

IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'SMC' : NEW DELHI)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 3133/Del/2018
Assessment Year: 2009-10

MOTI ADHESIVES P. LTD.,
C/O KAPIL GOEL, ADV.,
F-26/124, SECTOR-7,
ROHINI,
DELHI – 110 085
(PAN: AAACM9114E)
(APPELLANT)

VS. ITO, WARD 17(2),
NEW DELHI

(RESPONDENT)

Assessee by : Sh. Kapil Goel, Adv.
Revenue by : Ms. Ashima Neb, Sr. DR.

ORDER

The Assessee has filed this Appeal against the Order dated 26.3.2018 of the Ld. CIT(A)-22, New Delhi relating to assessment year 2009-10 on the following grounds:-

1. That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the order passed by AO u/s. 147/143(3) without appreciating that assumption of jurisdiction u/s. 148 was by AO was in violation of mandatory jurisdictional conditions stipulated under the Act;
 - 1.1 That on the facts und in the circumstances of the case and in law, ld CIT-A erred in sustaining

the order passed by Ld AO uls 147/143(3) without appreciating that "rubber stamp" reasons in present case are based on borrowed satisfaction and are without independent application of mind;

1.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO uls 147/143(3) without appreciating that reasons are merely based on purported documents seized from premises of Mr. SK Jain etc. and same cannot be put against that assessee unless statement of Mr. Jain on those documents vis a vis assessee herein is brought on records and the same is duly followed by cross examination of Mr. Jain which have not happened in present case;

1.3 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO uls 147/143(3) without appreciating that documents so relied in reasons have not evidentiary value qua assessee herein u/s. 292C of the Act and can only bind the person from whose possession those documents are found;

1.4 That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the order passed by the AO us. 147/143(3) without appreciating that on the date when reasons were recorded (07/03/2016) reliance placed in reasons recorded on AO and CIT(A) orders in case of Mr. Jain invalidates the entire foundation (sublato fundamento cadit opus) as those orders were

quashed and set aside by ITAT Delhi bench order dated 3.2.2016.

1.5 That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the order passed by the AO u/s. 147/143(3) without appreciating that Annexure B which is not referred in reasons supplied is introduced in the proceedings in incognito manner which vitiates the entire proceedings as complete reasons were not furnished to the assessee;

1.6 That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the order passed by AO u/s. 147/143(3) without appreciating that AO issued notice with questionnaire u/s. 142(1) and Section 143(2) on 1.6.2016 when reasons were supplied only on 1.6.2016 which vitiates the entire exercise being done in undue hurry and haste;

2. That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining the order passed by Ld AO u/s 147/43(3) without appreciating that on basis of surfeit and inundated evidences on records burden u/s 68 lying on assessee has been fully discharged and met so addition made by Ld AO (Rs 25,00,000 & Rs 45,000) and confirmed by CIT-A in impugned order deserves to be deleted.

2.1 That on the facts and in the circumstances of the case and in law, Ld. CIT-A 'erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that there is no basis of any of the addition of (Rs. 25,00,000 & Rs 45,000).

2.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that all the additions made are without bringing legally admissible document;

2.3 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that enquiry made has yielded positive confirmation, which is aborted by AO which is sufficient to strike down the additions made;

2.4 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that sole reason for addition has been non production of director of companies which is held to be not the valid reasons for addition u/s 68;

2.5 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that while making addition U/S 68 Ld AO has not issued required show cause notice nor Ld AO has considered detailed reply filed by the assessee;

2.6 That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that while making addition u/s 68 position of net worth of companies is suitably ignored;

2.7 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining

the order passed by Ld AO u/s 147/143(3) without appreciating that none of evidence filed by assessee is overruled In accordance with law

3. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not restoring the returned income declared by assessee in its return of income.

4. That on the facts and in the circumstances of the case and in law, Id CIT-A erred In not deleting the addition made by Ld AO which was also unlawful and made in violation of principles of natural justice.

That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal.

2. The brief facts of the case are that the assessee company was incorporated on 19.7.1995 under the Company Act, 1956. The assessee filed its return of income u/s 139 of the Income Tax Act,1961 (hereinafter referred as the Act) on 30/09/2009 declaring loss of Rs. 7,055/-. Later, the return of the assessee was processed u/s 143(1) of the Act on 29/10/2010. Subsequent to the processing of the return of income u/s. 143(1) of the Act on 29.10.2010 information was received from the Office of Director of Income Tax (Investigation-II), New Delhi vide letter dated 12.3.2013 mentioning therein that a search operation was carried out in the case of Surendera Kumar Jain group of cases therein after known as Entry Operator wherein after intensive and extensive enquiry and examination of documents seized during the course of search it has been noticed that the said group is involved in providing accommodation entries to the persons which were named in the report. The assessee company also figures in the list as one of the beneficiaries of the accommodation entries. On the basis of material

available on record and reasons recorded in writing, Notice u/s 148 of the Act dated 10/03/2016 was issued by the Assessing Officer. In response to the same, the assessee vide letter dated 18.4.2016 requested that the original return filed on 30.9.2009 may be treated as return filed in response to notice u/s. 148 of the Act and requested to supply copy of reasons recorded for reopening of the assessee. A copy of the reasons recorded was supplied to the assessee alongwith notice dated 01.6.2016 u/s. 142(1) of the Act. The assessee filed its objections to the initiation of proceedings u/s. 147 of the Act vide its letter dated 14.6.2016. Objections of the assessee were disposed of vide order dated 23.6.2016. The assessee was also asked to make complete compliance to the questionnaire already issued alongwith notice u/s. 142(1) of the Act dated 1.6.2016. The assessee has not challenged the assumption of jurisdiction u/s. 148 of the Act either at the beginning of assessment / re-assessment proceedings or of during the course of assessment / re-assessment proceedings. The AO on perusing the return of income observed that assessee has share capital and share application money fund of rs. 1,15,42,000/- as on 31.3.2009 as compared to Rs. 89,12,000/- as on 31.3.2008. On further perusal of balance sheet of the assessee AO observed that the assessee has shown receipt of share application money amounting to Rs. 26,30,000/- during the year under consideration. The AO observed that Rs. 25 lacs has been found credited in the books of accounts of the assessee. The immediate source of this amount has been found to be received from one of the entities controlled by Jain Brothers. Accordingly, the AO held that Rs. 25 lacs credited in the books of account of the assessee fails to pass the test of genuineness within the meaning of Section 68 of the Act and held to be the income of the assessee u/s. 68 of the Act and was added to the income of the assessee and also Rs. 45,000/- was added for arranging such accommodation entry necessary entails payment of commission to entry providers, vide

order dated 31.10.2016 and assessed the income of the assessee at Rs. 25,37,950/- u/s. 147(143(3) of the I.T. Act, 1961. Against the assessment order, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 26.3.2018 has dismissed the appeal of the assessee.

3. Apropos validity of the reopening action u/s 148 of the Act made by AO, Ld. AR submitted that same is invalid being mechanical and based on borrowed satisfaction only and no case specific and transaction specific valid material is brought on records which may justify the instant reopening action u/s 148 of the Act. Following case laws are relied by Ld. AR to challenge reopening action u/s 148:

- i) Hon'ble Delhi High Court in G&G Pharma 384 ITR 147
- ii) Hon'ble Delhi High Court in Meenakshi Overseas 395 ITR 677;
- iii) Hon'ble Delhi high court in RMG Polyvinyl 396 ITR 5 ;
- iv) Hon'ble Delhi high court Sabh Infrastructure 398 ITR 198

3.1 It was specifically pleaded that merely reopening on basis of directions of Investigation Wing cannot justify the reopening action made u/s 148 of the Act which requires independent application of mind. Further it was highlighted with reference to reasons that one major weakness in reasons is no where statement of searched persons is brought on records qua seized papers which vitiate the entire exercise. Moreover only one sided version of investigation wing on seized material that too which is not found from assessee's possession is submitted that it cannot be made as valid basis to infer income escaping assessment u/s 148 of the Act. Countering this, Ld. Sr. DR. opposed strongly contentions and stated that reopening made is perfectly in order and she relied on following case laws:

- i) Hon'ble Delhi High Court in Paramount Communications 250 Taxmann 100;
- ii) Hon'ble Supreme court in Raymond Woollen Silk Mills 236 ITR 34;

iii) Hon'ble Delhi high court in AGR Investments order dated 7/11/2011;

4. On merits of the case and on issue of addition u/s 68 of the Act, Ld. AR relying upon the following decisions and argued that merely non production of a Director without anything more and where all relevant documents are placed on records which remained uncontroverted specifically, cannot justify adverse inference u/s 68 of the Act which is unlawful according to Ld AR. He also filed a separate compilation for the following cases laws to support this proposition :

i) Hon'ble Bombay high court in Orchid Industries (397 ITR 136);

ii) Hon'ble Delhi high court in Softline Creation Pvt Ltd (387 ITR 636);

iii) Hon'ble Delhi high court in Rakam Money Matters Pvt Ltd (order dated 13/10/2015);

iv) Hon'ble Delhi high court in Goodview Industries order dated 21//11/2016;

v) Delhi ITAT decision (on same facts) in case of Aksar wire Products Pvt Ltd (order dated 11/12/2015);

vi) Delhi ITAT decision in case of Madhusudan Packaging order dated 09/05/2018

4.1 On the other hand, Ld. Sr. DR referring to material shared by investigation wing as extracted and narrated in detail that orders of AO and Ld CIT(A) are justified and placed reliance on the following decisions:

i) Hon'ble Delhi high court decision in case of N.Tarika Properties Pvt Ltd (28/11/2013);

ii) Hon'ble Delhi high court decision in case of Nipun Builders and Developers Pvt Ltd (07/01/2013);

iii) Hon'ble Delhi high court decision in case of Nova Promoters and Finlease Pvt Ltd (15/02/2012)

4.1.1 Finally Ld Sr. DR requested and pleaded for dismissal of assessee's appeal and confirmation of action of addition made u/s 68 of the Act by AO as sustained by Ld. CIT(A).

5. I have heard both the parties and perused the records especially the impugned order as well as the Paper Books and the decisions referred by both the sides. Before giving my opinion on the important legal issue raised u/s 68 of the Act, for sake of convenience, the important issue which requires the adjudication by this Tribunal is framed as:

Whether once assessee places before Ld AO all the relevant and best documents in its possession to establish its burden u/s 68 of the Act qua cash credit (here share capital received) , can simply because there is no personal appearance from director of said cash creditor (share holder) as called for by Ld AO, adverse inference u/s 68 can be drawn by Ld AO without discharging secondary burden lying on Ld AO u/s 68 of the Act?

In my view the answer to this issue as framed, can only be in negative as once all important and crucial documents are filed by assessee to prove its case qua share capital received u/s 68 of the Act, then simply harping on non production of director in person before the AO cannot be justified ground to draw adverse inference without adequate discharge of secondary burden lying on AO u/s 68 of the Act. Burden u/s 68 of the Act as it is settled law keeps shifting.

5.1 Particularly once reopening u/s 148 of the Act is resorted being extra-ordinary jurisdiction, on the basis of aforesaid apprehension and charge of accommodation entry u/s 68 of the Act for share capital received, firstly in my view AO should discharge the crucial and critical burden u/s 148 of the Act to bring home the material that

income has escaped assessment without which assessee cannot be asked to prove negative. For this reference may be made to sagacious observations of Hon'ble Delhi high court in Pardeep Gupta case 303 ITR 95. If this primary burden u/s 148 lying on AO remains un-discharged then in my considered opinion entire proceedings shall crumble (refer latin maxim *sublato fundamento cadit opus* meaning once foundation fails super structure falls). In present case AO till end has not brought on records the statement of searched person as recorded by investigation wing during their search action u/s 132 of the Act much less offered their cross examination to assessee herein to justify the allegations leveled in detailed reasons recorded which would in my opinion make the reopening as invalid (refer Apex court leading decision in case of Andaman Timber Industries reported at 127 DTR 241 order dated 02/09/2015 and Bombay high court decision in case of H.R.Mehta reported at 387 ITR 561) This violation of natural justice in my view is a serious flaw and goes to the root of the matter and nullifies the entire proceedings.

5.2 Be that as it may, once assessee places all the reliable and trustworthy documentary evidences to support the veracity of transaction u/s 68 of the Act, it is the duty of AO to dispassionately consider the same with objective standards and not to make the additions simply reproducing at length from the internal report of investigation wing prepared at the time of search (here on Jain Brothers). That is AO cannot make addition u/s 68 on mere basis of ifs and buts only and some credible incriminating material must be brought on records to displace the detailed evidence filed by the assessee during assessment proceedings. That is if reopening u/s 148 and addition u/s 68 are allowed to be made on same subjective standards of prima-facie opinion only which are generally required to reopen/start the case, and additions are allowed to be made without any credible material which can validly counter assessee's evidences in my view same would totally frustrate the entire object/scheme of

the law. In my view, AO is under a bounden legal duty to discharge his secondary burden u/s 68 of the Act before making any addition therein, where in present case as evident from facts noted above, only ground made is non production of director concerned which is plainly incorrect. For this reliance is placed on decisions which are narrated below. Moreover it looks from cursory reading from the impugned assessment order passed by AO that same is passed on merely borrowed satisfaction of investigation wing without independent application of mind by AO which is completely wrong and incorrect as AO u/s 148 while passing final order and before making addition of unexplained income under deeming provisions of section 68 etc cannot put cart before the horse and cannot pass the final assessment order just reproducing from investigation wing report which are made basis to reopen the case. The fact that present order is passed on mere basis of borrowed satisfaction only is evident if one compares the reasons recorded, show cause notice issued and final order as impugned before this Tribunal. At all three stages same and similar allegations are made dehors the evidences filed by assessee.

5.3 Turning back to facts of present case, I find from paper book running into 84 pages all the relevant and necessary documents required to establish the subject transaction of share capital received are brought on records before AO and Ld CIT(A) and have totally remained uncontroverted. Specially the fact of positive response made by share holder in response to enquiry made u/s 131 and confirmation of subject investment therein by share holder to AO clinches the issue in favor of assessee. Moreover the share holder company having handsome net worth and assessed u/s 153C/153A for subject period also supports assessee's case. Further AO has remained sited with folded hands and has not made any independent enquiry from concerned AO of share holder company which itself is sufficient to knock off the addition made. On basis of this I have no

hesitation to delete the additions of Rs 25,00,000 and Rs 45,000 made u/s 68 by AO in reopened proceedings u/s 148 of the Act, as alleged accommodation entry obtained, on sole and mere basis of non production of directors of share holder company which in my considered view is plainly incorrect and unjustified. Notably, there is no statutory presumption that all cash credits and share capital are deemed to unexplained unless otherwise proved. My aforesaid view is fortified by the following decisions –

- *Hon'ble Delhi High Court decision in case of Softline Creations Pvt. Ltd., order dated 31.08.2016 (ITA 504/2016) (387 ITR 636)*

Relevant Extract:

"The revenue is aggrieved by the order dated 10.02.2016 of the Income Tax Appellate Tribunal (ITAT) which confirmed the Commissioner of Income Tax (Appeals)'s order [hereafter "CIT(A)"]. The CIT(A) had ruled in favor of the assessee, i.e. the additions under Section 68 of the Income Tax Act, 1961 [hereafter "the Act"] were unwarranted. It is urged on behalf of the revenue that the AO's order, adding the amounts under Section 68 of the Act was justified in the circumstances. Learned counsel emphasized that to prove the identity, genuineness of the transaction and the creditworthiness of share applicants, it was essential for the assessee to produce the Directors as well as the source of funds of the share applicants since in the absence of these materials, the assessee could not claim to be aggrieved by the addition. This Court has considered the concurrent order of the CIT(A) as well as the ITAT. Both these authorities primarily went by the fact that the assessee had provided sufficient indication by way of PAN numbers,

to highlight the identity of the share applicants, as well as produced the affidavits of Directors. Furthermore, the bank details of the share applicants too had been provided. In the circumstances, it was held that the assessee had established the identity of the share applicants, the genuineness of transactions and their creditworthiness. The AO chose to proceed no further but merely added the amounts because of the absence of the Directors to physically present themselves before him. We are of the opinion that no question of law arises, having regard to the concurrent findings of fact. The assessee has, in our opinion, complied with the law spelt out by the Supreme Court in CIT v. Lovely Exports Pvt. Ltd. 216 CTR (SC) 195. The appeal is meritless and is consequently dismissed.”

- *Hon'ble Delhi High Court decision in case of Rakam Money Matters Pvt. Ltd., order dated 13.10.2015 (ITA no. 778/2015)*

Relevant Extract:

"The question sought to be urged before the Court by the Revenue is whether the ITAT was correct in law in affirming the order of Commissioner of Income Tax (Appeals) ['CIT (A)'] deleting the addition in the sum of Rs.60,00,000/- made by the Assessing Officer ('AO') to the income of the Assessee under Section 68 of the Act pertaining to share application/capital money received by the Assessee. The AO issued notices to the Directors of the aforementioned companies but none of them appeared. The AO was of the view that the fact that money had been received through banking channels was not in itself sufficient to prove the genuineness of the

creditors or their credit worthiness. The AO noted that the balance in the respective bank accounts of the companies demonstrated a common pattern where the balance would be very low up to a certain date and then substantial amounts were deposited either by cash or cheque to increase the balance and thereafter invariably withdrawn within a day or two. Since the process was shown to be repeated over and over in the P&L Account of the Assessee, the AO concluded that there was no business activity worthy of mention. Concluding that the Assessee had failed to discharge the onus to prove the genuineness or the creditworthiness of the companies which had made the payments, the AO held that the share application money received from the companies should be treated as income in the hands of the Assessee. He accordingly ordered an addition of Rs.60 lakhs. The Court is essentially called upon to consider whether on the facts of the present case, the view taken by CIT(A) as confirmed by the ITAT could be said to be plausible or is it so perverse as to require interference by the Court? A perusal of the order of the AO shows that its foundation is the report of the DIT (Investigation). Admittedly, the Assessee was not confronted with that material in the course of the reassessment proceedings. The Assessee was also not confronted with the statements recorded in the course of the investigation. Once that material is kept aside then the scope of enquiry can only be whether the Assessee has produced documents to discharge the initial onus of proving the genuineness and creditworthiness of the companies who were stated to have subscribed to the Assessee's shares. It is not in dispute that extensive material was produced

by the Assessee in the present case to prove the identity, genuineness and creditworthiness of the companies who had subscribed to its shares. Among the materials produced were the Income Tax Returns and the PAN card details of the eight companies. Even if the Directors of these companies did not respond to the summons issued by the AO, it was not impossible for the AO to make proper enquiries to ascertain the genuineness of these entities and satisfy himself of their creditworthiness. As pointed out by the CIT(A), the AO failed to make any effort in that direction. He did not take to the logical end the half-hearted attempt at getting the Directors to appear before him. He did not even seek the assistance of the AOs of the concerned companies whose ITRs and PAN card copies had been produced. The view taken by the CIT(A) that the AO failed to come up with the material to disprove what had been produced by the Assessee is certainly a plausible view in the facts and circumstances of the case. Likewise, the view taken by the ITAT concurring with the CIT(A) on facts cannot be said to be perverse. As far as the broad principles governing the law under Section 68 of the Act is concerned, the Court is satisfied that the order of the CIT(A) as confirmed by the ITAT suffers from no legal infirmity. No substantial question of law arises."

- Hon'ble Bombay High Court decision in case of M/s Orchid Industries Pvt. Ltd., order dated 05.07.2017 (ITA no. 1433/2014) 397 ITR 136

Relevant Extract:

"3] The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the

creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balance-sheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of Commissioner of Income Tax vs. Gagandeep Infrastructure (P.) Ltd., reported in [2017] 80 Taxmann 272 (Bombay) and the order of the Apex Court in case of Commissioner of Income Tax vs. Lovely Exports (P.) Ltd., reported in [2008] 216 CTR 195 (SC).

4] We have considered the submissions.

5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares

i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case.

7] Considering the above, no substantial question of law arises. The appeal stands dismissed. However, there is no order as to costs."

- Hon'ble Delhi ITAT Bench decision in case of Aksar Wire Products (P) Ltd. order dated: 11.12.2015 (ITA no. 1167/Del/2015)

Relevant observation :

"We have heard the arguments by both the parties. It is observed that the assessee has not obtained any share application money from the alleged Shri S.K. Jain Group. The Id. Assessing Officer, however, has alleged that the company by the name Victory Software Pvt. Ltd. is one of the group companies of Shri S.K. Jain and it is pertinent to note that the Id. Assessing Officer has not brought out materials on record to establish the same. It is further observed that the assessee has received the share application money from its applicant being Victory Software P. Ltd. by proper banking channels. The assessee has further submitted all

the details regarding the applicants including PAN numbers, board resolution, copy of the bank statements, incorporation certificates, memorandum and articles of association and the acknowledgement of IT returns filed by the applicants. The Id. Assessing Officer had issued summons to the company by the name Victory Software P. Ltd. which was received back from the postal authorities with remark "Refused". This does not mean that there was nobody who was present at the said address and further it cannot be inferred that the company is merely existing on papers.

The assessee counsel placed reliance on the judgment of the Hon'ble Jurisdictional High Court in the case of Signature Hotels P. Ltd. vs. ITO reported in (2012) 20 taxman.com 797 (Del.). The Hon'ble High Court has observed that as there is no reference to any document or statement except the annexure which has been quoted by the Assessing Officer a prima facie nexus or link cannot be made to have been established which shows that income has escaped assessment. The Hon'ble High Court held that from the reasons recorded by the Assessing Officer it does not appear that the Assessing Officer has applied his mind to the information and has independently arrived at a belief on the basis of material which he had before him that the income had escaped assessment.

In the facts of the present case, the assessee had furnished the names and all the relevant details of the companies, with which it had entered

into transaction, and that the Assessing Officer was made aware of the situation. I observe from the records placed before me that the Assessing Officer has not disputed the bank accounts and the payments that were made to the assessee by the applicant companies. Nowhere in the assessment order the Assessing Officer has brought into existence any material to show that the company Victory Software P. Ltd. is a non-existing and a fictitious entity. It is, therefore, incorrect to arrive at a conclusion that the money received by the assessee by way of share application from Victory Software is bogus. Merely because the name of one Shri Sukesh Gupta appears as a mediator in the annexure, it cannot be concluded that Sukesh Gupta had facilitated so called bogus transaction between the assessee and M/s Victory Software P. Ltd. The Assessing Officer has not issued any summons u/s 131 of the Act, to Sukesh Gupta to ascertain whether he was involved in the so called bogus transaction.

From the above discussion, I arrived at a conclusion that the Assessing Officer could not establish that the share application money received by the assessee from M/s Victory Software P. Ltd. are bogus. I also hold that the assessee has discharged its burden u/s 68 as it had filed the enormous details in respect of M/s Victory Software P. Ltd. before the Assessing Officer for him to investigate upon in detail. The Assessing Officer has failed to establish that the details filed by the assessee are wrong. He has also failed to produce

sufficient material on record to prove that the receipt of money by the assessee from M/s Victory Software P. Ltd. is accommodation entries from the entry operator S.K. Jain Group. In the above circumstances, I allow grounds filed by the assessee and held that reopening by the Assessing Officer was met valid."

- *Hon'ble Bombay High Court at Goa Bench in case of M/s Paradise Inland Shipping Pvt. Ltd., order dated 10.04.2017 (Tax Appeal no. 66/2016) 400 ITR 439 (Bom): (SLP dismissed by Hon'ble Apex court)*

Relevant Extract:

"We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :

1. *Sony Financial Services Ltd. – CIN U74899DL1995PLC068362- Date of Registration 09/05/1995*

a) *Memorandum of Association and Article of Association*

b) *Certificate of Incorporation*

c) *Certificate of Commencement of Business*

d) *Acknowledgment of the Return of Income AY 08-09*

e) *Affidavit of the Director confirming the investment*

f) *Application for allotment of shares*

g) *Photocopy of the share certificate*

h) *Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.*

i) *Audited account and Directors report hereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010*

j) *The Bank Statement highlighting receipt of the amount by way of RTGS.*

k) *Banks certificate certifying the receipt of the amount through Banking channels.”*

On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies. The Appellants have failed to explain as to how such Companies have been

assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse.

The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons

who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents. "

- *Further that law relating to section 68 is succinctly analyzed with great clarity in recent decision of Madras high court in case of Lalitha Jewellery wherein entire conundrum is explained 399 ITR 425 : SLP dismissed by Apex court recently. That gist of aforesaid decision is encapsulated below for sake of ready reference:*

2. The following substantial questions of law have been framed while admitting TCA.No.435 of 2013 on 25.2.2014 :

"(i) Whether the Appellate Tribunal is correct in confirming the assessment of share capital contributions as unexplained credit/investment within the scope of Section 68/69 of the Act in spite of the material evidence filed before them and the lower authorities establishing clearly/discharging of initial burden/onus statutorily vested on the

appellant company to provide the source ?

(ii) Whether the Appellate Tribunal is correct in law in confirming the assessment of share capital contributions as the income of the appellant company even though there were no materials in their possession of the respondent/Assessing Officer establishing such facts apart from mere suspicion as well as establishing perversity both on facts and in law in rendering their decision? and

(iii) Whether the Appellate Tribunal is correct in law in sustaining the assessment of share capital contributions as the income of the appellant company on the application of the deeming provisions in Section 68/69 of the Act even though there was no legal mandate for the appellant company to establish/prove the 'source for source' ?"

13. Before proceeding further, it is only appropriate to refer the contents of Section 68 of the Act. It reads as under.....

14. It is clear from the above provision that burden, initially, is cast upon the assessee to offer an explanation about the nature and source of the money found credited in its books of account and if that explanation is not satisfactory

in the opinion of the Assessing Officer, the sum so credited be charged as the income for the previous year. Similarly, if the assessee is a company and the sum is credited, consisting of share application money or share capital or share premium or any such amount, the assessee is required to offer satisfactory explanation about the nature and source of the sum credited to its book of account.

15. To understand the rationale behind this provision, it is only apt to refer to the judgment of the Hon'ble Supreme Court rendered in the case of Commissioner of Income Tax (Central), Calcutta v Daulat Ram Rawatmull [reported in (1973) Vol.87 ITR 349], it has been set out therein as under:

"Before dealing with the facts of this case, we may advert to the principles which should govern the decisions of the court in such like cases. Findings on questions of pure fact arrived at by the Tribunal are not to be disturbed by the High Court on a reference unless it appears that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to which they have come; and this is so, even though the High Court would on the

evidence have come to a conclusion entirely different from that of the Tribunal. In other words, such a finding can be reviewed only on the ground that there is no evidence to support it or that it is perverse. Further, when a conclusion has been reached on an appreciation of a number of facts, whether that is sound or not must be determined, not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting as a whole [Sree Meenakshi Mills Ltd. Vs. Commissioner of Income-Tax [1957] 31 ITR 28 : [1956] SCR 691 (SC)]."

16. *When a Court of fact acts on material partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. Likewise, if the Court of fact bases its decision partly on conjectures, surmises and suspicions and partly on evidence, in such a situation, an issue of law arises [Dhirajlal Girdharilal Vs. CIT [1954] 26 ITR 736 (SC)]. The Court went on to hold that a person can still be held to be the owner of a sum of money even though the*

explanation furnished by him regarding the source of that money is found to be not correct. Thus, the explanation regarding the source of money furnished by the person was not satisfactory does not automatically lead to a conclusion that that the money does not belong to that particular person, but belongs to the other automatically.

17. More importantly, the Supreme Court, in Daulat Ram, has laid down the following principle, which has a direct bearing upon the controversy at issue and it reads as under:

"The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of Biswanath, the burden lay on the department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination....."

(Emphasis is mine)

18. Similarly, in the case of CIT, Orissa Vs. Orissa Corporation P. Ltd. [reported in (1986) Vol.159 ITR 78], the Supreme Court has held as under:

"To what extent the assessee had an obligation to discharge the burden of proving

that these were genuine incomes has been considered by this court in Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288. This court was concerned there with the encashment of high denomination notes. In that case, some unexplained high denomination notes were treated as the undisclosed income of the assessee. This court held that when a court of fact arrives at its decision by considering material which is irrelevant to the enquiry, or acts on material, partly relevant and partly irrelevant, and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises, whether the finding of the court is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises, nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures and surmises. In that case, the so-called hundi racket in which the assessee was alleged to have been involved was not proved. That was only a suspicion of the Revenue.”

19. *It would also be appropriate to notice the observation of the Supreme Court in the case of Orissa Corporation P.Ltd., at page 83, as under :*

"In Sreelekha Banerjee Vs. CIT [1963] 49 ITR 112, this Court held that if there was an entry in the account books of the assessee which showed the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money was and to prove that it was not income. The Department was not at that stage required to prove anything. It could ask the assessee to produce any books of account or other documents or evidence pertinent to the explanation if one was furnished and examine the evidence and the explanation. If the explanation showed that the receipt was not of an income nature, the Department could not act unreasonably and reject that explanation to hold that it was income. If, however, the evidence was unconvincing, then such rejection could be made. The Department cannot by merely rejecting a good explanation unreasonably, convert good proof into no proof."

20. Again in the case of *Sumati Dayal Vs. CIT* [reported in 214ITR 801], at page 805, the Supreme Court has clearly explained the point of approach to be followed both by the assessee and the Department, in the context of Section 68 of the Act, in the following words:

"It is no doubt true that in all cases, in which, a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee [Parimiseti Seetharamamma [1965] 57 ITR 532 at page 536]. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing

Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee viz. the receipt of money and if he fails to rebut it, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably [Sreelekha Banerjee's case (1963) 49 ITR (SC) 112 at page 120]. "

21. *A Division Bench of the Delhi High Court in the case of CIT Vs. Stellar Investment Ltd., [reported in 192 ITR 2870, has pointed out the approach to be adopted in this type of matters, as under :*

"It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose

names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself."

22. The above view on the point of approach to the subject has been approved by the Hon'ble Supreme Court in CIT Vs. Stellar Investment Ltd., on 20.7.2000, in Civil Appeal No.7968 of 1996.

23. Applying the legal principles noticed supra, let us examine as to how the issue has been handled by the Assessing Officer at the first instance.

By the above observation of the Assessing Officer, it is clear that he is looking for proof of resources of the investors of the assessee and such proof is beyond the realm of possibility of production by the assessee. The Assessing Officer has adopted a totally

unreasonable attitude and was acting unreasonably. That was exactly what was frowned upon by the Supreme Court in Sreelekha Banerjea's case, (1963) 49 ITR (SC) 112. Even when the investor of the assessee demonstrated its resources, the Assessing Officer still has suspicion.

24. Thus, the assessee company has completely explained the sources of investments received by it. It has also disclosed the identity of such investors. The Assessing Officer traced out and reached all the four investors of the assessee. He also found as a fact that all the payments have been received through banking channels. Hence, the burden cast on the assessee stood discharged. But yet, the Assessing Officer disallowed and added the amount to income of the assessee. In this context, it is apt to take note of the crisply worded order of the Supreme Court in the case of CIT Vs. Lovely Exports (P) Ltd. [reported in (2008) 216 CTR 195 (SC)], which runs as follows :

"Can the amount of share money be regarded as undisclosed income under Section 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 Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law.”

41. However, the main theme, upon which, the Assessing Officer as well as the Tribunal proceeded to discredit the investors of the assessee is completely erroneous. They are both looking for proof beyond doubt. They are proceeding on an element of suspicion that the amounts of investments are really those of the assessee, which have been ploughed back by the assessee, whereas the settled principle of law is that any amount of suspicion, however strong it might be as well, is no substitute for proof. Suspicion is not sufficient enough to lead to a conclusion that the investments received by the assessee company are all manipulated receipts and on that basis, recorded a finding that the explanation of the assessee is not satisfactory.

42. On the other hand, the legal principle enunciated by the Hon'ble Supreme Court, as noticed supra by us, is that so long as the proof and identity of the investor and the payment received from him is through a doubtless channel like that of a banking channel, the receipt in the hands of the assessee towards share capital or share premium does not change its colour. The money so invested in the assessee company would still be the money available and belonging to the investors. The consistent principle followed is that the investors' sources and credit worthiness cannot be explained by the assessee. If the Department has a doubt about the genuineness of the investors capacity, it is open to it to proceed against those investors. Without taking such a course of action, the Assessing Officer and the Tribunal are proceeding on conjectures that the assessee has, in fact, ploughed back the money. The very approach of the Assessing Officer and the Tribunal are completely opposed to settled legal principles enunciated and they have arrived at conclusions contrary to the legal principles on the subject. Further, they are finding fault with the assessee for the alleged failure of it's investors in

proving beyond doubt that they have the capacity to invest at the moment they did in the assessee company. That is clearly a perverse view, as the assessing officer is not expected to perform a near impossibility. The assessee cannot call upon its investors to disclose all such business transactions that carried on in the immediate past and as to how much they made from their respective business enterprises. The assessee cannot also call upon its investors to prove their good business sense in investing in the assessee company, as such investors cannot gain any controlling stake.

43. In the result, the questions of law framed in TCA.No.435 of 2013 are answered in favour of the assessee and against the Revenue. Hence, TCA.No.435 of 2013 is allowed. Consequently, MP.No.1 of 2014 is closed."

5.4 In a case where the issue was whether the assessee availed cash credit as against future sale of product, the AO issued summons to the creditors who did not turn up before him, so AO disbelieved the existence of creditors and saddled the addition, which was overturned by Ld. CIT(A). However, the Tribunal reversed the decision of the Ld. CIT(A) and upheld the AO's decision, which action of Tribunal was challenged by the Hon'ble High Court, Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax

353 ITR 171 wherein the Tribunal's decision was overturned and decision of Ld. CIT(A) upheld and the Hon'ble High Court has held that when the basic evidences are on record the mere failure of the creditor to appear cannot be basis to make addition. The court held as follows:

"8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave

error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).

9. In this connection, he has drawn our attention to a decision of the Hon'ble Supreme Court in the case of Udhavdas Kewalram v. CIT [1967] 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must in deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.

10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory

statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:

"The Income-tax Appellate Tribunal performs a judicial function under the

Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "

11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

12. Taking inspiration from the Hon'ble Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of

the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to upset the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. I restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.

5.5 When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the OMISSIONER OF INCOME TAX, KOLKA TA-III Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Court held as follows:

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the

burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established. We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."

6. Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid decisions, I held that mere non production of Director of said share holder company cannot justify adverse inference u/s 68 of the Act. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee and in my view it cannot be brushed aside by the AO to draw the adverse view which here in present facts cannot be countenanced. Therefore addition of Rs. 25,45,000 made by AO and sustained by Ld CIT(A) are hereby deleted.

7. In the result, the appeal of the assessee is allowed.

Order pronounced on 25-06-2018.

Sd/-

**(H.S. SIDHU)
JUDICIAL MEMBER**

Dated : 25-06-2018

SR BHATANGAR

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.

