

**IN THE HIGH COURT OF DELHI**

**ITA No. 252/2012**

**ITA No. 253/2012**

**ITA No. 258/2012**

**AZEEM INVESTMENT PVT LTD**

**Vs**

**COMMISSIONER OF INCOME TAX**

**Sanjiv Khanna and R V Easwar, JJ**

**Dated: April 24, 2012**

**JUDGEMENT**

**Per: Sanjiv Khanna:**

**CM No.6952/2012 in ITA 252/2012**

**CM No.6955/2012 in ITA 253/2012**

**CM No.6971/2012 in ITA 258/2012**

Exemption allowed subject to all just exceptions.

Application is allowed.

**CM No.6953/2012 in ITA 252/2012**

**CM No.6956/2012 in ITA 253/2012**

**CM No.6972/2012 in ITA 258/2012**

This is an application for condonation of delay of 50 days in refiling the present appeals. Ld. counsel for the respondent waives right to file reply and submits that the application may be disposed of on merits. It is stated in the application that the clerk of the counsel had misplaced the file and therefore, he took time to rectify the defects. For the reasons stated in the application, delay in refiling is condoned.

**ITA 252/2012**

**ITA 253/2012**

**ITA 258/2012**

We have heard Mr. Santhanam in these appeals under Section 260A of the Income Tax Act, 1961 ('Act', for short) impugning the common order dated 26.8.2011. The appeals relate to assessment years 2002-03, 2003-04 and 2004-05. In the years in question, the appellant, a private limited company, had received share application money allegedly from Fair "N" Square Exports P. Ltd., Satwant Singh Sodhi Const. P. Ltd., Ethnic Creations P. Ltd., MV Marketing P. Ltd., Baldev Harish Electricals P. Ltd, Maestro Marketing & Advertising and Polo Leasing & Finance P. Ltd. of Rs. 20 lacs (as per the appellant it should be Rs. 15 lacs), Rs. 3.5 lacs and Rs. 7.5 lacs in the assessment years 2002-03, 2003-04 and 2004-05 respectively.

2. Ld. counsel for the appellant relying upon decision of this Court in *Bhav Shakti Steel Mines (P) Ltd. Vs. CIT (2010) 320 ITR 619* submits that the order of remit passed by the Tribunal is not justified and is contrary to law. Reliance is also placed upon decision of this Court in *Commissioner of Income Tax Vs. Kamdhenu Steel & Alloys Ltd. & Ors. (2012) 248 CTR (Del.) 33*. Learned counsel submits that there is a proposal to amend the Act, applicable w.e.f. assessment year 2013-2014 as per the Finance Bill which is pending for consideration before the Parliament. This proposed amendment is not retrospective. Lastly, he relies upon decisions of the Supreme Court in *Anis Ahmad and Sons v. CIT(A) (2008) 297 ITR 441 (SC)*.

3. Having heard the counsel for the parties and considered the contentions raised, we do not think any substantial question arises for consideration.

4. In this case reassessment proceedings were initiated after information was received from Director of Investigation regarding bogus/accommodation entries allegedly provided by different companies which were managed and operated by Mukesh Gupta and Rajan Jassal. The Assessing Officer noticed that these companies had been issued shares by the appellant-assessee. A question arose whether the share application money received was a genuine transaction. The Tribunal after noticing the facts on record felt that the matter cannot be decided in a superficial manner, by only making reference to the bank account entries and whether or not the alleged shareholders were incorporated companies. The Tribunal in paras 17 to 23 of its order has elucidated the relevant facts and given cogent and good reasons why an order of remit was necessary and required in the facts of the present case. For the sake of convenience we are reproducing the findings recorded in paras 17 to 23 of the Tribunal:

*"17. The assessee is a private limited company. Share application money was received by it not on account of public issue of shares but on account of private placement. The contention of the revenue is that the evidence on record would strongly suggest that the parties from whom such alleged share application money was received by the assessee were mere paper entity who did not have creditworthiness to advance such amounts as share application money to the assessee. The assessee's contention, on the other hand, is that the evidence on record would show that the assessee had discharged the onus cast on it in terms of section 68 of the Act and thus the onus to prove the contrary was on the revenue. In support of the above contention, the assessee has placed reliance on the judgment of Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra)*

*18. On the issue of resting of onus, the contention of revenue is that the ratio laid down by the Hon'ble Apex Court in the case of Lovely Exports Pvt. Ltd. (supra) is not applicable in the facts of the present case and, therefore, at the end of the proceedings before the Assessing Officer as well as before the Id. CIT (A), the onus lay on the assessee and not on the revenue.*

*19. We, therefore, have to first decide as to whether in the facts and circumstances of the present case, the ratio laid down by the Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra) is applicable or not. Special Leave Petition before the Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra) arose out of the judgment and order dated 16.11.2006 of Hon'ble Delhi High Court in I.T.A. No. 953 of 2006. The said judgment of the Hon'ble Delhi High Court has been reported as CIT v. Divine Leasing & Finance Ltd, 299 ITR 268. It could be seen from the said judgment that the assessee company namely M/s Divine leasing & Finance Ltd. was a public limited company. The said company received subscription from public issue through banking channel and the shares*

were allotted inconsonance with the provisions of Securities Contract (Regulation) Act, 1953. With reference to such share application money complete details were furnished. It was also found by the Tribunal that the Assessing Officer did not bring any positive material or evidence which would indicate that the share holders were benamidar or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources. There were five Sikkimese companies who subscribed to rights shares. Such Companies were duly incorporated under the Sikkimese Company Act and were assessed under Sikkimese Taxation Manual. In the above facts, the Tribunal deleted addition made on account of share capital by the Assessing Officer and such action of the Tribunal was upheld by the Hon'ble High Court by holding that no question of law arose. The Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra) has upheld the above judgment of the Hon'bel Delhi High Court.

20. In the present case, however, the assessee is a private limited company. The share application money was received through private placement. The Assessing Officer has brought on record evidence in the shape of Income tax returns and bank statements of the share applicants to show that these companies had very meager income or were running in losses. It has also been brought on record that in most of the cases, the amounts were deposited in the account either on the same day or a day before the issue of cheques to the assessee. All the share applicants had address in Delhi. Though the assessee could obtain their confirmation in the month of January, 2009, reasons best known to the assessee, the parties could not be produced before the Assessing Officer either during the assessment proceeding or remand proceeding. The summons issued by the Assessing Officer could not be served in the address of such share applicants by the postal authorities as none of them was found in the said address. Thus, it cannot be said that the Assessing Officer has not brought on record any evidence to show that there were strong indication that the so-called share applicants were mere paper entities and did not have the requisite capacity to advance the impugned amounts, it is also to be noted that share were not allotted to these parties in the immediate future. In the above facts and circumstances of the case, we are of the considered opinion that the ratio laid down by the Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra) is not applicable in the present case.

21. From the facts narrated by us in the earlier portion of this order, it is quite clear that when the Assessing Officer failed to serve summons on the share applicants, the assessee was required by the Assessing Officer to produce these parties,. Even during remand proceedings, the Assessing Officer has required the assessee to produce the parties. Though the assessee could obtain confirmations from these parties, surprisingly it could not produce them before the Assessing Officer. From the above, it is amply clear that at the end of proceeding, both in assessment and in remand, the onus finally lay on the assessee.

22. Be that as it may, it has been noted by us that all the share applicants have PAN Numbers and at least were assessed to tax in some year or other. What is the position of assessments of these companies for the relevant assessment year has not been brought to our notice by either of the parties. If the impugned amounts were assessed in the hands of the share applicants, the same could not be assessed in the hands of the assessee and vice versa.

23. Taking all the above facts and circumstances into consideration, we are of the considered opinion that the orders of the authorities below are required to be set aside on the impugned issues and the matter remitted back to the file of the Assessing Officer for re-adjudicating the same in the light of the discussion made herein above. The Assessing

*Officer should pass a fresh order as per law after giving the assessee adequate opportunity of being heard."*

5. Whether or not an order of remand is justified and required depends on facts of each case. We do not think any legal proposition or ratio has been laid down by Bhav Shakti Steel Mines (P) Ltd. (supra), which is contrary or runs counter to the direction of remand passed by the Tribunal. We may note that the decision in the case of *CIT Vs. Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (SC)* has been considered and examined by the Delhi High Court in *CIT Vs. Nova Promoters & Finlease (P) Ltd. in ITA No.342/2011 decided on 15.2.2012*. Nova Promoters (supra) was decided on merits in view of the factual back ground and evidence. The decision of the Supreme Court in Anis Ahmad and Sons (supra) is hardly applicable. In the said case, a dispute had arisen whether the third parties were commission agents of the assessee and whether the transactions were genuine. The third parties had appeared and made statements before the Assessing Officer affirming that they were agents of the assessee. This was the second round of litigation as earlier also an order of remit was passed. The decision in the case of Kamdhenu Steel & Alloys Ltd. & Ors. (supra) is on merits and therefore, not germane and relevant as far as the present case is concerned.

6. An order of the remit has been passed, with a direction to conduct in depth inquiry, reach and record correct and true finding, which depending upon the material may eventually even go in favour of the assessee. Certain aspect and questions have been noticed and referred to in paragraph 20 of the impugned order quoted above.