

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'I' BENCH BEFORE
SHRI RAJPAL YADAV, JM & SHRI A.N. PAHUJA, AM

ITA No.964/D/2009
Assessment Year:2005-06

M/s Caneron Concrete Industries Pvt. Ltd., E-163, Pandav Nagar, Delhi-91	V/s.	Income Tax Officer, Ward-3 (2), New Delhi
[PAN:AAACC 0245M]		
(Appellant)		(Respondent)

Assessee by	S/Shri Ved Jain & Rano Jain, ARs
Revenue by	Shri A.K. Monga, DR

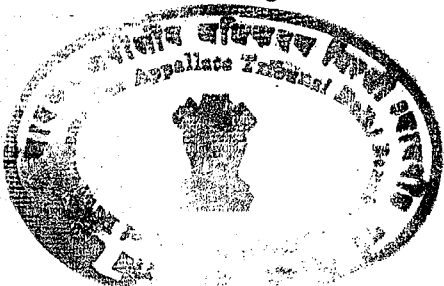
Date of hearing	07-12-2011
Date of pronouncement	06-01-2012

ORDER

A.N.Pahuja:- This appeal filed on 17.03.2009 by the assessee against an order dated 12th January, 2009 of the learned CIT(A)-VI, New Delhi, raises the following grounds:-

- 1 "On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad, both in the eye of law and on the facts.
- 2(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming an addition of ₹ 16,50,000/- as income from undisclosed sources.
- (ii) That the above-said addition was made ignoring the material and evidences brought on record by the appellant in support of his contention and by indulging in surmises, conjecture and without bringing any adverse material on records.
- (iii) That the CIT(A) has erred both on facts and in law in confirming the addition on account of share capital despite the fact that the assessee has discharged his onus by establishing the identity of the shareholders.
3. That the above-said additions are untenable in the eye of law, having been made on the basis of the material collected at the

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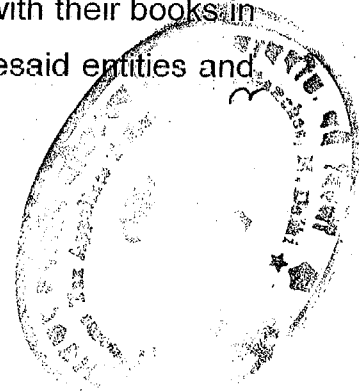


back of the assessee without providing copy of the same and providing opportunity to rebut the same.

4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition which was made on the basis of statement of a person without giving assessee an opportunity to cross examine the same.

5. The appellant craves leave to add, amend or alter any of the grounds of appeal." _____

2. Facts, in brief, as per relevant orders are that return declaring income of ₹1.23.800/- filed on 19.10.2005 by the assessee, after being processed on 13.01.2006 u/s 143(1) of the Income-tax Act, 1961 (hereafter referred to as the Act), was selected for scrutiny with the service of a notice u/s 143(2) of the Act issued on 28th July, 2006. During the course of assessment proceedings, the Assessing Officer (A.O. in short) noticed that the assessee raised share capital of ₹32,00,000/- during the year under consideration. Inter alia, the assessee received an amount of ₹4,50,000/- from Onyx Exim; ₹4,50,000/- from Shimmer Marketing, ₹3,00,000/- from Rapid Impex P Ltd. and ₹4,50,000/- from Jainco Metals (P) Ltd. In response to notice u/s 133(6) of the Act issued to the said share applications, no reply was received from M/s Rapid Impex Pvt. Ltd., and notice issued to M/s Jainco Metals Pvt. Ltd. was returned unserved. Meanwhile, the AO received a report from Investigating Wing, which revealed that that entry operator Shri S.H. Malik admitted that he was instrumental in providing accommodation entries to various beneficiaries. In his statement recorded on 23rd June, 2004, shri Malik admitted that no business was carried on by Onyx Exim & Shimmer Marketing, in which he was a director and these companies provided entries. The assessee is stated to have received an entry for an amount of ₹4,50,000/- from each of these two companies by way of share capital. The AO confronted the statement of Shri S.H. Malik to shri R.C.Gupta, a director of the assessee company and requested him to produce the directors/controlling persons of the aforesaid companies along with their books in order to and establish the identity and creditworthiness of aforesaid entities and



genuineness of the transactions. However, the assessee did not produce any of the directors of the following four companies from whom share capital was received:

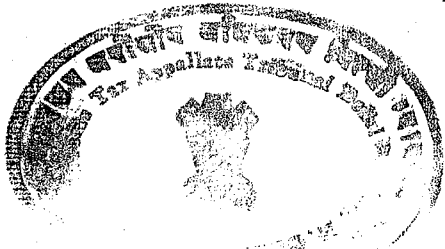
Sr. No.	Name of the Shareholders	Amount
1.	M/s Onyx Exim Pvt. Ltd.	4,50,000.00
2.	M/s Shimmer Marketing Pvt. Ltd.	4,50,000.00
3.	Ms. Jainco Metals Pvt. Ltd.	4,50,000.00
4.	M/s Rapid Impex Pvt. Ltd.	3,00,000.00
	Total:	16,50,000.00

2.1 Though the assessee submitted PAN and copies of the acknowledgements of filing of returns along with their confirmations and bank details of the aforesaid companies, the assessee did not produce either the directors or the books of account of the said companies, as directed by the AO. In this situation, since the assessee failed to establish identity and creditworthiness of the aforesaid four companies nor established genuineness of the transactions, the A.O. added the amount of ₹16,50,000/- 68 of the Act.

3. On appeal, the learned CIT(A) upheld the addition in the following terms:-

"6.3 I have carefully considered the submissions made by learned AR and my observations on the issue are as under:-

- i) *During the year under consideration, the appellant has raised the share Capital of Rs.32 lacs. During the assessment proceedings, the Assessing Officer asked for the details of the additions made to share capital and issued notices u/s 133(6) to various share holders. It is evident from the assessment order that notice u/s 133(6) sent to M/s Jainco Metals (P) Ltd. at the given address was received back unserved. Similarly, for notice u/s 133(6) sent to M/s. Rapid Impex Pvt. Ltd., no reply was received. In such circumstances, the Assessing Officer required the presence of persons controlling M/s. Jainco Metals (P) Ltd. and M/s. Rapid Impex Pvt. Ltd. respectively alongwith books of accounts to verify the claim of genuineness. As per para 4.2 of the assessment order, the appellant submitted that the confirmation, cheque and bank details, PAN and copy of the Income Tax Return have already been submitted. Similarly, vide para 4.4 of the assessment order it is evident that for M/s. Rapid Impex (P) Ltd. the appellant submitted that the confirmation, cheque and bank details PAN No. and copy of Income Tax return have already been submitted*

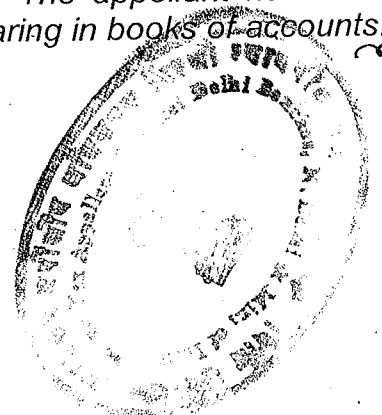


and they are trying to produce the concerned persons which is likely to take some time. However, no such person was produced. Hence, the Assessing Officer has made the addition u/s 68 of the Act as unexplained credits.

ii) I further find that during the assessment proceedings it came to the notice of the Assessing Officer that the appellant has received share capital of Rs.4,50,000/- each from M/s. Onyx- Exim Pvt. Ltd. and M/s. Shimmer Marketing (P) Ltd. It was further revealed from the report of the Investigating Wing that one M/s. S.H. Malik is the Director in both these companies and he has admitted that these companies are involved in providing entries and no actual business is being carried on. It was further explained by Sh. Malik in his statement that the cheques or DD/Pay order is issued in lieu of cash to the party concerned and for this they get the commission. In light of the above investigation report, the appellant was required to produce the concerned persons so as to prove the identity, genuineness and creditworthiness of the entries appearing in the books of accounts. Copy of the statement of Sh. S.H. Malik was also provided.

iii) The Ld. A.R. has submitted that that all the relevant documents like confirmation, PAN, copy of Income Tax return, bank/cheque details etc. were produced to discharge the onus of proving the identity, genuineness of the transaction and creditworthiness of these parties. Further, time given to the appellant was very short and the case was finalized arbitrarily. In this regard, I find that as far as M/s. Rapid Impex Pvt. Ltd. and M/s. Jainco Metals (P) Ltd. are concerned, the Assessing Officer had sent the notice u/s 133(6) on the given addresses. However, in case of M/s. Jainco Metals (P) Ltd., the notice was received back and in case of M/s. Rapid Impex Pvt. Ltd. there was no response. Hence, the A.O. required the appellant to produce the parties concerned alongwith books of account. However, the same was not done. The appellant has submitted that time given was very short. However, I find that the proceedings were going on and the addresses were submitted by the appellant itself and since there was no response, the Assessing Officer rightly required the presence of the (concerned parties. The appellant has nowhere indicated that what efforts have been made by him and why the same had failed.

iv) I further find that the Ld. A.R. has raised objection on the reliance placed by the Assessing Officer on the statement of Sh. S.H. Malik. However, I find that in this regard, what the Assessing Officer did was to apprise the appellant about the facts emerging from the statement of Sh. S.H. Malik. A copy of its statement of Sh. S.H. Malik was also given to the appellant. However, at the same time, the appellant was asked to prove the identity, genuineness and creditworthiness of the entries made with regard to Onyx Exim Pvt. Ltd. and M/s. Shimmer Marketing(P)Ltd. It is not a case where the Assessing Officer has based his decision entirely on the statement of Sh. S.H. Malik. The appellant has been provided specific opportunity to prove the entries appearing in books of accounts.



v) Vide Ground No. 4 of the appeal, the 'appellant has raised the objection that the amount actually disallowed is Rs.15,00,000/- as against: Rs. 16,50,000/- as per the details given below :-

a)	Onyx Exim (P) Ltd.]	Rs. 7,50,000/-
b)	Shimmer Marketing (P) Ltd.]	
c)	Rapid Impex (P)Ltd.	Rs. 3,00,000/-
d)	Jainco Metals (P) Ltd.	Rs. 4,50,000/-

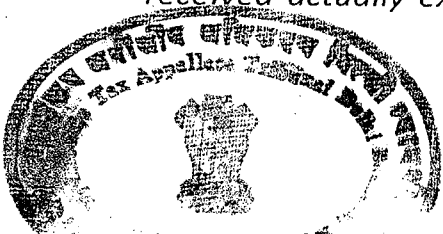
No specific objection has been raised during the appellate proceedings. Further, I find that during the proceedings, the Ld. A.R. has himself given the details as under:

Sr. No.	Name of the Shareholders	Amount
1.	Onyx Exim Pvt. Ltd. :	4,50,000.00
2.	ShimmerMarketing (P) Ltd.	4,50,000.00
3.	Mls.Jainco Metals (P) Ltd.	4,50,000.00
4.	Mls. Rapid Impex Pvt. Ltd.	<u>3,00,000.00</u>
Total		16,50,000.00

Hence, in view of the same, I find that apparently there is no mistake in taking the figure at Rs.16,50,000/-. However, the assessing officer is directed to verify the figures from his records.

vi) During the proceedings before 'me', Ld. AR placed reliance on certain case laws. However, I find that the facts and circumstances of the present case are different. As discussed above, in the present case, the appellant has been required specifically to prove the genuineness of the transactions. Investigations were made and the appellant was intimated about the results of the efforts and information available. Specific queries were raised and the appellant was required to prove the genuineness of the credits appearing in its books of accounts. However, it has failed to do so. In case of CIT vs. Sophia Finance Ltd. 15 ITR 98, Hon'ble High Court observed as under:

"As we read section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income-tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of

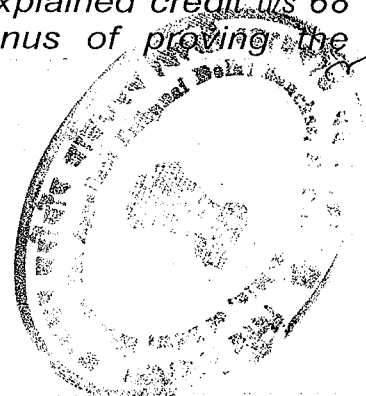


each case. the Income-tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. Be that as it may, it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money."

While discussing the application of section 68 Hon'ble High Court in case of CIT vs. Sophia Finance Ltd further opined as under:

"What is clear, however, is that section 68 clearly permits an Income-tax Officer to make enquiries with regard to the nature and source of any or all the sums credited in the books of account of the company irrespective of the nomenclature or the source indicated by the assessee. In other words, the truthfulness of the assertion of the assessee regarding the nature and the source of the credit in its books of account can be gone into by the Income-tax Officer. In the case of Stellar Investment Ltd, [1991] 192 ITR 287 (Delhi), the Income-tax Officer had accepted the increased subscribed share capital. Section 68 of the Act was not referred to and the observations in the said judgment cannot mean that the Income-tax Officer cannot or should not go into the question as to whether the alleged shareholders actually existed or not. If the share holders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regarded as a capital receipt and to that extent the observations in the case of Stellar Investment Ltd. [1991] 192 ITR 287 (Delhi), are correct but if, on the other hand, the assessee offers no explanation at all or the explanation offered is not satisfactory then, the provisions of section 68 may be invoked. In the later case section 68, being a substantive section, empowers the Income-tax Officer to treat such a sum as income of the assessee, which is liable to be taxed in the previous year in which the entry is made in the books of account of the assessee."

vii) In view of the above discussion, I find that the Assessing Officer has rightly treated the amount of Rs.16,50,000/- as unexplained credit u/s 68 as the appellant has failed to discharge its onus of proving the



genuineness and credit worthiness of the entries appearing in its books of account."

4. The assessee is now in appeal before us against the aforesaid findings of the Id. CIT(A). At the outset, the Id. AR on behalf of the assessee while inviting our attention to details placed on page 11 to 20 of the paper book contended that the assessee submitted all the relevant details viz. confirmations of the investors, and copies of acknowledgments of filing returns along with PAN and cheque number to the A.O. Since the assessee discharged the primary onus establishing identity of the aforesaid four companies, no such addition can be made in view of decisions in CIT Vs. Lovely Exports (P) Ltd. (2008) 6 DTR (S.C.) ,308;CIT Vs. Value Capital Services (P) Ltd. (2009) 307 ITR 334;CIT Vs. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Del.);CIT Vs. Orissa Corporation (P) Ltd. (1986) 159 ITR 78 (S.C.)and CIT vs. Oasis Hospitalitys (P) Ltd. in ITA no.2093 of 2010 dated 31.1.2011, the Id. AR submitted. The Id. AR further pointed out that statement of Shri S.H. Malik was recorded on 23rd June, 2004 while the amounts were received from the aforesaid companies on 23rd December, 2004, 28.12.2004 and 6th January, 2005. Thus, no reliance can be placed on the statement of Shri S.H. Malik. On the other hand, learned DR supported the findings of the Id. CIT(A).

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions. As is apparent from the facts of the case, the assessee, inter alia, received following amounts towards share capital:

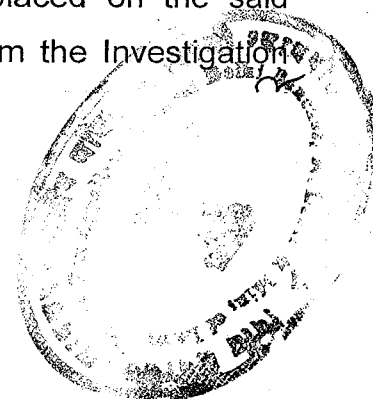
Sl. No.	Name	PAN	No. of shares	Amount[In ₹]	Cheque nos & date
1	Onyx Exim P. Ltd, 2842, Classic Apmt. Daryaganj, Delhi	AAACO1979R	45,000	4,50,000	Ch. No.326178 Dt.23.12.04 of Synd Bank
2.	Rapid Impex Pvt. Ltd., H-16/332 Bapa Nagar,	AACCR5081P	30,000	3,00,000	Ch.No.325932 Dt.23.12.04



	Karol Bagh, N.D.-5				
5.	Jainco Metals Ind.Pvt. Ltd., 313 Thansingh Ngr. Anand Parbat, N.D.	AABCR2938C	45,000	4,50,000	Ch.No.000011 Dt.28.12.04
6.	M/s Shimmer Marketing Pvt. Ltd., 2842, Moti Mahal ST Daryaganj, Delhi	AAFCS1881B	45,000	4,50,000	Ch.No.326202 Dt.6.1.2005.

5.1 The assessee submitted confirmations of the aforesaid companies along with copies of acknowledgment of their returns during the course of assessment proceedings. However, the assessee did not produce the directors or controlling persons of the aforesaid companies. Merely because the assessee could not produce these four parties, there is no justification to draw an adverse inference. In this case, the assessee had given the names, addresses and PAN of the aforesaid investors. The AO, apart from issuing notices under section 133(6) of the Act, did not pursue the matter further. There was no effort made to pursue the said investors. In those circumstances, the assessee could not do anything further. In the premises, it can not be said that the assessee did not discharge the burden that lay on him [CIT vs. Orissa Corporation Ltd., 159 ITR 78(SC)]

5.2 Indisputably, the statement of Shri S.H. Malik was recorded on oath on 23rd June, 2004 wherein he had submitted that M/s Onyx Exim Pvt. Ltd. and Shimmer Marketing Pvt. Ltd. did not carry on any marketing activity and were engaged in providing entries only. However, in the instant case, the assessee received the aforesaid subscription to its shares vide cheques dated 23rd December, 2004, 28.12.2004 and 6th January, 2005. Thus, the said statement becomes irrelevant in the context of subsequent investment made by the aforesaid companies. Consequently, no reliance can be placed on the said statement of Shri S.H. Malik. Despite having information from the Investigation



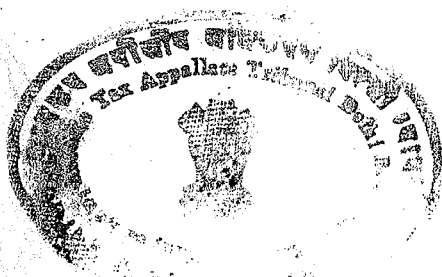
Wing, the AO did not make any further inquiries. There is nothing to suggest that in lieu of these cheques, cash was returned to the aforesaid companies.

5.3 In this regard, we refer to the decision of the Hon'ble Apex Court delivered in the case of CIT Vs. Lovely Exports 216 CTR 195. In this case it was held 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, but it cannot be regarded as undisclosed income of the assessee.

5.4 Following the aforesaid decision, while adjudicating an identical issue, Hon'ble Jurisdictional High Court in the case of C.I.T. vs. Dwarkadhish Investment P Ltd. in ITA No. 911/2010 vide order dated 02.8.2010 held as under:

"6. In our opinion, as section 68 of the Act, 1961 has been interpreted as recently as 2008 by a Division Bench of this Court in Divine Leasing and Finance Ltd. (Supra) after considering all the relevant judgements, we do not have to reconsider all the judgements referred to by Mr. Sahni which are prior in date and time to the aforesaid judgement. In fact, a Special Leave Petition filed against the said Division Bench Judgement was dismissed by the Supreme Court by way of speaking order in C.I.T. vs. Lovely Exports (P) Ltd. 216 CTR 195 (SC). The Supreme Court in Lovely Exports Pvt. Ltd. (Supra) has held as under:-

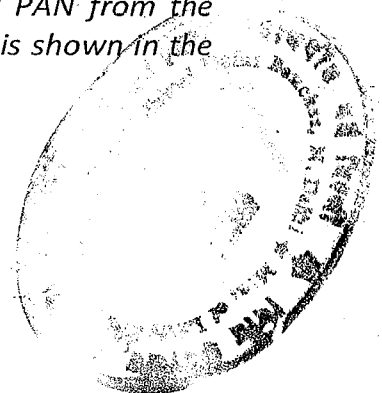
"Can the amount of share money be regarded as undisclosed income under section 68 of the Income Tax Act, 1961. We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgement."



7. Consequently, the doctrine of merger would apply and the judgement of the Supreme Court in *Lovely Exports (P) Ltd. (Supra)* would cover the field with regard to interpretation of section 68 of the Act.
8. In any manner, the onus of proof is not a static one. Though in section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/ share applicants by either furnishing their PAN number or income tax assessment number and shows the genuineness of transaction by showing money / his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the revenue. Just because the creditors /share applicants could not be found at the address given, it would not give the revenue the right to invoke section 68. One must not lose sight of the fact that it is the revenue, which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the source of source."

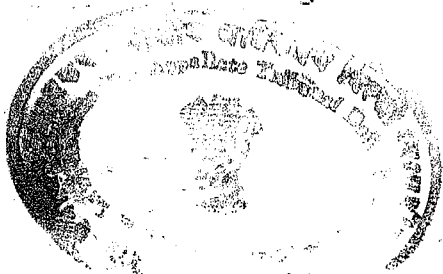
5.5 Hon'ble Jurisdictional High Court in their another decision in *C.I.T. vs. Oasis Hospitalities P Ltd.*, 333 ITR 119 concluded as under:-

" 27. The order of Assessing Officer would reveal that it had received an information from the Investigation Wing which had made various enquiries / investigations on the basis of which it was found that these six investors belong to one Mahesh Garg Group who were not carrying on any real business activity and were rather engaged in the business of providing accommodations entries. They were, thus, entry operators of which the appellant was the beneficiary. According to the Assessing Officer, the modus operandi involved in such type of activity was like this: an entry operator operates a number of accounts in the same bank/branch or in different branches in the name of companies, firms, proprietary concerns and individuals and for the operation of these bank accounts, filing income tax returns etc. persons are hired. Most of these persons work on part-time basis and are called upon to sign documents, cheque books, etc. whenever required. Whenever any beneficiary is interested in taking an entry, he would approach the entry operator and handover the cash alongwith commission and take cheques, demand draft, postal order. The cash is deposited by the Entry Operator in a bank account either in his name or in the name of relative/ friends or other person hired by him for the purposes of opening the bank account. After the deposit of cash when there is sufficient balance, the entry operator issues demand draft, postal orders, cheques in the name of beneficiary. Most of these concerns / individuals also have obtained PAN from the department and are filing income tax returns, but what is shown in the return is not actual state of affairs.



28. The appellant filed copies of PAN, acknowledgement of filing of income tax returns of the companies, their bank account statements for the relevant period, i.e. for the period when the cheques were cleared. However, the parties were not produced in spite of specific direction of the Assessing Officer instead of taking opportunities in this behalf. Since the so called Directors of these companies were not produced on this ground coupled with the outcome of the detailed inquiry made by the investigation wing of the department, the Assessing Officer made the addition. This addition could not be sustained as the primary onus was discharged by the appellant by producing PAN number, bank account, copies of income tax returns of the share applicants, etc. We also find that the Assessing Officer was influenced by the information received by the Investigating Wing and on that basis generally modus operandi by such entry operators is discussed in detail. However, whether such modus operandi existed in the present case or not was not investigated by the Assessing Officer. The appellant was not confronted with the investigation carried out by the Investigation Wing or was given an opportunity to cross examine the persons whose statements were recorded by the Investigation Wing.
29. As regards discrepancies found by the Assessing Officer in the bank statement, suffice it to mention that the bank statements that were filed by the appellant were provided by the share holders and were computer printed on the bank stationery. The same were filed by the appellant during the assessment proceeding without any suspicion of their being incorrect. During the assessment proceedings, the appellant was never confronted by the Assessing Officer that there are discrepancies between the bank statements filed and the statements directly called by the Assessing Officer. However, even after considering the alleged discrepancies, it does not follow that the amount of share capital was the undisclosed income of the appellant. Even the correct bank statements as claimed by the Assessing Officer reveal that the appellant has received cheques from the shareholders. In this backdrop, the following observations of the Court in the case of C.I.T. vs. K.C. Fibres Ltd. (2010) 187 Taxman 53 (Del) are reproduced:

"It is strange that when the Assessing Officer is questioning the bona fides of M/s Diamond Protein Ltd. for collecting money to subscribe to the share to the capital of the appellant, but it is the appellant who is fastened with the liability. The Assessing Officer did not question M/s Diamond Protein Ltd. in this behalf. Insofar as Assessing Officer is concerned, it is not disputed that money was paid to it towards the aforesaid share application money, by means of cheques. It is not for the Assessing Officer to probe as to the source from where



M/s Diamond Protein Ltd. collected the aforesaid money. It was for the Assessing Officer, in these circumstances to inquire into the affairs of M/s Diamond Protein Ltd. which is an independent company inasmuch as no finding is arrived at by the Assessing Officer that the two companies are umbrella companies or have any relationship with each other."

30. We are, therefore, of the opinion, that there is no merit in these two appeals, which are accordingly dismissed at the admission stage itself."

5.6 In the light of view taken in the aforesaid decisions, especially when the existence of aforesaid share applicants is not in doubt, we have no hesitation in vacating the findings of lower authorities and thereby deleting the aforesaid addition on account of share capital. Consequently, ground no. 2 in the appeal is allowed. As a corollary, ground nos. 3 & 4 become academic in nature and do not survive for our adjudication.

6. Ground no.1 in the appeal being general in nature, nor any submissions having been made before us on this ground, does not require any separate adjudication while no additional ground having been raised before us in terms of residuary ground no.5 in the appeal, accordingly, these two grounds are also dismissed.

7. No other submission or argument was made before us.

8. In the result, appeal is allowed.

Order pronounced in Open Court

Sd/-

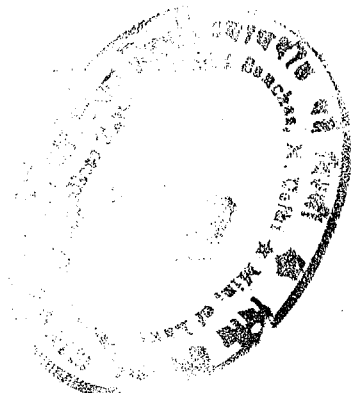
(RAJPAL YADAV)
JUDICIAL MEMBER

Sd/-

(A.N. PAHUJA)
ACCOUNTANT MEMBER

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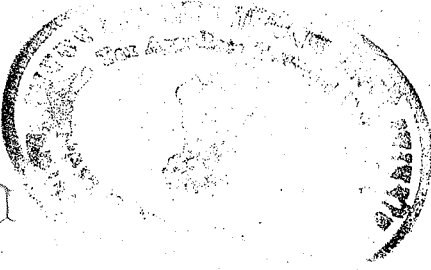


1. M/s Caneron Concrete Industries Pvt. Ltd., E-163, Pandav Nagar, Delhi-91. *By hand*
2. Income Tax Officer, Ward 3 (2), New Delhi.
3. CIT (Appeals)-VI, New Delhi
4. The CIT concerned.
5. The DR, ITAT, 'I' Bench, New Delhi
6. Guard File.

By Order,

Deputy/Asstt. Registrar
ITAT, Delhi

सहायक पंजीकार
Assistant Registrar
आयकर अपील क्षेत्र अधिकरण
Income Tax Appellate Tribunal
नई दिल्ली/ New Delhi





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