263 (SC) and the judgments of the Delhi High Court in *Commissioner of Income Tax vs. Sophia Finance Ltd. (1994) 205 ITR 98* and *CIT vs. Lovely Export (Supra)* and thereafter in paragraph 11 noted that the share applicants confirmed having made the investment in the assessee company along with other documents such as income tax returns etc. and thus their identity stood established. Having recorded this finding, the Tribunal proceeded to apply the judgment of the Supreme Court in *Lovely Export (supra)* and held that the only remedy of the department was to reopen the assessment of the individual share holders in accordance with law but the share application monies cannot be regarded as undisclosed income of the assessee company. With this solitary observation/finding, the appeal of the Revenue was dismissed. We find it difficult to uphold the order of the Tribunal. The present case is one of reassessment on the basis of a report of the investigation wing of the Income Tax department. According to the Assessing Officer there was information from the investigation wing that the assessee had taken accommodation entries from the three companies, viz., Suma Finance and Investment Ltd., Precision Agencies Pvt. Ltd. and S.N. Electricals Pvt. Ltd. during the year under consideration. He has referred to the information received from the Assessing Officer having jurisdiction over Precision Agencies Pvt. Ltd. that the Director of that company, i.e., Pradeep Kumar Jindal, has admitted to providing accommodation entries to the assessee. In an attempt to verify the identity and creditworthiness of the three share applicants, as also the genuineness of the transactions, the Assessing Officer called upon the assessee to produce the directors of the three companies. This was done on 24th December, 2007. The Directors were required to produce on 26th December, 2007. On 27th December, 2007, the authorized representative of the assessee attended the proceedings but did not produce the directors or any other responsible person of those companies, but took the stand that the Assessing Officer may issue summons to enforce the personal attendance of the directors. However, before the CIT(Appeals)

affidavits were sought to be introduced as additional evidence under Rule 46A. These affidavits are from the directors of the three companies. It was claimed before the CIT(Appeals) that by the time the affidavits were taken to the Assessing Officer (on 28th December, 2007), the assessment proceedings had been closed. If affidavits from the companies could be obtained, it is not known why the directors could not be produced before the AO as directed by him. These facts do not find any mention in the order of the Tribunal. The Tribunal did not refer to the observation of the Assessing Officer from a perusal of the bank accounts of the three companies which had applied for the shares. We have already referred to the inferences drawn by the AO. The Assessing Officer had examined the bank accounts and had deduced a pattern by which the bank accounts were used only as a conduit to receive the monies and pay them out on the same day. This pattern, coupled with the general admission made by Pradeep Kumar Jindal and the failure of the share applicants to produce the directors before the Assessing Officer, all taken cumulatively, should have excited suspicion in the mind of the Tribunal necessitating a deeper probe into the matter. The Tribunal, however, has chosen to rest its decision on the sole fact that the share applicants had established their identity by filing confirmation letters and copies of their income tax returns. This is hardly sufficient for the purpose of discharging the creditworthiness of the share applicants and the genuineness of the transactions. There can be no dispute that Section 68 applies equally to share application monies received by an assessee and, therefore, the burden is on the assessee to prove the nature and source thereof, to the satisfaction of the Assessing Officer. It involves three ingredients, namely, the proof regarding identity of the share applicants, their creditworthiness to purchase the shares and the genuineness of the transaction as a whole. The Tribunal failed to keep in mind these aspects of the matter and has chosen to dispose of the appeal on the limited question of the identity of the share holders. A Division Bench of this Court in the case of *CIT vs. Nova Promoters and Finlease P. Ltd.* (2012) 342 ITR 169 pointed out the circumstances in which the ratio of the

judgment of the Supreme Court in *Lovely Export (supra)* can be applied and the circumstances where the ratio cannot be applied. The present case is one where there is enough material in the possession of the Assessing Officer which warrants explanation from the assessee regarding the nature and source of the share application monies. There is precious little which has been done by the assessee in discharging its burden under the section. The Tribunal has failed to keep in view the broader picture and has taken a rather simplistic view of the matter, ignoring the factual aspects and surrounding circumstances present in the case. It should have dealt with the case in a wholesome manner dealing with the entire evidence relied upon and having regard to the report of the investigation wing, the manner in which entries were made in the bank accounts of the three companies, the statement of Pradeep Kumar Jindal and denial thereof by A.K.Kaul, as also the other surrounding circumstances of the case. We find that the appeal before the Tribunal has not been disposed of in all its aspects. We accordingly answer the substantial questions of law against the assessee, but in the circumstances remit the appeal to the file of the Tribunal for being disposed of afresh and in accordance with law. No costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

NOVEMBER 08, 2012
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