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

Reserved on: February 19, 2015
Pronounced on: March 11, 2015

\+ **ITA 525/2014**

THE COMMISSIONER OF INCOME TAX-II ..... Appellant
Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

versus

M/S JANSAMPARK ADVERTISING AND MARKETING (P) LTD. ..... Respondent
Through: Mr. R.M. Sinha, Mr. Rajiv Saxena, Mr. Shashwat Bajpai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. This appeal under Section 260-A of Income Tax Act, 1961 assails the order dated 14.06.2013 passed by Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") in appeal No. 4839/Del/2009 respecting the respondent ("the assessee") for the assessment year (AY) 2004-05. The following substantial question of law was framed by order dated 25.11.2014:-

"2.1 Whether in the facts and circumstances of the case ld.

ITAT was correct in allowing the appeal of the assessee in regard to addition of ₹71,00,000/- on account of unexplained credit u/s 68 of the Income Tax Act.

2.2 Whether in the facts and circumstances of the case ld. ITAT was correct in allowing the appeal of the assessee in regard to addition of ₹1,42,000/- on account of commission paid on entry taken from entry provider."

2. The assessee had filed its return of income for AY 2004-05 on 01.11.2004 declaring income of ₹3,180/-. The said original return was accepted. It is stated that some time in 2007 the Assessing Officer (AO) was in receipt of information from DIT (Investigation), New Delhi that the assessee had been in receipt of accommodation entries from the entry providers. It is the averment of the Revenue that –

"during the course of the enquiries conducted by the investigation wing of the department it was concluded that most of the entry operators are charging commission @ 2% for giving this accommodation approach to another person and hand over the cash plus commission and take cheques/DDs/Pos. The cash is deposited by the entry operator in a bank account either in his own name or in the name of the relative/friends or other person hired by him for the purpose of opening bank account. The other person (in whose name the account is opened) only signs the blank cheque book and hands over the same to main entry operators. The entry operator then issues cheques/DDs/Pos in the name of the beneficiary from the same account in which the funds are transferred through clearing in two or more stages. The beneficiary in turn deposits these instruments in his bank accounts and the money comes to his regular books of accounts in the forms of gift, share application money/share capital/unsecured loans etc. through banking channel. Since the funds have come through banking channel in the books of beneficiary these apparently look genuine."

3. Having reasons to believe that income had escaped assessment, the AO re-opened the case for AY 2004-05 under Section 147 of Income Tax Act and issued notice under Section 148 on 18.04.2007. In response to the notice, the assessee filed a copy of the return that had been submitted on 01.11.2004.

4. During the assessment proceedings, thus re-opened, the AO noticed that the assessee had raised share capital from the following parties to the extent indicated against each:-

1.	M/s Labh - Tronics Overseas (P) Ltd.	5,00,000/-
2.	M/s F.N.S. Consultancy	7,00,000/-
3.	M/s C.V. Metal Powder	5,00,000/-
4.	M/s Maestro Mktg.(P) Ltd.	4,00,000/-
5.	M/s Dignity Finvest (P) Ltd.	4,00,000/-
6.	M/s Ethnic Creation (P) Ltd.	3,00,000/-
7.	M/s M.V. Marketing (P) Ltd.	3,00,000;':·
8.	M/s Akshay Sales (P) Ltd.	5,00,000/-
9.	M/s S.G.C. Publishing (P) Ltd.	10,00,000/-
10.	M/s Maestro Mktg. & Advertising (P) Ltd.	13,00,000/-
11.	M/s Fair N Square Exports (P) Ltd.	5,00,000/-
12.	M/s Jain Projects & Fin. Consultants (P) Ltd.	7,00,000/-
	TOTAL	**71,00,000/-**

5. It is the case of the Revenue that on examination of the details, and as per the information collected on the basis of investigation carried out, it was

found that share capital had been received from the following three entry operators who are allegedly engaged in the business of giving accommodation entries:

a. Maestro Mktg. & Advertising (P) Ltd.
b. Fair N Square Exports (P) Ltd.
c. Jain Projects & Fin. Consultants (P) Ltd.

6. It is stated that in order to verify the genuineness of the claim of receipt of share application money, summons were issued under Section 131 of the Income Tax Act to the twelve entities in response to which, no one appeared and some of the processes returned un-delivered with the postal remarks "left/no such person". In this fact situation, the AO called upon the assessee to produce the parties/persons in question which direction was not complied with.

7. The AO, thus, treated the amount of ₹71 Lacs as unexplained credit in terms of the provision contained in Section 68 of Income Tax Act and added it to the income of the assessee. The assessee's explanation was rejected by drawing adverse inferences on the following reasoning:-

> *"(i) Mere payment of a/c payee cheque is not sacrosanct.*
>
> *(ii) Bank account revealed a uniform pattern of cash deposit of equal amount by cash or cheque in respective accounts.*
>
> *(iii) Assessee failed to produce the directors of the companies from whom the share application money was received.*
>
> *(iv) Summons u/s 131 of the Act were issued, but some of the summons were received unserved with postal remarks "left/no such person"; none appeared in response to served summons."*

8. Further, a sum of ₹1,42,000/- taken as probable commission given out of the unaccounted income not having been booked was also added to the income.

9. The assessee preferred appeal against the assessment order before the Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT (Appeals)"] making the following submissions:-

> *"(i) The allegation of the assessing officer that some of the summons came back unserved, the assessee was never confronted with any such correspondence.*
>
> *(ii) Assessee had discharged the preliminary burden in terms of Sec. 68 for the existence of the creditors – The parties from whom it has received share application money by filing copy of application for subscription of shares, confirmations, copy of Company Master Data from the office of ROC. Acknowledgment of Filing of Income Tax Return with Permanent Account Number etc.*
>
> *(iii) The credit worthiness of the parties to pay such Share Application Money to the Appellant Company has been established on the basis of copy of Annual Accounts of the subscriber Companies, copy of Bank Statements etc., filed during assessment proceedings.*
>
> *(iv) The genuineness of the transaction i.e. the nature of receipts by the Assessee Company by way of Share Application Money is established by the fact that the amounts were received through banking channels, shares were allotted against the amounts received, vide return of allotment dated 29.06.2004, filed with ROC."*

10. The appeal was allowed by the CIT (Appeals) deleting the additions made by the AO, *inter alia*, relying upon *CIT v. Lovely Exports Pvt. Ltd.*,

(2008) 216 CTR 195 (SC). The Revenue having preferred appeal (ITA No. 4839/Del/2009), to which the assessee had also filed counter-objection (No. 103/Del/2011), was unsuccessful before ITAT.

11. The ITAT has noted in the impugned order that in the case of re-assessment, the assessee had been asked to show the identity and genuineness of the share applicants and creditworthiness of the transactions and that the assessee had responded by clarifying that the share application monies had been received through account payee cheques, whilst filing following documents before the AO:-

> *"(i) Confirmations of the parties;*
>
> *(ii) Copies of income-tax returns along with supporting statements;*
>
> *(iii) Copies of the bank statements;*
>
> *(iv) Copies of the Board resolution of the respective share holding companies for subscribing the share applications;*
>
> *(v) Copies of allotment letters;*
>
> *(vi) Copies of the registration certificates of the share holder companies from Registrar of Companies disclosing existence of the companies as per master data from the office of ROC along with the subscription of the capital details, number and dates of payments."*

12. The contentions of Revenue were rejected by the ITAT with observations to the following effect:-

> *"7. ... the assessee consequent to the assessing officer's queries furnished all the relevant documentary evidence before the assessing officer. From the perusal of record and order-sheets it clearly emerges that the requirement of physical*

production of the parties was communicated to the assessee as late as on 17-12-2008 as against the date of assessment being 26- 12-2008. Similarly, from the entry dated 22-12-2008 the assessing officer vaguely stated that some summons were issued on some parties, some came unserved and none appeared. The same is sketchy and non-specific. We find merit in the argument of the ld. Counsel
that it will not be easily possible to ask an assessee to accompany him to the proceedings before the assessing officer. In our view, adverse inference drawn on these issues is unjustified.

7.1. No adverse material was confronted to the assessee by the assessing officer. Thus, the addition cannot be sustained on the ground of canon of natural justice i.e. audi alteram partem. The assessing officer set back on his query and merely asking some non-specific sketchy questions at the fag end of the assessment order, it cannot be held that proper inquiries were instituted. Thus, it is case which suffers from lack of enquiries as referred to by Hon'ble Delhi High Court in the case of Gangeshwari Metal Pvt. Ltd. which we have to respectfully follow."

13. It must be noted here that it has been the case of the Revenue that the entities which had given share capital to the assessee company were same as had similarly given share capital to another entity named M/s Nova Promoters and Finlease (P) Ltd. It is stated that the bank accounts statements indicate that there is a uniform pattern of transaction wherein issue of cheques is immediately preceded by the deposits of equal amounts in the account either in cash or through cheques/transfer entries. In the case of M/s Nova Promoters and Finlease (P) Ltd., the addition made by the Revenue of the amounts received from similar entry providers was upheld by this court. Relying upon, *inter alia*, the decision of this court in *CIT v. Nova Promoters and Finlease (P) Ltd.*, (2012) 342 ITR 169 (Del.), the

Revenue argues that similar entries in the case of assessee herein cannot be treated differently.

14. In accepting the contentions of the assessee, the ITAT referred, *inter alia*, to the decision of this court in *CIT v. Gangeshwari Metal Pvt. Ltd.* (ITA 597/2012 decided on 21.01.2013) quoting the following observations from *M/s Nova Promoters and Finlease (P) Ltd.*(supra) and distinguishing it on facts:-

> *"The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers" whose business it is to help assessees bring into their books of account their unaccounted monies through the medium or share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre- meditated plan -a smokescreen – conceived and executed with the connivance or*

involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary."

[emphasis supplied]

15. In upholding the contention of lack of inquiry on the part of the AO, the following submissions of the assessee were accepted by the ITAT:-

"6.1. A perusal of the order-sheet entries will clearly reveal that on 17-12-2008 the assessee was asked to produce the parties for physical verification. It is submitted that in income-tax proceedings it is not possible for the assessee to enforce attendance of any person to physically bring him before any income-tax authority. The assessee has neither the powers nor the ability to convince the parties to come with it to attend before the assessing officer. On 22-12-2008 assessee was only intimated that some 131 summons were issued 5 days prior to the framing of the assessment. It was intimated by assessing officer that summons U/S 131 have been issued to "some of the parties" and some of the summons have been received back, and for others none of them appeared. The assessee was never made aware which were the some parties to whom summons were issued; which were the some parties whose summons came back and who were some parties for which non-appeared. On 23-12-2008 assessee in all humbleness expressed his inability to produce the parties in short period. The additions were made without conducting any inquiry and assessing officer sitting in his chamber held that assessee did not

> *discharge its burden. Thus, the entire edifies of the assessing officer drawing the adverse inference is on wrong premise i.e. without conducting any inquiry, verification of income-tax record and without any confrontation to the assessee. In the absence of any exercise what so ever by assessing officer, the assessee's primary burden cannot be held to have been rebutted by assessing officer."*
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> [emphasis supplied]

16. By way of the cross-objections, the assessee has raised the issue of limitation bar against the re-opening which had not been considered by the authorities below. The ITAT, having rejected the appeal of the Revenue, declined to go into that issue observing that it had been rendered mere academic and infructuous.

17. The Revenue is aggrieved on the ground that the reliance on *CIT v. Gangeshwari Metal Pvt. Ltd.* (supra) was not correct inasmuch as unlike the said case, here the AO had issued summons to the share applicants which either remained unserved or were not responded to and when the assessee was confronted with this fact-situation and given opportunity to produce the share applicants, there was failure in compliance.

18. It must be noted at this stage that the assessee had also come up with appeal (ITA No. 289/2014) impugning the order dated 14.06.2013 of ITAT raising grievances as to validity of re-opening of the assessment, questions in which respect had remained unaddressed since the cross-objections were rejected as infructuous. While entertaining the appeal at hand filed by the Revenue (ITA No. 525/2014), the Division Bench then seized of the matter by order dated 29.08.2014 disposed of the assessee's appeal with observations that in the event of Revenue succeeding here, the issue with regard to validity of re-opening would be remitted to the ITAT for

determination.

19. The argument of the Revenue that the entities which had provided the share capital having been found in case of *M/s Nova Promoters and Finlease (P) Ltd.* (supra) to be engaged in the business of giving accommodation entries, similar transactions indulged in here cannot be treated otherwise must be rejected outright. Each case has to be examined on its own merits and the adverse findings recorded in the other case concerning assessment of a different assessee cannot hold good or be binding against the present assessee.

20. The provision contained in Section 68 of Income Tax Act reads as under:-

> *"**68. Cash credits.**—Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:*
>
> ***Provided** that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
> *(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*

> ***Provided further*** *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10*."
> [emphasis supplied]

21. It must be mentioned at this stage that two provisos were added to the main provision in Section 68 as extracted above by Finance Act, 2012 and came into effect from 01.04.2013. Therefore, they would not strictly apply to the case at hand which relates to AY 2004-05.

22. The objective behind the provision is to hold the assessee accountable for each sum found credited in his books of accounts by responding to the call of the AO to give satisfactory explanation about "nature and source" of such sums. If no explanation is forthcoming or the explanation given is found to be unsatisfactory, the sum of money so credited may be lawfully included in the income of the assessee for the corresponding period.

23. More often than not, questions have been arising in assessment proceedings respecting sums found credited in the books of accounts of companies incorporated under the Companies Act in the context of their efforts to raise capital through shares, pursuant to which they receive applications along with share application money from various persons. If the AO doubts the genuineness of such investors as had purportedly subscribed to the share capital, the assessee is generally asked to explain the nature and source as also the genuineness of the transaction.

24. The provision contained in Section 68 read in above context suggests that the initial burden of proof is on the assessee to explain. The question as to what kind of proof is to be furnished by the assessee to discharge such

burden, however, has been the subject matter of adjudication in a number of judicial pronouncements, including *CIT V. Biju Patnaik*, (1996) 160 ITR 674 (SC), crystallizing eventually in the view upheld by the Supreme Court in the case of *CIT v. Lovely Exports Pvt. Ltd.* (supra).

25. The appeal before the Supreme Court in the case of *CIT v. Lovely Exports Pvt. Ltd.*(supra) had arisen out of the decision of this court in the case reported as *CIT v. Divine Leasing and Finance Limited*, (2007) 207 CTR 38 (Del.). The judgment of this court governed three appeals including ITA No. 953/2006 concerning Lovely Exports. The conclusions in para 16 of the judgment in *CIT v. Divine Leasing and Finance Limited* (supra) need to be extracted as under:-

> *"16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Shared Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."*
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> [emphasis supplied]

26. The facts of *CIT v. Lovely Exports Pvt. Ltd.*(supra), as summarized later in the case of *M/s Nova Promoters and Finlease (P) Ltd.*(supra), were as under:-

> *"...The assessee-company in that case had furnished the necessary details such as PAN No./income tax ward no./ration card of the share applicants and some of them were assessed to tax. The monies were received through banking channels. In some case, affidavits/confirmations of the share applicants containing the above information were filed. The Assessing Officer did not carry out any inquiry into the income tax records of the persons who had given their file numbers in order to ascertain whether they were existent or not. He neither controverted nor disapproved the material filed by the assessee. Further, the assessee had specifically invited the Assessing Officer to carry out an enquiry and examine the assessment records of the share applicants whose income tax file numbers were given. Though the Assessing Officer had sufficient time to carry out the examination, he did not do so, but put forth an excuse that the assessee was taking several adjournments. This court observed that it is for the Assessing Officer to manage his schedule and he should have ensured that because of the adjournments he did not run out of time for discharging the duties cast on him by law. It was held that when details were furnished by the assessee, the burden shifted to the Assessing Officer to investigate into the creditworthiness of the share applicants which he was unable to discharge..."*
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> [emphasis supplied]

27. The matter concerning *CIT v. Lovely Exports Pvt. Ltd.* (supra) was taken by the Revenue to the Supreme Court. The Special Leave Petition was dismissed *in limine* with the following observations:-

> *2. 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."

28. The appeals of the Revenue questioning deletion of the addition in almost similar set of circumstances by the AO involving a number of similarly placed assessees giving rise to common questions concerning application of Section 68 of Income Tax Act were dismissed by another Division Bench of this court by judgment rendered on 31.01.2011 reported as *CIT v. Oasis Hospitalities Pvt. Ltd.* (2011) 333 ITR 119 (Del.). Taking note of the jurisprudential development on the subject as culminating in judgment of Supreme Court in *CIT v. Lovely Exports Pvt. Ltd.*(supra), it was held that the initial burden is upon the assessee to explain the nature and source of the share application money and in order to discharge this onus, the assessee should prove (a) the identity of shareholder; (b) genuineness of the transaction; and (c) creditworthiness of shareholders. It was further observed that for discharging the above burden, the assessee must file some documents or produce the shareholder to prove his identity. In the case of subscriber being a company details in the form of registered address or PAN identity, etc. would suffice. The genuineness of the transaction may be demonstrated by showing that the assessee had, in fact, received money from the applicant shareholder and that it had come not from the coffers of the assessee but from that of the applicant shareholder. As to the creditworthiness or financial strength of the subscriber, the proof could include banks statements of the subscriber showing sufficient balance in its

kitty to enable it to subscribe.

29. In *M/s Nova Promoters and Finlease (P) Ltd.* (supra), this court found the facts as under:-

> *"41. In the case before us, not only did the material before the Assessing Officer show the link between the entry providers and the assessee company, but the Assessing Officer had also provided the statements of Mukesh Gupta and Rajan Jassal to the assessee in compliance with the rules of natural justice. Out of the 22 companies whose names figured in the information given by them to the investigation wing, 15 companies had provided the so-called "share subscription monies" to the assessee. There was thus specific involvement of the assessee-company in the modus operandi followed by Mukesh Gupta and Rajan Jassal. Thus, on crucial factual aspects the present case stands on a completely different footing from the case of CIT v Oasis Hospitalities P. Ltd. (supra)."*
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> [emphasis supplied]

30. The judgment in the case of *CIT v. Gangeshwari Metal Pvt. Ltd.* (supra), which has been referred by the ITAT in the impugned order followed the same line of reasoning but with adverse result for the Revenue because, on facts, it was held that the assessee having furnished all the requisite material, there had been a failure on the part of the AO to conduct proper inquiry.

31. In the case at hand, the counsel for the assessee submitted that a large number of documents were made available to the AO to prove not only the identity of some of the entities, the share application money received from which was under scrutiny but also their respective creditworthiness and the genuineness of each transaction, and yet they were not properly examined. The counsel, however, conceded that the documents, thus, submitted would

not cover each of the twelve entities. He submitted that sufficient opportunity was not available to procure similar documents from the other share applicants or to produce them before the AO. In this context, he pointed out that the communication for physical production of the parties was received on 17.12.2008 whereas the assessment was finalized on 26.12.2008. It was further argued that it had been submitted before the CIT (Appeals) that the assessment order was barred by limitation and that the conclusions reached by the AO were without basis. It was also argued that the assessment order is vague, in that, it is not clear as to the summons under Section 131 of Income Tax Act to which of the twelve entities had returned undelivered with postal remarks indicative of the same having been evaded.

32. On the other hand, the counsel for the Revenue submitted that the conclusion of the CIT (Appeals) that the genuineness of the transactions of each of the twelve entities was duly established is unfounded, in that, the order leading to such conclusion is silent as to the material, which it is based upon. Counsel submitted that the ITAT was not correct in concluding that the assessee was not confronted with the adverse material. He pointed out that this conclusion is in the teeth of the other conclusions that insufficient time was given for production of the parties in question after the summonses under Section 131 were returned unserved. It is further argued by the Revenue that the appellate authorities below were duty bound in law to hold proper inquiry in to the facts before reaching the conclusions on facts and, for such purposes, a remand report could and should have been called for and subjected to detailed analysis.

33. Significantly, prior to the amendment of Section 68 by the Finance Act, 2012 (whereby the two provisos quoted earlier were inserted), there

was no express statutory obligation on the part of a company called upon it to explain a sum credited in its books of accounts described as share application money to support it with explanation of the share applicant about the nature and source of such sum credited in his name. In such scenario, it could not be expected that the company which had received the share application money in response to the offer made to the public at large to collect minute details respecting the share applicants to the extent of it being able to vouchsafe the financial worth of each subscriber, such that, when called upon by the Income Tax authorities, it would be in a position to conclusively prove their respective creditworthiness. But then, given the larger objective behind the provision contained in Section 68, the primary aim of which is to ensure that no monetary transaction remains unaccounted, the initial burden is on the recipient of the money. For this purpose, the assessee in receipt of money (by whatever name called, including in the form of share application money credited in its book by a company) must collect and have in its possession some proof to satisfy, when the need arises, the assessing authorities not only as to the identity of the party making the payment but also its creditworthiness as indeed the genuineness of the transaction.

34. From the orders passed by the three authorities below, it does appear that the assessee in the case at hand had submitted some documents respecting the twelve entities indicative of their identity/existence. Some further material appears to have been shared by the assessee with the AO to show that the share application money in each case had come to its credit through banking channels. From the conclusions reached by CIT (Appeals), which were endorsed by ITAT, it appears that the first appellate authority

was satisfied with the explanation of the assessee only because the identity of the shareholders had been "established". The CIT (Appeals) rejected the additions made by the AO, in which result the ITAT concurred, on the reasoning that the AO had failed to point out "any discrepancy" in the evidence relied upon by the assessee and because the AO had failed to "pursue the matter further for making inquiries", inasmuch as "it was equally the duty of the AO to have taken steps to verify their assessment records".

35. Assessment proceedings under the Income Tax Act are not a game of hide and seek. The inquiry in the wake of a notice under Section 148 is not an empty formality. It must be effective and with a sense of purpose. There is an elaborate procedure set out which requires scrupulous adherence and followed up on. In the hierarchy of the authorities, the AO is placed at the bottom rung. The two layers of appeals, before the matter engages the appellate jurisdiction of this court, are authorities vested with the jurisdiction, power and obligation to reach appropriate findings on facts. Noticeably, it is only the appeal to the High Court, under Section 260-A, which is restricted to consideration of "substantial question of law", if any arising. As would be seen from the discussion that follows, the obligation to make proper inquiry and reach finding on facts does not end with the AO. This obligation moves upwards to CIT (Appeals), and also ITAT, should it come to their notice that there has been default in such respect on the part of the AO. In such event, it is they who are duty bound to either themselves properly inquire or cause such inquiry to be completed. If this were not to be done, the power under Section 148 would be rendered prone to abuse.

36. The authority to bring to tax unaccounted money by exercising the

power given to the AO under Section 68 is of great importance. It is expected that the AO would resort to this provision with all requisite circumspection. Since the provision is generally invoked, as has been done in the case at hand, by recourse to the procedure of notice under Section 148 upon satisfaction under Section 147 that the income (purportedly represented by the unexplained sums found credited in the books of accounts), within the mischief of Section 68, it is inherent that the explanation of the assessee respecting such credit entries would be called for only with circumspection and solely upon some concrete material coming up to support the tentative impression about it being suspect.

37. Thus, when the AO sets about seeking explanation for the unaccounted credit entries in the books of accounts of the assessee in terms of Section 68, it is legitimately expected that the exercise would be taken to the logical end, in all fairness taking into account the material submitted by the assessee in support of his assertion that the person making the payment is real, and not non-existent, and that such other person was actually the source of the money forming the subject matter of the transaction as indeed that the transaction is real and genuine, same as it is represented to be. Having embarked upon such exercise, the AO is not expected to short-shrift the inquiry or ignore the material submitted by the assessee.

38. The provision of appeal, before the CIT (Appeals) and then before the ITAT, is made more as a check on the abuse of power and authority by the AO. Whilst it is true that it is the obligation of the AO to conduct proper scrutiny of the material, given the fact that the two appellate authorities above are also forums for fact-finding, in the event of AO failing to discharge his functions properly, the obligation to conduct proper inquiry on

facts would naturally shift to the door of the said appellate authority. For such purposes, we only need to point out one step in the procedure in appeal as prescribed in Section 250 of the Income Tax Act wherein, besides it being obligatory for the right of hearing to be afforded not only to the assessee but also the AO, the first appellate authority is given the liberty to make, or cause to be made, "further inquiry", in terms of sub-section (4) which reads as under:-

> *"The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals)."*

39. The further inquiry envisaged under Section 250(4) quoted above is generally by calling what is known as "remand report". The purpose of this enabling clause is essentially to ensure that the matter of assessment reaches finality with all the requisite facts found. The assessment proceedings re-opened on the basis of preliminary satisfaction that some part of the income has escaped assessment, particularly when some unexplained credit entries have come to the notice (as in Section 68), cannot conclude, save and except by reaching satisfaction on the touchstone of the three tests mentioned earlier; viz. the identity of the third party making the payment, its creditworthiness and genuineness of the transaction. Whilst it is true that the assessee cannot be called upon to adduce conclusive proof on all these three questions, it is nonetheless legitimate expectation of the process that he would bring in some proof so as to discharge the initial burden placed on him. Since Section 68 itself declares that the credited sum would have to be included in the income of the assessee in the absence of explanation, or in

the event of explanation being not satisfactory, it naturally follows that the material submitted by the assessee with his explanation must itself be wholesome or not untrue. It is only when the explanation and the material offered by the assessee at this stage passes this muster that the initial onus placed on him would shift leaving it to the AO to start inquiring into the affairs of the third party.

40. The CIT (Appeals), as also the ITAT, in the case at hand, in our view, unjustifiably criticized the AO for not having confronted the assessee with the facts regarding return of some of the summons under Section 131 or not having given opportunity for the identity of all the share applicants to be properly established. The order sheet entries taken note of in the order of CIT (Appeals) seem to indicate otherwise. The order of CIT (Appeals), which was confirmed by ITAT in the second appeal, does not demonstrate as to on the basis of which material it had been concluded that the genuineness of the transactions had been duly established. There is virtually no discussion in the said orders on such score, except for vague description of the material submitted by the assessee at the appellate stage. Whilst it does appear that the time given to the assessee for proving the identity of the third party was too short, and further that it is probably not always possible for the assessee placed in such situation to be able to enforce the physical attendance of such third party (who, in the case of share applicants vis-à-vis a company, would be individuals at large and may not be even in direct or personal contact), the curtains on such exercise at verification may not be drawn and adverse inferences reached only on the basis of returning undelivered of the summonses under Section 131. Conversely, with doubts as to the genuineness of some of the parties persisting on account of non-

delivery of the processes, the initial burden on the assessee to adduce proof of identity cannot be treated as discharged.

41. We are inclined to agree with the CIT (Appeals), and consequently with ITAT, to the extent of their conclusion that the assessee herein had come up with some proof of identity of some of the entries in question. But, from this inference, or from the fact that the transactions were through banking channels, it does not necessarily follow that satisfaction as to the creditworthiness of the parties or the genuineness of the transactions in question would also have been established.

42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld.

43. In the result, the questions of law stand answered in favour of the Revenue though with a direction that the matter of assessment arising out of

notice under Section 148 Income Tax Act issued on 18.04.2007 for AY 2004-05 in respect of the assessee would stand remitted to the CIT (Appeals) for fresh consideration/adjudication in accordance with law.

44. In above view, the contentions of the assessee respecting the validity of the assessment, as preserved for consideration by this court by order dated 29.08.2014 in ITAT No. 289/2014, would also be examined by the CIT (Appeals). Given the fact that such objections have a bearing on the issue of jurisdiction, consideration of such contentions of the assessee must precede the scrutiny of the questioned credit entries from the perspective of Section 68.

45. The appeal is disposed of in above terms.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MARCH 11, 2015
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