

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'B' NEW DELHI**

**BEFORE : SHRI H.S. SIDHU, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 508/Del./2012
Asstt. Years : 2006-07**

A.C.I.T., Central Circle-22,
New Delhi.

(Appellant)

vs. Express Earth Movers & Equipments Pvt. Ltd.
2A, Avenue Cassia, Westend Greens, Rajokari,
New Delhi [PAN: AAACE 9926 C]

(Respondent)

Appellant by	:	Md. Mohsin Alam, CITIDR
Respondent by	:	Sh. Salil Kapoor, Advocate
Date of hearing	:	09.09.2015
Date of pronouncement	:	30.09.2015

ORDER

Per L.P. Sahu, Accountant Member:

This appeal is filed by the Revenue against the order dated 16.11.2011 passed by CIT(A)-III, Delhi for the assessment year 2006-07 on the following effective ground:

"1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs. 50,00,000/- made by the AO u/s. 68 of the Income tax Act, 1961 on account of bogus share application money/share premium received by the assessee company.

2. In this appeal, the only issue pertains to deletion of addition of Rs.50,00,000/- made by the Assessing Officer u/s. 68 on account of bogus share application money received by the assessee. In the assessment proceedings, the AO

on perusal of balance sheet found that the assessee company has received share application money to the tune of Rs.50,00,000/- from certain companies on premium of Rs.90/- each for per share of Rs.10/-, the details of which are given para 5 of the assessment order. The Assessing Officer after considering the reply of show cause notice, enquiry report received by the Department from Addl. DIT(Inv.) Kolkata regarding existence /genuineness of share applicants, i.e., Kolkata based companies, bank statements of share applicants, assessee's failure to produce the share applicants-companies and various case laws, concluded that the alleged share applicant companies are non-existent entities and assessee failed to establish the identity, creditworthiness and genuineness of the transactions and it is a case of routing the unaccounted money through entry operators under the garb of share application money which cannot be held to be genuine share application money. He also observed that investments were arranged through Kolkata based non-existing paper companies. The assessing officer, therefore, made an addition of Rs.50,00,000/- to the total income of assessee u/s. 68 of the IT Act. The addition was challenged before the learned CIT(A) who deleted the same observing as under:

"On a careful consideration of the assessment order and the appellant's submission filed on various dates the undisputed fact on record is that during the course of search no incriminating document was found with reference to the fact that the amount invested by shareholders in the appellant company does not belong to the respective shareholders but is the unaccounted income of the appellant company which has been pouged back in the appellant company in the form of the share capital.

That the post search enquiries made by investigation wing of Kolkata

was not confronted to the assessee during the assessment proceedings.

The other argument of the assessee is that while the AO has mentioned about certain facts and proceedings conducted by the Investigation Wing of the Income Tax Department after the search as per the AO shows that the investor companies are non-genuine entities but the case of the appeal is that the result of these proceedings were never specifically confronted to the assessee company during the assessment proceedings.

The appellant has further stated in its submissions that the action of the AO to treat these share holder companies as non-existent is arbitrary and is based on surmises and conjectures and is contradictory to the facts on record as evident from the master data of these shareholder companies drawn from the website of Department of Corporate Affairs, which clearly shows that all these companies are active and have filed their Balance sheets up to 31.03.10. That all these shareholder companies are having Income Tax Pan Number. It is further observed from the assessment order that the appellant company had filed confirmation, copy of ITR, share application form and copy of bank statements of the share applicant companies. The appellant in its written submission has quoted and relied on the legal proposition enunciated by Hon 'ble Delhi High Court in case of Oasis Hospitalities Limited (supra) and Winstral Petrochemical Pvt. Ltd. (supra) and other earlier decisions of the Hon 'ble Courts on the issue.

It is seen from the submissions and paper book filed by the appellant that in order to substantiate the claim that the share applicants are existing and the the transactions are genuine, the appellant had filed the following documents before the A O:

- a. Copy of share application forms,*
- b. Confirmation of share capital contribution from the investor company, giving details of the cheque Nos. and bank accounts through which the share application has been made,*
- c. PAN details of the investor company,*
- d. Copy of IT returns, copy of the investor company*
- e. Copy of bank statement of the investor company*
- f. Copy of Form No. 2 together with list of shareholders, to whom the impugned shares totaling 50,000 were allotted.*
- g. Copy of annual return to ROC for F.Y. 2005-06 filed on 25.01.07 evidencing the fact of the names of shareholders appearing in the members register of the appellant company.*

- h. *Present active status of the investor company as downloaded the website of Ministry of Corporate Affairs*
- i. *Copy of share certificates issued to the share applicant companies, bearing their folio no. & distinctive numbers.*

Thus from the above details and placing reliance on the latest decisions of jurisdictional High court in the cases of Dwarkadhish Investment P. Ltd. 2010 Indlaw Del 1969, CIT vs. Gangour Investment Ltd. 18 DTR 242 & CIT vs. Oasis Hospitality Private Limited in ITA No. 2093 of 2010 (supra) and Winstral Petrochemical Pvt. Ltd. (supra) in which various earlier decisions of High court and that of the S. C. has been considered, it is observed that the appellant has discharged the initial burden placed on it to prove the identity and existence of the share applicant investor company. The fact that the share application money from the applicant have been received through banking channel further goes to substantiate the identity of the share applicant and genuineness of the transaction in case of the investor. So far as the issue of creditworthiness of the share subscriber company is concerned, the Hon 'ble S. C. in case of Lovely Exports P. Ltd. 216 CTR 195 has held that if the share application money is received by the assessee company from alleged bogus share holders whose names are given to the A 0 then the department is free to proceed in their individual assessment, but it cannot be regarded as undisclosed income of the assessee company. On this issue another decision of Delhi High Court in case of CIT vs. Value Capital Services (307 ITR 334) is also quite relevant wherein the court inter alia observed that there is additional burden on the revenue in as much as even if the applicant does not have the means for the investment, it must show that the investment made by the applicant actually emanated from the confers of the assessee, so as to enable it to be treated as undisclosed income of the assessee. Further the following observation of the jurisdictional H. C in case of CIT vs. Divine Leasing and Finance Ltd (207 CTR 38), which has been quoted with approval in the case of Dwarkadhish Investment (supra) are also quite relevant viz.

"In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber. (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, 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 on adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; (7) the AO is duty bound to investigate the creditworthiness of the creditor/subscriber, the genuineness of the transaction and the veracity of the repudiation. "

Thus, from the details filed by the assessee and referred to above it cannot be said that the identity of the subscriber is not established. The AO has observed that the Director of the share applicant companies have not been produced in person in spite of repeated requests. That thus the assessee has not fully discharged its's onus to prove the creditworthiness of the company which do not have any source of profit and are not in any actual business.

On this matter, the observation of the jurisdictional High Court in the case of Dwarkadhish Investment (supra) are quite relevant where the court has observed that it is the revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not prove the "source of source". Thus in view of the fact that the assessee had filed on record the several documents to substantiate the fact of investment through share application money by the investor companies, it was now for the AO to have enforced the attendance of the Director's concerned for making further investigation in the case. This could have been done by issuance of summons under the Act. On the issue of the initial burden of proof the observation of the jurisdictional High court in the case of Dwarkadhish Investment (supra) made in para 8 thereto is also relevant which is as under:

"In any matter, the onus of proof is not a static one. Though in section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income tax assessment number and shows the genuineness of transaction by showing money 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 section 68. Moreover law that the assessee need not to prove the "source of source".

In view of the above discussion it is held that the appellant's case is squarely covered by the ratio of various decisions of the High court & Supreme Court discussed above. From the necessary evidences/details provided to the AO during the proceeding it is seen that the initial onus has been duly discharged by the appellant company. As discussed above, the investigation done by the AO is not sufficient/adequate to controvert the appellant's explanation and to hold that the impugned share application money is the undisclosed income of the appellant.

The AO has also raised doubts on the genuineness of the share application money on the premises that it is at abnormally high premium, even where the shares of the applicant company are not listed. On this issue it is observed that such features are trigger for further investigation but the matters ends at this point & the AO is enquired to investigate the issue independently and through corroborative evidences and cannot for this fact of abnormal premium the very basis for making addition u/s. 68

In view of all the above discussion taken in totality and respectfully following the ratio of decision of jurisdictional high court and the Hon'ble Supreme Court in CIT vs. Lovely Export P. Ltd. 216 CTR 195(supra) as also the latest judgment of Dwarkadhish Investments (P) Ltd. 2010-TIOL-617-HS-DEL-IT, CIT vs. Gangour Investment Ltd. 18 DTR 242 (Del) & CIT vs. Oasis Hospitality Private Limited in ITA No. 2093 of 2010, the addition made for Rs.50,00,000/- is directed to be deleted.

3. The learned DR relied upon the order of the Assessing Officer and submitted that the ld. CIT(A) is not justified in deleting the addition made by the AO in the facts and circumstances of the case ignoring the fact that the share applicants were found non-existing. On the other hand, the ld. AR of the assessee relied on the order of the first appellate authority.

4. We have carefully considered the rival submissions and thoroughly gone through the aforesaid order passed by the ld. CIT(A) and we are of the considered

opinion that the first appellate authority has passed well reasoned order by passing a speaking order. He has also considered various judicial pronouncements and the relevant provisions of law. Substantial evidences were found available on record and the same were properly considered by the Id. CIT(A) impugned order. The learned DR could not be able to rebut the findings elaborately recorded by the Id. CIT(A). We are, therefore, of the view that the impugned order of the Id. CIT(A) does not call for any interference. Therefore, the impugned order is liable to be upheld and the appeal of the Revenue deserves to be dismissed.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 30.09.2015.

Sd/-
(H.S. SIDHU)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 30.09.2015

*aks/-

Copy of order forwarded to:

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

By order

*Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*