

(2012) 12 DEL CK 0175
In the Delhi High Court
Case No : ITA 262 of 2012

CIT

APPELLANT

Vs

Ultra Modern Exports Pvt. Ltd.

RESPONDENT

Date of Decision : 11-12-2012

Acts Referred:

Income Tax Act, 1961 — Section 133(6), 271(1)(c), 68

Citation : (2012) 12 DEL CK 0175

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : Suruchi Aggarwal, for the Appellant; Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. The Revenue is in appeal, aggrieved by the order of the ITAT dated 14.06.2011 in ITA-87/del/2011. The question of law urged is:-

Whether on the facts and circumstances of the case, the ITAT could have deleted the entire addition of Rs. 4,34,00,000/-, citing the reason that

the AO has not doubted the identity of the share applicants and by placing reliance on the decision of the Apex Court in the case of M/s. Lovely

Exports Pvt. Ltd. besides other cases like Dhirajlal Girdhari Lal v. CIT, 261 TR 736?

The facts necessary for deciding this case are that for AY 2007-08, the AO held that the assessee had received Rs. 4,34,00,000/- as unexplained

credit in the form of share application money from 9 applicants. After considering the materials on record, including the documentary evidence

furnished by the assessee such as PAN numbers, detailed particulars of the

addresses, audited accounts and bank statements of the share

applicants etc. and lastly the return of allotment filed by the assessee with the ROC, the AO was of the opinion that the burden which was primarily

upon the assessee had not been discharged in explaining adequately the source of the said amount. The same was accordingly added back.

2. The assessee feeling aggrieved appealed to the CIT (A) which after considering the records and submissions and taking note of the applicable

precedents, particularly, Commissioner of Income Tax Vs. Dwarkadhish Investment (P) Ltd., , proceeded to hold as follows:-

4. I have verified the copies filed as on 15.10.2010 which include certificate with regard to share application, bank statement showing the name of

the assessee company, copy of income tax returns, copy of the audited balance sheet and copy of additional information as required under

Companies Act in all the five cases. In this regard Id. AR has relied on various judgments of the Hon"ble S.C. as under:-

a) Commissioner of Income Tax Vs. GP International Ltd.,

b) Commissioner of Income Tax Vs. Orbital Communication (P) Ltd.,

c) Commissioner of Income Tax Vs. Dwarkadhish Investment (P) Ltd.,

d) Commissioner of Income Tax Vs. Lovely Exports (P) Ltd., .

Assessee"s reliance on the above mentioned case laws is appreciated. In the latest judgment in the case of Commissioner of Income Tax Vs.

Dwarkadhish Investment (P) Ltd., , the Hon"ble Delhi High Court has held as under:-

Though in s. 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors by either furnishing their

Pan or income tax assessment number and shows the genuineness of transaction by showing money in 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 s. 68- Revenue 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"-In the instant case, the tribunal has confirmed the order of

the CIT (A) deleting the impugned addition holding that the assessee has been able to prove the identity of the share applicants and the share

application money has been received by way of account payee cheques-No question of law arise.

The ratio of the case law in the case of CIT Vs. Dwarkadhish Investment (P) Ltd. clearly hits the instant case as the AO has formed his opinion of

addition on the basis of the fact that some letters issued u/s. 133 (6) of the IT Act were returned back. However, assessee has fully satisfied the identity, capacity and creditworthiness of the share applicant.

4.1 The AO has not doubted the identity of the share applicants which is stated to be the main parameter to be discharged by the assessee in respect of share application money/share capital received as held recently by the judicial for all over the country.

4.2 It is settled principle of law that no addition/disallowance can be made on suspicion, surmises and conjectures as held by the Hon"ble Supreme

Court in the following cases:-

- a) Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay,
- b) Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras,
- c) 2013 (26) ITR (Trib) 775
- d) Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa,

4.3 In the case of (2009) 30 SOT 44 , the Hon"ble ITAT observed as under:-

Suspicion cannot replace evidential document. Simple argument or allegation of manipulation is not sufficient without proper evidence.

4.4 In view of the above discussion, I am of the considered view that addition amounting to Rs. 4,34,00,000/- is misconceived, hence deleted and the appeal of the appellant is allowed.

3. The Revenue"s appeal was rejected by the ITAT which held as follows:-

6. We have heard the rival contentions in the light of the material produced and precedent relied upon. We find that in this case the assessee has furnished the basic information in this regard. These were certificate with regard to share application, bank statement showing the name of the assessee company, copy of income tax returns, copy of the audited balance sheet and copy of addition information as required under the

Companies Act in all the five cases. Thus, the identity of these share applicants is duly established. The Assessing Officer has also not disputed the

identity of share applicants. In these circumstances, Hon"ble Apex Court decision in the case of Commissioner of Income Tax Vs. Lovely Exports

(P) Ltd., is relevant. 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.

7. In the background of the aforesaid discussion and precedent, in our considered opinion, there is no illegality or infirmity in the order of the Ld.

Commissioner of Income Tax (Appeals), hence, we uphold the same.

4. Learned counsel for the Revenue submits that the assessee had sought for share application amounts in the very first year of its functioning and

claimed premium ranging between Rs. 90-190 per share. Nine share applicants had invested huge amounts. Upon enquiry, 5 out of 9 notices

issued to the applicants u/s 133 (6) were returned unserved. Furthermore, the materials on record in the form of the returns of income of the share

applicants furnished by the assessee disclosed that the applicants had very meager income; in these circumstances, the AO was justified in

deducing that Rs. 4.34 Crores was unexplained cash credit liable to be treated as such and added back u/s 68.

5. Counsel for the assessee argued that this Court should sustain the concurrent orders of the CIT (Appeals) and the Tribunal. It was submitted

that the decision of the Supreme Court in Commissioner of Income Tax Vs. Lovely Exports (P) Ltd., only requires that the assessee should, in

order to discharge the onus which falls upon it in the first instance whenever Section-68 is sought to be invoked, furnish such materials as are

necessary and in its possession. This would be in the form of proof of identity of the share applicants, its PAN, addresses, materials evidencing its

existence such as relevant extracts of the ROC register or returns etc. Once this burden is discharged, the onus shifts back to the AO who has to

then in order to dislodge the burden make further enquiries and satisfy himself that indeed the amount is to be added back u/s 68.

6. Learned counsel for the assessee submitted that by furnishing addresses and other particulars such as PAN and ROC certificate/documents, the

assessee had in fact discharged its burden. The fact that some of the notices were returned back unserved could not adversely affect its position. In

this regard, learned counsel relied upon the decision reported as Commissioner of Income Tax Vs. Divine Leasing and Finance Ltd., and CIT Vs.

Dwarkadhish Investment (P) Ltd.(supra). Learned counsel also relied upon the judgment of the Division Bench of this Court in Gupta Citi Shelters

Ltd. v. CIT, especially the following extracts :-

The entire case of the Revenue based on the plea that as per the report, the investing companies were not found at the given addresses and on this

basis, argument is raised that the companies are non-existing and the transactions were bogus and not genuine. Here, the case of the Revenue is

even weaker than the cases discussed above. It is not even the case that the Directorate of Income Tax (Investigation) has found Mr. Mahesh

Garg in such racket of floating bogus companies. We state at the cost of repetition that after the assessee had furnished the evidence, initial onus

had been discharged and it was for the AO to make further necessary inquiries which are completely missing.

7. The AO in this case while proceeding to add back the sum of Rs. 4.34 Crores reasoned as follows:-

3.3 Therefore, to verify the source of fund so invested by other entities in the assessee company, Notice u/s 133 (6) sent to above entities for

calling the information and their existences. But the Notices were received back unserved from the addresses provided by the AR. Accordingly,

vide order sheet entry dated 17/12/2009 the AR was asked that ""You have given the details of investors during the assessment proceedings but

Notices u/s 133 (6) sent to these entities for calling the information, received back unserved from the most of the addresses provided by you.

Please explain and produce the Directors of these entities. In reply to the above query, AR filed letter dated 21/12/09 and replied that all the

subscribers are private limited companies duly incorporated under the provisions of Companies Act, 1956, having a distinct, separate and legal

identity whereby the existence of identity of the person is comprehensively and conclusively proved. The confirmation would provide adequate and

sufficient proof/evidence in respect of identity, creditworthiness and genuineness of all persons from whom Share Application Money had been

received.

Notices u/s 133 (6) were sent to investors out of which Notices sent to below mentioned entities are received back as unserved.

3.4 Therefore, the AR was specifically asked to produce the Directors of above mentioned investors but the same were not produced. It has been

noticed from the details filed by the AR that the investors are declaring very small income in their Return of Income and further noticed that before

issue of cheque to M/s Ultra Modern Exports Pvt. Ltd. Huge amounts are being transferred in its accounts. Therefore it could not be said that

creditworthiness of these investors were proved. Keeping in view the above facts and discussions, I have no option but to treat the Share Capital

amount of Rs. 4,34,00,000/- as unexplained cash credits and added back to the income of the assessee company. Since the assessee has

furnished inaccurate particulars of income, penalty proceedings u/s 271 (1) (c) is being initiated separately.

8. As noticed previously, the CIT (A) was of the opinion that the assessee had discharged the basic onus which was cast upon it after considering

the ruling in Lovely Exports matter (supra). The material and the records in this case show that notice issued to the 5 of the share applicants were

returned unserved. The particulars of returns made available by the assessee and taken into consideration in paragraph 3.4 by the AO in this case

would show that the said parties/applicants had disclosed very meager income. The AO also noticed that before issuing cheques to the assessee,

huge amounts were transferred in the accounts of said share applicants. This discussion itself would reveal that even though the share applicants

could not be accessed through notices, the assessee was in a position to obtain documents from them. While there can be no doubt that in Lovely

Exports (supra), the Court indicated the rule of ""shifting onus"" i.e. the responsibility of the Revenue to prove that Section 68 could be invoked once

the basic burden stood discharged by furnishing relevant and material particulars, at the same time, that judgment cannot be said to limit the

inferences that can be logically and legitimately drawn by the Revenue in the natural course of assessment proceedings. The information that

assessee furnishes would have to be credible and at the same time verifiable. In this case, 5 share applicants could not be served as the notices

were returned unserved. In the backdrop of this circumstance, the assessee's ability to secure documents such as income tax returns of the share applicants as well as bank account particulars would itself give rise to a circumstance which the AO in this case proceeded to draw inferences from. Having regard to the totality of the facts, i.e., that the assessee commenced its business and immediately sought to infuse share capital at a premium ranging between Rs. 90-190 per share and was able to garner a colossal amount of Rs. 4.34 Crores, this Court is of the opinion that the CIT (Appeals) and the ITAT fell into error in holding that AO could not have added back the said amount u/s 68. The question of law consequently is answered in favour of the Revenue and against the assessee. The Appeal is accordingly allowed.