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

+ ITA 917/2010

COMMISSIONER OF
INCOME TAX-XIII

..... Appellant
Through: Ms. Rashmi Chopra, Advocate

versus

PRAYAG HOSPITAL &
RESEARCH

..... Respondent
Through: None

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Date of Decision: 22 July, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J.

CM 12301/2010

This is an application for condonation of delay of 281 days in re-filing the appeal.

For the reasons stated in the application, delay of 281 days in re-filing the appeal is condoned.

Accordingly, application stands disposed of.

ITA 917/2010

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity “Act, 1961”) challenging the order dated 5th December, 2008 passed by the Income Tax Appellate Tribunal (in short “ITAT”) in ITA No. 1970/Del/2005, for the assessment year 2000-2001.

2. Ms. Rashmi Chopra, learned counsel for Revenue submitted that ITAT had erred in law and on merits in deleting the addition of Rs. 1,32,72,500/- on account of bogus share capital under Section 68 of Act, 1961. She contended that the assessee-company had failed to prove the identity, genuineness and creditworthiness of the share applicants.

3. However, upon a perusal of impugned order, we find that out of 42 persons who had invested in the share capital of the assessee-company, 39 persons had appeared before the assessing officer and their statements had been recorded by the inspector. These shareholders had also furnished affidavits along with supporting documents like bank account, kisan bahi ration card etc.

4. In fact, ITAT in the impugned order has observed as under :-

“25. We have heard both the sides and perused the material placed on record. The facts have been narrated above. The assessee has categorized the depositors in three categories as mentioned above. Out of 42 persons 39 persons appeared, their statements were recorded by the Inspector, who gave the share application money. Affidavits were given and in respect of other persons necessary documents were given. In respect of second category, CIT(A) has observed that no evidences have

been furnished. However, from record in the paper books filed, we find that these persons appeared before the AO, their statements were recorded confirming the share application amount and supporting the documents, like copies of bank account, affidavit etc.

26. In respect of third category, Ld. DR could not controvert the contention of assessee that no enquiries were made by AO.

27. Except Shri K.K. Shukla who denied having made investment, all other persons confirmed the share application money by giving various documents. In respect of third category of depositor, AO did not carry out any specific enquiries. In our view, the matter has to be looked into from the point of burden cast on the assessee for which parameters have been laid down by Hon'ble Supreme Court in the case of *Lovely Exports (Pvt.) Ltd.* and of Delhi High Court in the case of *Sophia Finance Ltd., Stellar Investment Ltd. and AGR Investments Ltd. (supra)*. Hon'ble Courts have laid down following main parameters.

- (1) When the identity of the shareholder is established by the assessee no addition in respect of share application money received by the assessee can be made u/s 68.
- (2) If some of the summons come unserved, no adverse inference can be drawn.

28. In our view, the assessee has discharged its onus in terms of parameters laid down by these courts. This is so inasmuch as in investigations, assessee could produce a number of persons who appeared in person and confirmed having made the share application money. In respect of persons not produced confirmatory documents were filed. The lower authorities have pointed out certain discrepancies about their creditworthiness. However, in view of the parameters laid down by Hon'ble Courts, AO cannot enlarge the burden of the assessee in establishing the identity of the share applicants. From the entirety of facts and circumstances of material on record, in our view, assessee discharged its burden by proving the identity of the share applicants either by attendance or supported with some documents like bank account, kisan bahi ration card etc. In our

view, once assessee established the identity of these persons and various statements were recorded, same cannot be denied by pointing out discrepancies in respect of financial capabilities of these share applications and their not depositing in their bank accounts. However, at the same time Shri K.K. Shukla appeared and by statement denied having made the share application money of Rs. 1 lakhs. In consideration of all the above, we are the view that in respect of share applicants except Shri K.K. Shukla, the assessee has discharged its burden, hence addition made is not proper and is deleted. Shri K.K. Shukla has denied the amounts of Rs. 1 lakhs, therefore, the addition of Rs. 1 lakh is upheld. This ground of the assessee is partly allowed.”

5. On a scrutiny of the order passed by the Tribunal, it is clear that the Tribunal has based its conclusion on the decision rendered in ***Commissioner of Income Tax v. Lovely Exports (P) Ltd.*** (2008) 216 CTR 195 wherein their Lordships have held as under:

“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.”

6. In our considered view, reliance placed by the Tribunal on the said decision in the obtaining factual matrix is totally justified. In the case at hand, the identity of the creditors is known and hence the assessing officer can proceed as has been held in ***Lovely Exports (P) Ltd.*** (supra) against such creditors in accordance with law.

7. In the result, we do not find any substantial question of law involved in this appeal and accordingly the same stands dismissed *in limine*.

MANMOHAN, J

CHIEF JUSTICE

JULY 22, 2010

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