

(2013) 11 DEL CK 0111
In the Delhi High Court
Case No : IT Appeal No. 341 of 2012

CIT

APPELLANT

Vs

MAF Academy (P.) Ltd.

RESPONDENT

Date of Decision : 28-11-2013

Acts Referred:

Citation : (2013) 11 DEL CK 0111

Hon'ble Judges : Sanjiv Khanna, J; Sanjeev Sachdeva, J

Bench : Division Bench

Judgement

Sanjeev Sachdeva, J.—This is an appeal u/s 260A(1) of the Income Tax Act, 1961 (for short "the Act") filed by the Revenue against the order of the Tribunal dt. 14-10-2011 in ITA No. 3650/Del/2011 for the assessment year 2002-03.

2. Vide order dt. 7-11-2012, the following substantial question of law was framed:

Whether on the facts and circumstances of case, the Tribunal was correct in law in deleting the addition of Rs. 3,43,00,000 u/s 68 of the Income Tax Act, 1961 holding the same to be camouflage transactions/accommodation entries ?

3. The assessee had filed the return for the assessment year 2002-03 declaring nil income. The return was processed u/s 143(1) of the Income Tax Act.

4. On the basis of the information received from the Investigation Wing of the IT Department, notice u/s 148 was issued to the assessee. The proceedings were sought to be opened on the basis of the information unearthed by the Investigation Wing of the IT Department, wherein it came to their knowledge that a huge money laundering racket was being run by a few persons and bogus accommodation entries were being provided. As per the information of the Investigation Wing, accommodation entries were being provided in lieu of payment in cash of equivalent amount plus commission being paid thereon to the entry operators. The Investigation Wing during the investigation came across

names of various individuals, who were operating as entry providers and also various parties, who were taking such accommodation entries. The name of the assessee also figured as one of the parties involved in taking such accommodation entries.

5. In response to the notice u/s 148, the assessee issued a letter dt. 6-4-2009 submitting that the return filed on 30-9-2002 may be treated as the return filed in response to the notice u/s 148. The assessee filed the said letter also inquiring about the reasons for reopening of the case. The reasons for reopening of the case were duly provided to the assessee vide letter dt. 12-10-2009 and the same are as under:

The Investigation Wing of the IT Department had unearthed a huge money laundering mechanism wherein it was established that bogus accommodation entries were being provided. These accommodation entries are received in lieu of payment of cash of equivalent amount plus commission thereon to the entry operator. For obvious reasons, these cash, transactions are not routed through the books of account of the assessee. In this case, information has been received from Directorate of IT (Invi), New Delhi that during the relevant assessment year,..... this assessee had received the following cheque amount(s) in the nature of accommodation entry:

Therefore, I have reason to believe that an income of Rs. 2,92,12,400 plus commission @ 2 per cent thereon amounting to Rs. 5,84,248, totalling to Rs. 2,97,96,648 has escaped assessment during the assessment year. On the basis of this information, I have reason to believe that the incomes described above have escaped assessment and that the case is fit for issuing notice u/s 148 of the Income Tax Act, 1961.

6. The assessee, vide letter dt. 21-10-2009, filed the objections to the initiation of proceedings u/s 147 of the Income Tax Act. The objections were disposed of against the assessee on 21-10-2009. One of the grounds taken by the assessee was that certain entries mentioned in the reasons recorded were duplicate entries and were figuring in two or three places and on account of this, the amount mentioned in the reasons was inflated. The assessee before the assessing officer submitted a list of parties out of the parties mentioned in the reasons for reopening and claimed that these parties had invested money towards acquisition of share capital in the assessee amounting to Rs. 1,50,00,000. The list of the parties is as under:

7. The assessing officer during the reassessment proceedings found, on the basis of the inquiries and investigations made by the Investigation Wing, that the 24 parties/persons, who legitimately had invested a sum of Rs. 1,50,00,000 as share capital in the assessee were in fact parties belonging to one Mahesh Garg group and these parties/persons were not carrying on any actual business and were engaged in the business of providing accommodation entries. The Investigation Wing had recorded the statement of Mahesh Garg on various dates

and in the statement of Mahesh Garg, various dates and modus operandi unearthed.

8. As per the Investigation wing the modus operandi adopted by this entry operator was that the entry operator (person who provides such entries) would operate a number of accounts either in the same bank or branch or in different branches in the name of banks/firms/proprietary concerns and individuals. For the purpose of operations of these bank accounts and to legitimize the transactions, IT returns would be filed and PANs would be obtained in the names of these persons. Various individuals would be hired, who would be merely name lenders in whose names bank accounts would be operated and returns would be filed. However, two or three key persons would be employed who would be involved in the operations of bank accounts collection of cash and deposit of the same. The name lenders would be required to sign documents and cheque books from time to time.

9. As per the Investigation Wing whenever any beneficiary (person who obtains an entry) was interested in taking an entry, he would approach the entry operator and in exchange for cash and commission, obtain a cheque/demand draft/pay order for the value of the cash. The cash would be deposited by the entry operator in an account either his own account or the account of the name lender or in the name of a relative/friend. On deposit of the said cash, a cheque of the account of the said name lenders or demand draft or pay order obtained from the bank of the name lenders would be then handed over to the beneficiary. At times, the entry operator or name lender would transfer the funds from one account to the other and through this process give semblance of legitimacy to the transaction. The beneficiary's cash would be made to transfer through various bank accounts before being routed back to the beneficiary. The real purpose of transferring the fund from one account to the other was to mislead the authorities and to create a semblance of legitimate transaction. The entry operators were cautious enough to obtain a PAN in their names and also in the names of the name lenders and regular returns would be filed with the Department so as to create semblance of genuineness and also to show creditworthiness of these parties.

10. As per the Investigation Wing another modus operandi which was an extension of the first modus operandi mentioned above, was that the entry provider would invest money in a company which was a private limited unlisted company. The money would be infused into such company as money towards acquisition of share capital or would be share application money. The acquisition of the share capital or investment in the share application money would at times be at a huge premium. Ultimately, the said share capital was then sold back by the directors or family members/friends of the directors at a huge discount. The share capital was purchased at high prices (premium) and in a short span sold back to the company or its directors at a nominal value thereby creating semblance of legitimacy to the transactions.

11. The assessee company is a private limited company. In the case of the assessee, in order to verify the genuineness of the transactions as well as the creditworthiness of the parties, who had invested in the assessee company, the assessing officer asked the assessee to file the necessary details in respect of the parties who had infused share capital in the assessee company. The assessee filed affidavits of confirmations of the following parties:

12. The assessing officer on receipt of the affidavits from the assessee issued summons u/s 131 to the 9 parties, who had executed the affidavits in the year 2009. The summons were received back unserved. The assessing officer during the reassessment proceedings further noticed that the addition to the share capital of the assessee was not only Rs. 1,50,00,000, as mentioned by the assessee, but was Rs. 2,85,00,000 by as many as 40 more persons, as mentioned below:

13. The assessing officer thus found that the assessee had received share capital including premium of a sum of Rs. 4,35,00,000 during the year and out of the said amount only Rs. 92,00,000 had been received from the four directors/their family members of the assessee company and the remaining amount had been received from the parties mentioned in the reasons recorded for reopening or from related parties. Summons were selectively issued to 8 more additional parties, however, the same were returned unserved as the parties were not available at the addresses provided by the assessee. On the failure of the availability of the parties at the given addresses and also their failure to appear pursuant to the summons-, an Inspector was deputed to serve summons, who reported that none of the parties were available at the addresses given by the assessee. The assessee was thereafter directed to produce the parties. However, the Authorized Representative of the assessee stated that it was not possible for them to produce the said parties, who had invested in the share capital of the assessee company.

14. The assessing officer, vide his assessment order dt. 29-12-2009, assessed the income at Rs. 3,49,86,000. Aggrieved by the assessment order, the assessee filed an appeal against the said assessment order. The Commissioner (Appeals) noticed that the appellant company was incorporated on 17-7-2007 [sic] and upto 31-3-2001, it had only nominal share capital and had not carried out any business activity either in the year of incorporation or the subsequent year in which the present assessment relates to. On the grounds of challenge to the reopening of assessment proceedings u/s 147, the Commissioner (Appeals) held in favour of the Revenue and held that the proceedings had been rightly reopened for reassessment.

15. With regard to the additions made by the assessing officer of Rs. 3,49,86,000, the Commissioner (Appeals) allowed the appeal filed by the assessee. One of the reasons for allowing the appeal is that the assessing officer has relied on the statement of Mahesh Garg recorded by the Investigation Wing and neither the statement was recorded by the assessing officer nor was Mahesh

Garg summoned to re-examine the fact as to whether Mahesh Garg knew the assessee company and to verify the veracity and the statement made by Mahesh Garg before the Investigation Wing.

16. The Commissioner (Appeals) was of the view that merely because the assessee could not furnish the present addresses of the subscribers to the share capital or could not produce them before the assessing officer for personal deposition, would not prove that the share capital had emanated from the coffers of the assessee's unexplained sources.

17. The Commissioner (Appeals) had further held that the assessing officer did not make any effort to find out from the assessee whether the said parties had made investment in the share capital of the assessee nor was an opportunity given to the assessee to cross-examine Mahesh Garg. The Commissioner (Appeals) further held that the assessee had been paid money through account payee cheques. The fact that the cash was deposited in the accounts of the persons, who had purchased the shares immediately preceding the issuance of cheque, does not prove that the cash was not of the persons and was of the assessee company.

18. The Commissioner (Appeals) was further of the view that the subscribers to the share capital were people who existed on the record of the IT authorities/ Department and had bank accounts from which payments were made and thus, it could not be said that their identity was not proved since the assessee company had submitted copies of their return of income.

19. The Commissioner (Appeals) was further of the view that merely because some information was received by the assessing officer, which was not verified and no opportunity was granted by the assessing officer to cross-examine or to verify the evidences furnished by the assessee and that the burden on the assessing officer of establishing these evidences could not be shifted to the assessee.

20. Another factor that, the Commissioner (Appeals) has relied on is that the assessing officer had not held that no dividend or interest would be credited to, the parties subscribing to the share capital and with regard to the non-availability of the parties at the given addresses, the assessing officer was required to find out from the assessee and bankers of these parties about their current addresses and since cash had been deposited in the accounts of these parties, the additions should have been made in the hands of the subscribers and-not the assessee company.

21. The Commissioner (Appeals) has further held that the appellant has furnished voluminous evidences to justify the identity and creditworthiness of the parties and genuineness of the transactions and that no verification was carried out by the assessing officer to controvert the evidences filed by the assessee from the income tax record of the concerned parties. Accordingly, the Commissioner (Appeals) has held that the officer was not justified in making all

addition of Rs. 3,43,00,000 u/s 68 of the Act and the same was thus deleted.

22. The matter was carried forward by the Revenue by way of an appeal to the Tribunal. Vide the impugned order, the Tribunal upheld the order passed by the Commissioner (Appeals).

23. We have heard the learned counsel for the parties and also perused the records produced by the Revenue. We are of the considered, opinion that the orders of the Commissioner (Appeals) and the Tribunal in deleting, the addition made by the assessing officer of Rs. 3,43,00,000 u/s 68 of the Act are clearly unsustainable.

24. Recently in the case of Commissioner of Income Tax Delhi-V Vs. M/s. N.R. Portfolio Pvt. Ltd., we have held as under:

"14. When an assessee does not produce evidence or tries to avoid appearance before the assessing officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the assessing officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the assessing officer with the desire to prevent inquiry or investigation, an adverse view should be taken. We shall now come to the merits and the findings recorded by the Commissioner (Appeals), which as noted above, have been simply affirmed by the Tribunal without verifying or referring to the facts.

17. The Commissioner (Appeals) thereafter proceeded on the basis that even if the subscribers to the share capital were not genuine, the amount received cannot be regarded as undisclosed income of the respondent-assessee. Reference was made to the decision of the Delhi High Court in Lovely Exports (P) Ltd./Divine Leasing & Finance Ltd. (supra). Reference was made to some decision of the Tribunal. It would be here relevant to highlight and note what was recorded by the assessing officer in the assessment order. The assessing officer has mentioned that the subscribers belonged to Mahesh Garg group of entry operators, which included 51 companies/persons, who were operating more than 100 bank accounts in different banks/branches. Their modus operandi was to provide accommodation entries to different persons/beneficiaries. Reference was made to the bank statements of the entry operators that showed substantial deposit of cash in the bank accounts and subsequent issue of cheques to the beneficiaries. This was the only activity of these companies/persons. The said companies/persons were not carrying on any other business activity i.e., manufacturing or trading activity. The assessment order has quoted and referred to the bank account statements in support of the said assertion and finding. The assessing officer has mentioned that the respondent-assessee was a private limited company, closely held and there should be proximate relationship between the promoter directors and the shareholders. Closely held companies usually receive share capital subscriptions from friends, relatives and not from unrelated/unknown third parties/general public. There was no relationship or

connection between the subscribers and the respondent-assessee, for subscribers to become investors. Assessment order records that to establish identity and availability of funds, it was necessary to have at least some idea if not complete details of the actual business undertaken and engaged in by the respondent-assessee and explained how and why these unrelated and unconnected third parties decided to become investors in the absence of public issue or advertisement.

18. In the remand report, the assessing officer referred to the provisions of section 68 of the Act and their applicability. The word identity as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal position as identity, creditworthiness and genuineness have to be established. PANs are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share dividend or interest to the said entry operators/subscribers. The profit motive was normal in case of investment entirely was absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return of income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

23. The contention that the Revenue must have evidence to show circulation of money from the assessee to the third party is fallacious and has been repeatedly rejected, even when section 68 of the Act was not in the statute. In *A. Govindarajulu Mudaliar Vs. Commissioner of Income Tax, Hyderabad*, , Supreme Court observed that it was not the duty of the Revenue to adduce evidence to show from what source, income was derived and why it should be treated as

concealed income. The assessee must prove satisfactorily the source and nature of cash received during the accounting year. Similarly observations were made in (1964) 53 ITR 623 (SC) , inter alia holding that it was not necessary for the Revenue to locate the exact source. This principle was reiterated in Commissioner of Income Tax, Uttar Pradesh Vs. Devi Prasad Vishwanath Prasad, , wherein the contention that the assessing officer should indicate the source of income before it was taxable, was described as an incorrect legal position. Thus when there is an unexplained cash credit, it is open to the assessing officer to hold that it was income of the assessee and no further burden lies on him to show the source. In Yadu Hari Dalmia Vs. Commissioner of Income Tax, Delhi (Central), , a Division Bench of Delhi High Court has observed:

It is well known that the whole catena of sections starting from section 68 have been introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even though there were judicial decisions covering some of the aspects. For example, even long prior to the introduction of section 68 in the statute book, Courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the ITO, not satisfactory, the sums so credited could be charged to income tax as income of the assessee of a relevant previous year. Sec. 68 was inserted in the Income Tax Act, 1961, only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions.

24. We are conscious of the doctrine of source of source or origin of origin and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of source of source or origin of origin cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arms length transaction, resort or reliance to the said doctrine may be counter productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill-gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus no assessee should be harassed and harried but any dishonest facade and smokescreens which masquerade as pretence should be exposed and not

accepted.

25. In *Lovely Exports (supra)*, a Division Bench examined two earlier decisions of this Court in *Commissioner of Income Tax Vs. Stellar Investment Ltd.*, and *Commissioner of Income Tax Vs. Sophia Finance Ltd.*, . The decision in *Stellar Investments case (supra)* was affirmed by the Supreme Court but by observing that the conclusion was on the facts and no interference was called for. *Lovely Exports (supra)* was a case of public limited company where shares were subscribed by public and it was accordingly observed:

This reasoning must apply a fortiori to large scale subscriptions to the shares of a public company where the latter may have no material other than the application forms and bank transaction details to give some indication of the identity of these subscribers. It may not apply in circumstances where the shares are allotted directly by the company/assessee or to creditors of the assessee. This is why this Court has adopted a very strict approach to the burden being laid almost entirely on an assessee which receives a gift.

26. Thereafter reference was made to Full Bench decision in the case of *Sophia Finance Ltd.*'s case (*supra*) wherein it has been observed that if the shareholders exist then, possibly, no further enquiry need to be made and that the Full Bench had not reflected upon the question of whether the burden of proof rested entirely on the assessee and at which point this burden justifiably shifted to the assessing officer. The Full Bench has observed that they were not deciding as to on whom and to what extent was the onus to show that the amount Credited in the books of accounts was share capital and when the onus was discharged, was not decided. The standard of proof might be rigorous and stringent and was dependent upon nature of the transaction and where there was evidence that the source of investment cannot be manipulated, it was material. Similarly, it was observed that assessee could scarcely be heard to say that he did not know the particulars of a donor in Case of a gift. It was held:

There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenues insistence that it should prove the negative. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the assessing officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of section 68 and 69 of the Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the assessing officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound, to carry out

thorough investigations. But if the assessing officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company.....

..... Once material to prove these ingredients are produced it is for the assessing officer to find out as to whether, on these materials, the assessee has succeeded in establishing the ingredients mentioned above. The assessing officer lift the veil and enquire into the real nature of the transaction. Commissioner of Income Tax Vs. Ruby Traders and Exporters Ltd., , Commissioner of Income Tax Vs. Nivedan Vanijya Niyojan Ltd., and Commissioner of Income Tax Vs. Kundan Investment Ltd., are the other three.

In this analysis, a distillation of the precedents yields the following propositions of law in the context of section 68 of the Income Tax 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, share 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 assessing officer take such repudiation at face value and construe it, without more, against the assessee; and (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.

27. The decision in the case of *Lovely Exports* (supra) was considered in *CIT v. Nova Promoters & Finlease (P) Ltd.* (supra) and it was elucidated:

38. 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 shareholders 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 u/s 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 assessee bring into their books of

account their unaccounted monies through the medium of 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 premeditated 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 u/s 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.

28. In *Nova Promoters & Finlease* (supra), it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN, acknowledgement of IT returns of the entry provider, bank account statements etc. were not sufficient to discharge the onus.

29. In *CIT Vs. Nipun Builders and Developers Pvt. Ltd.*, , this principle has been reiterated holding that the assessee and the assessing officer have to adopt a reasonable approach and when the initial onus on the assessee would stand discharged depends upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call monies, dividends, warrants etc. have to be sent and the relationship is/was a continuing one. In such cases, therefore, the assessee cannot simply furnish details and remain quiet even when summons issued to shareholders u/s 131 return unserved and uncomplied. This approach would be unreasonable as a general proposition as the assessee cannot plead that they had received money, but could do nothing more and it was for the assessing officer to enforce shareholders attendance. Some cases might require or justify visit by the Inspector to ascertain whether the shareholders/subscribers were functioning or available at the addresses, but it would be incorrect to state that the assessing officer should get the addresses from RoC website or search for the addresses of shareholders and communicate with them. Similarly, creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank account. Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after due diligence or for personal reasons.

Thus finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders.

30. What we perceive and regard as correct position of law is that the Court or Tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PANs or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, control and manage them."

25. We have in the N.R. Portfolio case (supra) held that when an assessee does not produce evidence or tries to avoid appearance before the assessing officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the assessing officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the assessing officer with the desire to prevent inquiry or investigation, an adverse inference should be drawn. The said case, i.e., N.R. Portfolio (P) Ltd. (supra), was also one of the cases where accommodation entries were being provided by Mahesh Garg group of entry providers as in the present case. It has been noticed in that case that the modus operandi used by the entry providers for providing accommodation entry to different persons/beneficiaries was very similar to the one in the present case. It has been further noticed that the bank statements of the entry operators showed substantial deposit of cash in the bank accounts and subsequent issuance of cheques to the beneficiaries. The entry providers were not carrying on any business activity but the only activity was for providing entries. It has been held that a private limited company is a closely held company having proximate relationship between promoters and shareholders and usually in closely held companies, share capital subscription is from friends, relatives and not from unrelated/unknown third parties/general public.

26. We have further in N.R. Portfolio (P) Ltd. (supra) held that mere production of PAN or assessment particulars does not establish the identity of a person. The identification of a person includes the place of work, the staff and the fact that it was actually carrying on business and further recognition of the said company/individual in the eyes of public. We have further noticed that PANs are allotted on the basis of applications without actual de facto verification of the identity or ascertainment of the active nature of business activity. PAN is allotted as a facility to Revenue to keep track of transactions. The PAN cannot be blindly and

without consideration of surrounding circumstances treated as sufficiently disclosing the identity of the individual.

27. Referring to the various judgments of the Supreme Court [A. Govindarajulu Mudaliar Vs. Commissioner of Income Tax, Hyderabad, , (1964) 53 ITR 623 (SC) and Commissioner of Income Tax, Uttar Pradesh Vs. Devi Prasad Vishwanath Prasad, we have in N.R. Portfolio (P) Ltd. (supra) rejected the contention that the Revenue must have evidence to show a circulation of money from the assessee to third parties. Following Commissioner of Income Tax Vs. Nova Promoters and Finlease (P) Ltd., we have held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN, acknowledgement of IT returns of the entry providers, bank account statement is not sufficient to discharge the onus on the assessee.

28. In the case of private limited companies, generally persons known to the directors or shareholders directly or indirectly buy or subscribe to shares. The share subscribers post investment do not lose touch or become incommunicado. In the case of private limited companies where normally there is close proximity between the company, i.e., the directors and shareholders and the investors. The assessee cannot simply furnish details and remain quiet even when summons issued to the shareholders u/s 131 are returned unserved and uncomplied. In N.R. Portfolio (P) Ltd. (supra) we have held that the assessee cannot plead as a general proposition that they had received summons and it was for the assessing officer to enforce the contents on the shareholders.

29. We have further held that the Court or Tribunal should be convinced about the identity, creditworthiness and genuineness of the transactions. The onus to prove the three factum is on the assessee as the facts are within the personal knowledge of the assessee. Mere production of incorporation details, PANs or IT returns may not be sufficient when surrounding and attending facts predicate a cover up. The production of incorporation details, PANs or income tax details may indicate towards completion of paper work or documentation but genuineness, creditworthiness and identity of investment and the investors are deeper and obtrusive than mere completion of paper work or documentation.

30. The affidavits filed by the assessee have been produced before us and we have perused the same. Out of the 18 affidavits filed, 9 affidavits give the number of shares which have been allotted by the assessee. The said 9 affidavits show that the face value of the share is Rs. 100 and the premium at which the shares are purchased was Rs. 100 in the month of May, 2001 and Rs. 200 for the shares purchased in the month of November, 2001. These 9 affidavits are all in seriatim and prepared on the same date i.e. 15-6-2009 and all pertain to transactions of the year May and November, 2001: The language of all these 9 affidavits is standard and one such affidavit is as under:

"I Ajay Bansal S/o. V.P. Bansal R/o. 9/1970, Gali No. 4, Kailash Nagar, Delhi 110031 do hereby solemnly affirm and declare as under:

1. That I am holder of PAN ADIPB6339G

2. That I have been issued 4,500 equity shares of Rs. 100 each by M/s. MAF Academy (P) Ltd. as detailed below:

3. That I have made the payment of issue price by P/o. No. 002777 dt. 23-4-2001 of Innovative Co-op. Urban Bank Ltd., Ashok Vihar, New Delhi Branch and ch. No. 496264, dt. 1-1-2001 of Oriental Bank of Commerce, Minto Road, New Delhi Branch for Rs. 5,00,000 and Rs. 6,00,000 respectively.

4. That this is a genuine transaction and I have not received anything against this issue of shares from MAF Academy (P) Ltd. or from any other person.

Deponent.

Verified on the 15-6-2009, that the contents of my above affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed.

Deponent.

31. The other 9 affidavits do not give the break-up of the number of shares, face value or premium. 7 out of the 9 affidavits in the second set are all attested on 26th Nov., 2001 and one is attested on 23rd May, 2001. All the nine affidavits are in the same language and are as under:

I, Manish Kumar Aggarwal S/o. Shri D.P. Aggarwal, hereby solemnly affirm and declare as under:

1. That I am resident of 13/A, Sector-11, Rohini, Delhi-110085.

2. That I have invested Rs. 9,00,000 (Rs. nine lacs only) vide cheque No.. 011269 dt. 13-9-2001 drawn on State Bank of Patiala, Darya Ganj, New Delhi in the equity share capital of M/s. MAF Academy (P) Ltd., D-11, Abbul Fazal Enclave, New Delhi-110025.

3. That I am regularly assessed to income tax vide GIR/PAN No. AGKPK24261.

Deponent

Verification

Verified at New Delhi that the contents of the abovesaid affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Deponent.

32. The reason why we have referred to the date of attestation of the year 2001 is that we find it strange that the assessee in the year 2001 felt the need of obtaining affidavits from the persons investing in the shares of the company to certify the genuineness of the transaction as far back in the year 2001 when there was no suspicion or inquiry/investigation in contemplation even in the

Department. We find it strange that an assessee along with share application money would obtain affidavits from the investors to confirm genuineness of the transaction. In a normal business transaction, no such certificate/affidavit would be obtained by any company from persons investing in its share capital. The fact that the assessee felt the necessity of obtaining such affidavits raises a suspicion on the genuineness of the very transaction.

33. The assessee company is a private limited company and had not come out with any public issue nor made any advertisement for issuance of share capital. However, in one year there is infusion of share capital including premium of Rs. 4,35,00,000, out of which only Rs. 92,00,000 was infused from the directors/family members of the directors. The remaining share capital had been infused from parties which were completely unrelated either to the assessee or to any of its directors. In a private limited company, normally the investment of shares is from parties or persons who are friends or relatives of promoters/directors.

34. It is noticed that the shares had face value of Rs. 100 and were allotted at a premium of Rs. 100 to Rs. 200 and were then subsequently purchased by the promoters/directors, who had originally transferred these shares at Rs. 35 per share.

35. It is really surprising that a person who had purchased shares at a premium of Rs. 100 to Rs. 200 per share i.e. at a price of Rs. 200 to Rs. 300 per share, sold the shares at Rs. 35 per share i.e. at a substantial loss. Another surprising factor is that the entire investment happened during a short span of time and retransfer of the shares to the four promoters/directors of the company at Rs. 35 per share by different parties also happened during a short span of few days. The modus operandi and the manner in which cash is deposited in a bank and then utilized by way of an account payee cheque for purchase of shares for a premium of Rs. 100 to Rs. 200 per share and then the sale of shares at a loss clearly establishes that the said transaction was a camouflage transaction. The assessee has clearly attempted to camouflage the accommodation entries and tried to give it a colour of purchase of share capital and then sale of the same at a loss. Thus the assessee's capital increased or was enhanced by a substantial figure through these dubious transactions. This should be and has to be checked.

36. Out of Rs. 4.35 crores received as share capital including premium, only Rs. 92 lacs has been received from the directors or their family members and the remaining amount has been received from parties totally unrelated to the assessee. Notices to some of the investors could not be served and even the Inspector who was deputed to serve the summons stated that none of the addresses could be found. The Authorised Representative of the assessee refused to produce the parties who had invested in the share capital on the ground that they were not in a position to produce them. The fact that the assessee failed to produce the persons who had invested towards share capital shows that these were people who were completely unrelated to the assessee and as such, all the entries were merely accommodation entries. Otherwise, in a private limited

company, it would not have been difficult on the part of the assessee to produce persons who were investing substantial amount of money in the company towards share capital.

37. The assessing officer in his order has as a sample referred to the entries in the account of some of the shareholders noticing that there are cash deposits of the exact amount for which cheque is subsequently issued to the assessee. Perusal of the bank statements clearly establishes that these parties were depositing cash and immediately either on the same day or in the near future withdrawing the same through a cheque which was issued in favour of the assessee.

38. Reliance is placed by the counsel for the respondent on the judgments in the cases of Commissioner Income Tax-V Vs. Nipuan Auto Pvt. Ltd., , CIT Vs. Gangeshwari Metal Pvt. Ltd., , CIT v. Fair Finvest Ltd. (IT Appeal No, 232 of 2012, dt. 22nd Nov., 2012), Commissioner of Income Tax and Others Vs. Oasis Hospitalities (Pvt.) Ltd. and Others, , Commissioner of Income Tax Vs. Dwarkadish Investment (P) Ltd., , Commissioner of Income Tax -II, Central Revenue Building, New Delhi Vs. Kamdhenu Steel and Alloys Ltd., , CIT v. Gourdin Herbals India Ltd. (IT Appeal No. 665 of 2009, dt. 17-9-2009), CIT v. Victor Electrodes Ltd. (2010) 329 ITR 271 (Del) , Commissioner of Income Tax Vs. Value Capital Services (P.) Ltd., , Madhuri Investment (P) Ltd. v. Asstt. CIT & Ors. (IT Appeal No. 110 of 2004, dt. 18-1-2006), CIT v. Goel Sons Golden Estate (P) Ltd. (IT Appeal No. 212 of 2012, dt. 11-4-2012), CIT v. Expo Globe India Ltd. (IT Appeal No. 1257 of 2011, dt. 20-7-2012) and Commissioner of Income Tax Vs. Pradeep Kumar Gupta, .

39. None of the judgments, referred to by the learned counsel for the respondent, advance the case of the respondent in as much as the judgments are based on the factual matrix of the respective cases.

40. In Nipuan Auto (P) Ltd. (supra), the High Court decided in favour of the assessee by holding that the assessee had been able to discharge the initial burden to establish the identity, creditworthiness and genuineness as regards the transaction concerning the allotment of shares.

41. In the case of Gangeshwari Metals (P) Ltd. (supra), the High Court decided on the basis of the fact that the assessing officer sat back with folded hands till the assessee exhausted all the evidence and materials in his possession and then came forward to merely reject the same on the presumptions. The Court was of the view that there was a lack of inquiry on part of the assessing officer once the assessee had furnished all the materials.

42. Similarly, in the case of Fair Finvest Ltd. (supra), the Division Bench of this Court formed the opinion in favour of the assessee by holding that no efforts were made by the assessing officer to enquire into the matter or invoke his powers u/s 131 of summoning the share applicants or directors.

43. In the case of Oasis Hospitalities (P) Ltd. (supra), the assessee had produced the share applicants and the Court was satisfied that the onus had been discharged by the assessee in terms of the identity, creditworthiness and genuineness of the transaction.

44. In the case of Dwarkadhish Investment (P) Ltd. (supra), the Division Bench of this Court has found as a fact that the assessee has proved the identity of the creditors/share applicants and shown the genuineness of the transaction.

45. Similar is the view of the Division Bench of this Court in the case of Kamdhenu Steel & Alloys Ltd. & Ors. (supra) which is based on the factual matrix of the case.

46. The order relied upon in the case of Gourdin Herbals India Ltd. (supra) does not further the case of the respondent since the said assessee was a limited company in contrast to the present case in which the assessee is a private limited company and was based on the facts of the case.

47. In the case of Victor Electrodes Ltd. (supra), once again the said judgment pertains to a limited company and the Division Bench has returned a finding that the assessing officer did not make any verification vis-?-vis the bank statements and the assessing officer had not summoned the share applicants.

48. In the case of Value Capital Services (P) Ltd. (supra), the High Court has noticed that the share applicants had appeared before the assessing officer during the inquiry.

49. In the case of Madhuri Investment (P) Ltd. (supra), some of the applicants had appeared before the assessing officer and confirmed the applications made by them and the assessing officer had come to the conclusion that the transaction was not genuine solely on the ground that the assessee had failed to produce the correct addresses.

50. Decision in Goel Sons Golden Estate (P) Ltd. (supra) is distinguishable as it proceeds on its own facts. No doubt, one S.H. Mallick in his statement had stated that he had provided accommodation entries, but the assessee during the course of assessment proceedings had filed several details and evidence including affidavits, confirmation letters from the companies, bank statements, balance sheets etc. It was observed that the assessing officer had failed to conduct necessary enquiry, verification and deal with the matter in depth especially after affidavits, confirmation letters and bank statements were filed. It was further observed that if the assessing officer had conducted the said enquiry and investigation, probably the challenge made by the Revenue would be justified. In the absence of the said verification and enquiry, the factual findings recorded by the assessing officer were incomplete and sparse. In these circumstances, High Court of Delhi refused to interfere on the ground that the order of the Tribunal was perverse.

51. In the case of Expo Globe India Ltd. (supra), the Court has noticed that

though the assessing officer had initially concluded on the basis of material made available, at that stage, the service of entry providers had been utilized to bring in capital, however, after remand, the Commissioner (Appeals) elaborately took into account considerable material furnished by the assessee which included amongst other IT return and the balance sheet which showed the source of the share application money having been satisfactorily explained.

52. The case of Pradeep Kumar Gupta (supra), is not a case of share application money and was dealing with the issue of addition being made solely on the basis of the statement of an individual, who was not produced for cross-examination and furthermore, the same was also rejected on the ground of low tax effect.

53. In contrast to the above judgments, in the present case, the assessee is a private limited company and in the factual matrix, we have held that the assessee has not been able to discharge the initial onus and has not been able to establish the identity, creditworthiness of the share applicants and the genuineness of the transaction. Though, in our considered opinion, none of the above judgments, referred to by the assessee respondent, are applicable in the facts of the present case and in view of the findings recorded by us hereinabove.

54. In view of the above, we are of the view that the assessee has not discharged the onus satisfactorily and the additions made by the assessing officer were justified and sustainable.

55. The substantial question of law is thus answered in favour of the appellant and against the respondent-assessee. The appeal is accordingly allowed with costs that are assessed at Rs. 20,000.