IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER, AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5955/DEL/2014
[Assessment Year: 2010-11]

Umbrella Projects Pvt. Ltd GH – 9/5, Paschim Vihar New Delhi	Vs.	The I.T.O Ward 18(1) New Delhi

PAN : AATPA 0581 F

[Appellant] [Respondent]

Date of Hearing : 23.01.2018
Date of Pronouncement : 23.02.2018

Assessee by : Shri Ved Jain, Adv
Shri Ashish Chaddha, CA
Ms. Devina Sharma, Adv

Revenue by : Shri Amit Jain, Sr. DR

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER,

This is an appeal filed by the assessee challenging the order of the CIT(A) dated 1st September, 2014, whereby he has confirmed the addition of Rs. 86 Lakhs made by the AO.

2. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year under consideration on 29th September, 2009. During the course of scrutiny proceedings, the AO asked the assessee to file details in respect of the share capital of Rs. 3,26,00,000/- raised during the year. The assessee submitted the details thereof along with evidences. The AO not being satisfied with the reply and evidences submitted by the assessee, added a sum of Rs. 86 Lakh being the share capital received from 4 shareholders during the year. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A) and made various submissions. The CIT(A) not being satisfied with the explanation and evidences of the assessee confirmed the addition made by the AO.

3. Aggrieved by the order of the CIT(A), the assessee is in appeal before us and has raised the following grounds of appeal:

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.

2(i) On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 86,00,000/- made by AO on account of share application money.

3. On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition made by the AO rejecting the explanation and evidences brought on record to prove the identity and creditworthiness of the shareholder and genuineness of the transaction.

4. On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition despite the fact that the AO has not been able to bring on record any mistake on discrepancy in the evidences & explanation given by the assessee.

5. On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the said addition disregarding the settled legal position that the notices to shareholders having been served the AO had to bring the investigation to a logical end, as such no addition can be made on this count.

5(i) On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition ignoring the fact that the AO has given a wrong finding that the shareholders have not filed reply to his notice u/s 133(6) , the replies having been filed twice.

6. The Appellant craves leave to add, amend or alter any of the grounds of appeal."

4. On going through the above grounds, we note that the only issue in this appeal is the addition of Rs. 86,00,000/- on account of share capital received from 4 shareholders of the assessee company. It was submitted by the Ld. AR that during the year the assessee has raised share capital of Rs. 3,26,00,000/- from 19 shareholders. The assessee has submitted complete details in respect of each of the person who has subscribed to the share capital of the company. The details included name, address, PAN, etc. The assessee also submitted supporting evidences in respect of each of the shareholder which included confirmation, copies of bank statements of each of the shareholder, copy of share application form, copy of income tax return, copy of audited balance sheet and profit and loss account. The AO made an independent enquiry in respect of each of these shareholders. The AO issued notices under Section 133(6) to each of these shareholders. The AO also got reply. As per the assessment order, the AO has alleged that he did not get any reply from 4 shareholders who have subscribed the share capital to the extent of Rs. 86 lakhs. The AO on 19th March, 2013 asked the assessee to produce these shareholders on 25th March, 2013. The assessee requested the AO for adjournment of two days only to produce these 4 shareholders. The AO however did not agree with

the request of the assessee and made the addition of Rs. 86 lakhs being the share capital received from the following 4 shareholders:

1. M/s Attractive Finlease Ltd. Rs. 30,00,000/-
2. M/s Euro Asia Mercantile (p) Ltd. Rs. 20,00,000/-
3. M/s Shalini Holdings Ltd. Rs. 30,00,000/-
4. M/s Stranger Hotels (P) Ltd. Rs. 6,00,000/-

5. It was pointed out by the Ld. AR that there is no adverse comment by the AO in the assessment order other than the allegation that replies have not been received from 4 shareholders which has led to this addition. It was contended by the Ld. AR that firstly, this allegation of the AO that he did not receive the reply from the above 4 shareholders is not correct. In this regard, the Ld. AR in support of this contention invited attention to PB. Pg. 109, which is the reply along with evidences in response to notice under Section 133(6), sent by Euro Asia Mercantile Pvt. Ltd. dated 11th February, 2013 addressed to the AO. Attention was also invited to PB. Pg. 122, which is a reply dated 11th February, 2013 submitted by the Shalini Holdings Ltd. to the AO in response to notice under Section 133(6) received by it from the AO. The Ld. AO also invited attention to PB. Pg. 141 which is a reply submitted to the AO by the Stranger Hotels Pvt. Ltd. and PB. Pg. 145, which is a reply submitted by

Attractive Finlease Ltd. It was further submitted that on being brought to its notice that replies have not been received in respect of these four shareholders, the shareholders thereafter have again sent the replies along with necessary evidences. The additions have been made merely on the basis of reply not being received from these 4 shareholders. It is not a case where the notices have come back unserved or the persons are not available at the address given by the assessee company. To support the above facts, the Ld. AR invited attention to the assessment order where there is no allegation or any material regarding these shareholders. The Ld. AO has simply made the addition as the case was getting time barred. It was submitted that non-receipt of reply in response to notice under Section 133(6) per se cannot be a ground for drawing adverse inference against assessee when the assessee has submitted sufficient evidences in respect of the credit appearing in its books of accounts. In support of this contention, the Ld. AR placed reliance on the judgment of Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation 159 ITR 78 (SC). It was further submitted by the Ld. AR that this is a case of a normal scrutiny assessment and not a case of a reopening of assessment on the basis of any allegation of accommodation entry.

6. The Ld. AR contended that the CIT(A) has confirmed the addition by indulging into surmises and raising doubts without appreciating the evidences on record. The CIT(A) has made allegation which are not borne out on the record. It was contended that addition cannot be sustained on the basis of doubt as doubt howsoever strong can never take place of the proof as held by the Supreme Court in the case of Umacharan Shaw & Bros vs. CIT 37 ITR 271 (SC). It was further contended that the reliance placed by the CIT(A) on the judgment of the Supreme Court in the case of McDowell & Company Ltd. vs. CTO 154 ITR 148 (SC) and CIT vs. Durga Prasad More 82 ITR 540 (SC) and Kerala High Court Judgment in the case of ITO vs. Diza Holdings Pvt. Ltd. 120 Taxmann 539 (Kerala), is not correct as these judgments have been delivered on entirely different facts. In the present case, it is clear from the facts that there is no allegation of any accommodation entry, nor there is any adverse statement of any entry operator about the share capital received by the assessee company from these 4 shareholders. Further, nothing adverse has been brought on record by the AO nor by the CIT(A).

7. The Ld. AR invited attention to PB. Pg. 65 to 145, which are the evidences in the form of confirmation, acknowledgement of income tax return, share application form, bank statement and audited balance sheet of each of the 4 shareholders to substantiate that it has discharged its onus under Section 68 in respect of these 4 shareholders. The Ld. AR also referred to the bank statement to demonstrate that there is no cash deposits in the bank account. The Ld. AR also invited attention to the balance sheet of each of these companies to demonstrate that the net worth of each of these shareholders was substantial. The Ld. AR submitted that having discharged its onus fully about identity, creditworthiness and genuineness, the CIT(A) has gone wrong in confirming the addition made by the AO. The Ld. AR further placed reliance on the following judgments in support of its contention:

- CIT vs. Lovely Exports Pvt. Ltd. [2009] 319 ITR 5
- CIT vs. Orissa Corporation Pvt. Ltd. [1986] 159 ITR 78
- CIT vs. Laxman Industrial Resources Pvt. Ltd. [2017] 397 ITR 106
- CIT vs. Rakam Money Matters Pvt. Ltd. ITA No. 778 of 2015
- CIT vs. Divine Leasing and Finance Ltd. General Exports and Credits Ltd. [2008] 299 ITR 268
- CIT vs. Orchid Industries Pvt. Ltd. [2017] 397 ITR 136

8. Per contra, the Ld. DR placed reliance on the order passed by the authorities below. It was submitted that AO was justified in drawing adverse inference against the assessee. Further, the CIT(A) has examined the issue and rightly confirmed the addition made by the AO. The Ld. DR placed reliance on the following judgments in support of its contention:

- CIT vs. Nipun Builders & Developers (P) Ltd. 350 ITR 407.
- CIT vs. Nova Promoters & Finlease (P) Ltd. 342 ITR 169.
- CIT vs. Ultra Modern Exports (P) Ltd. (40 taxmann.com 458, 220 Taxmann 165).
- CIT vs. N R Portfolio Pvt. Ltd. [2013] 29 taxmann.com 291(Delhi) / 214 Taxman 408 (Delhi) / 263 CTR 456 (Delhi).

9. We have heard the arguments and perused the orders passed by the authorities below and the Paper Book. The only issue in this appeal is the addition of Rs. 86 Lakhs in respect of the share capital received by the assessee company during the year. As per the facts on record, the assessee company has received total share capital of Rs. 3,26,00,000/- from 19 shareholders. The AO has called for the details from the assessee and has also made independent enquiry by issue of notice under Section 133(6). The AO was apparently satisfied in respect of the 15 shareholders from whom the assessee has received share capital of Rs. 2,40,00,000/-.

The AO however drew adverse inference in respect of 4 shareholders as stated in the assessment order as according to him, he did not receive replies from these 4 shareholders. Thus, the only reason for which the AO drew adverse inference was non-receipt of replies from these 4 shareholders. The AO has not pointed out any other adverse feature or material in the assessment order. There is no allegation in the assessment order of any accommodation entry or any statement by any person regarding genuineness of the share capital received by the assessee company from these 4 shareholders. Ongoing through the paper book, we note that assessee has submitted complete details in respect of each of these 4 shareholders to substantiate the identity, creditworthiness and genuineness. During the course of the hearing before us with the assistance of the Ld. AR and the Ld. DR, we have gone through each of these documents.

(i) The assessee company has received a sum of Rs. 30,00,000/- from Attractive Finlease Ltd. This amount has been paid by this company from its bank account no. 224011618 with Axis bank on 28th May, 2009. Ongoing through the bank statements at PB. Pg. 92-94, we note that there is no cash deposit. This company has total net worth of Rs. 105.05 Crore as per the audited balance sheet on record. This company is also being assessed to Income

Tax as per the ITR on record with ITO Company Ward 1(1) Delhi with PAN AAGCA3662F.

(ii) The assessee company has received Rs. 20 Lakh from Euro Asia Mercantile Pvt. Ltd. As per the bank statement placed at PB. Pg. 106-107, this amount has been paid on 28th July, 2009 and there is no cash deposit in the bank account. This company has a substantial net worth of Rs. 48.11 Crore as per its audited balance sheet on record. It is being assessed to income tax with Income Tax Officer Ward 11(2) New Delhi at PAN No. AABCE7522P.

(iii) The assessee company has received Rs. 30 Lakh from M/s Shalini Holdings Ltd. This amount has been paid from its current bank account placed at PB. Pg. 120. This company has also got substantial net worth of Rs. 124.87 Crore as per the audited balance sheet on record. This company is also being assessed to Income Tax as per the ITR on record with ITO Company Ward 8(1) Delhi with PAN AAACS0913M.

(iv) The company has received Rs. 6,00,000/- from Stranger Hotes Pvt. Ltd. This amount has been paid from its bank account placed at PB. Pg. 139. We have perused the same and note that there is no cash deposit in this bank account. We have also perused the audited balance sheet placed on record, it is seen that this company was having a net worth of Rs. 1.91 Crore. This company is also being assessed to Income Tax as per the ITR on record with ITO Company Ward 9(2) Delhi with PAN AALCS1218C.

10. In view of the above documents and evidences filed by the assessee, we are of the opinion that these are sufficient to discharge its initial onus regarding the identity, creditworthiness and genuineness as required under Section 68 of the Act. The assessee having discharged its onus, it was upon the AO to bring material or evidence to discredit the same. In the present case, from the assessment order, it is evident that no adverse material is available with the AO. There is no allegation against any of the above 4 shareholders of doing anything wrong on record. The AO has drawn adverse inference as he did not receive reply from the 4 aforesaid shareholders in response to notice issued by him under Section 133(6). On this issue, firstly, the Ld. AR has drawn our attention to the replies along with evidences submitted by these 4 shareholders to the AO to discredit the allegation of the AO that he did not receive reply in response to notice issued by him under Section 133(6). De horse the non-receipt of the reply, even for the sake of argument we assume that the AO has not received the reply, still the fact remains that 133(6) notice were served on these four shareholders. On going through the assessment order we note that it is not the case of the AO that notices have come back unserved or these shareholders were not available at the address given by the assessee. If that be so, we are of

the view that no adverse inference can be drawn against the assessee merely because reply has not been received by the AO in response to notice issued under Section 133(6). The AO having issue the notice and such notice having been served on the person concerned, the AO has to take the process to the logical end. He cannot draw adverse inference merely because reply has not been received. Submission of the reply in an independent enquiry being carried out by the AO by issue of notice under Section 133(6) from the person concerned directly is not in the hands of the assessee. The AO may be justified in certain circumstances when notice is not served or when an adverse reply is received in response to notice issued by him under Section 133(6), but merely non-receipt of reply can be a justification for drawing adverse inference. Our this view is supported by the judgment of the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation 159 ITR 78 where a similar issue has come up. The finding of the Hon'ble Court in this regard reads as under:

> *"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the*

source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

11. Though the CIT(A) in its order has made an allegation that these appears to be accommodation entries but the allegation seems to be farfetched in the absence of any material being brought on record to substantiate the allegation. For sustaining the addition, passing or a casual remarks are not sufficient. Though, the strict rule of evidence are not applicable to the income tax proceedings but at the same time it does not mean that no evidences are required. It may be relevant to refer to the judgment of the Supreme Court in the case of Dhakeshwari Cotton Mills Ltd. vs. CIT 26 ITR 775 (SC) where the Hon'ble Court has held as under:

"As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends ; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab."

12. It is also a settled law that doubt howsoever strong cannot take place of proof as submitted by the Ld. AR relying upon the judgment of the Supreme Court in the case of Umacharan Shaw & Bros Vs. CIT [1953] 37 ITR 271. The relevant observations of the Hon'ble Supreme Court on this issue reads as under:

"Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the

conclusion is the result of suspicion which cannot take the place of proof in these matters."

13. The addition can be sustained when there are sufficient evidences to support such allegation. In the present case, we are of the view that CIT(A) has sustained the addition by indulging into surmises and merely on the basis of doubt.

14. The Ld. DR has relied upon the four judgments stated hereinabove. Without going much into each of the judgments referred by the Ld. DR, the common feature in all these judgments was the statement of the alleged entry operators which lead to the addition. In the present case, there is no such statement, nor there is any allegation by the AO as is evident from the assessment order. The Ld. AR has rightly pointed out that this is a normal scrutiny assessment, not an assessment consequent to the information being received of accommodation entries and statement of such entry providers. Thus, in our opinion the assessee company was required to discharge its preliminary onus under Section 68 in respect of the credit appearing in its books of accounts. The assessee

has fairly discharged this onus and hence addition cannot be sustained. Our above view find support from the judgment of Jurisdictional Delhi High Court in the case of CIT vs. Laxman Industrial Resources Pvt. Ltd. [2017] 397 ITR 106 where the Hon'ble High court has held as under:

> *"This Court notices that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case."*

15. Similarly, in the case of CIT Vs. Rakam Money Matters Pvt. Ltd. in ITA No. 778 of 2015, the Hon'ble Delhi High Court on this issue has held as under:

> *"This Court notices that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case."*

16. The Bombay High Court in a recent case of CIT vs. Orchid Industries Pvt. Ltd. 397 ITR 136 had occasion to deal with a somewhat similar issue and held as under:

"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."

17. The reliance placed by DR on the judgment of Hon'ble Delhi High Court in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169, in fact, in the present case support the case of the assessee. The Hon'ble High Court in para 39 has pointed out that evidence or material adduced by the assessee cannot be thrown out without any enquiry. The relevant observations in para 39 reads as under:

"39. The case of Orissa Corporation (1986) 159 ITR exemplifies the category of cases where no action is taken by the Assessing Officer to verify or conduct an enquiry into the particulars about the creditors furnished by the assessee, including their income-tax file numbers. In the same category fall cases decided by this court in Dolphin Canpack (2006) 283 ITR 190, CIT v Makhni and Tyagi P. Ltd. (2004) 267 ITR 433, CIT v Antartica Investment P. Ltd. (2003) 262 ITR 493 and CIT v Achal Investment Ltd. (2004) 268 ITR 211. To put it simply, in these cases the decision was based on the fundamental rule of law that evidence or material adduced by the assessee cannot be thrown out without any enquiry. The ratio does not extend beyond that. The boundaries of the ratio cannot be, and should not be, widened to include therein cases where there exists material to implicate the assessee in a collusive arrangement with persons who are self-confessed "accommodation entry providers"."

18. In the above said case, the court had pointed out that there exists material to implicate the assessee in a collusive arrangement with person who are self-confessed accommodation entry providers. In the present case, there is no such material to implicate the assessee and as such this judgment nowhere supports the case of the Revenue. In view of the above facts and our findings, we hold that the assessee has fully

discharged its onus under Section 68 and accordingly direct the AO to delete the addition.

19. In the result, the appeal of the assessee in ITA No. 5955/DEL/2014 is allowed.

The order is pronounced in the open court on 23.02.2018.

Sd/-	**Sd/-**
[SUDHANSHU SRIVASTAVA**]**	**[B.P. JAIN]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23rd FEBRUARY, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,