

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No. 3982/Del/2010
(Assessment Year: 2006-07)

ITO, Ward13(4), Room No.219, C.R. Building, New Delhi (Appellant)	Vs.	OPG Leasing & Finance P. Ltd., 201, Neelkanth House, S-524, Vikash Marg, School Block, Delhi PAN:AAACO0822D (Respondent)
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Appellant by : Sh. V.K. Tulshiyar, CA
Revenue by : Sh.P. Dam Kanujna, Sr. DR

Date of Hearing	27.11.2015
Date of pronouncement	25.01.2016

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the revenue directed against deletion of addition made u/s 68 of the Income Tax Act, 1961 by the Id. CIT (A)-XVIII, New Delhi dated 04.05.2010 for the Assessment Year 2006-07.
2. The revenue has raised the following grounds:-
 - "1. 1. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition of Rs.58,00,000/- made u/s 68 of the Income tax Act, 1961 on account of alleged share application money.
 2. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in ignoring the fact that the judgment of the Hon'ble Supreme Court in the case of Lovely Exports (P) Ltd. 216 CTR 199 (SC) cannot be extended to a situation where a mechanism has been formed to introduce unaccounted money in the books of accounts with the help of accommodation entry providers which has been

exposed by deep and detailed investigation carried out by the Investigation Wing of the Department.

3. That on the facts and circumstances of the case and in law the Ld. CIT(A) failed to appreciate the facts that the assessee company failed to prove physical identity and existence of the share applicant,
4. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that the judgment of the Supreme Court in the case of M/s Lovely Exports (P) Ltd. is not applicable where share application money is not received in a public issue."

3. Though revenue has raised four grounds of appeal however in substance revenue is contesting the deletion of addition u/s 68 made by AO on account of share application money received by the assessee of Rs 58,00,000/- .
4. The brief facts of the case are that the assessee is private ltd company and during the year the assessee has received share application money of Rs.58 lacs from the following companies:

1.	Warsi Overseas (P) Ltd.	5,00,000/-
2.	Muktkeshi Home Products (P) Ltd.	5,00,000/-
3.	RMK Car Helpline (P) Ltd.	5,00,000/-
4.	Milap Automotive (P) Ltd.	5,00,000/-
5.	Peals Infosoft (P) Ltd.	3,00,000/-
6.	G. T. Infotech (P) Ltd.	3,00,000/-
7.	eDynamics Solutions (P) Ltd.	10,00,000/-
8.	Techno Soft Infosystems (P) Ltd.	4,00,000/-
9.	CVH Sea Lifes Ltd.	4,00,000/-
10.	Nipun Infotech (P) Ltd.	4,00,000/-
11.	Garg Finvest (P) Ltd.	5,00,000/-
12.	Sparrow marketing (P) Ltd.	5,00,000/-
	Total Share application money	58,00,000/-

5. Discharge its onus the assessee submitted list of share holders of the company as well as the confirmation of all the share applicants along with their audited financial statements, Their bank Account statement and copy of the income tax return of those parties. Further the assessee also submitted the print out of

the data obtained by them from the web-site of the Registrar of Companies to prove their identity and existence. Therefore the assessee contended that it has established the identity, creditworthiness and genuineness of the share application of Rs 58,00,000/-. Assessee requested AO to issue notice u/s 133(6) of the Income Tax Act for summoning the parties and seeking their presence. During the course of assessment proceedings the AO deputed Inspector who reported that this share applicants of the companies do not exists at the given address. The assessee asked for the copy of the Inspector Report, however the same was not submitted. The AO made the addition u/s 68 of the Act on verification of the bank account of the various parties holding that after issue of cheque for share applicants to the company there was a meager amount left as a balance which is not commensurate to the volume and value of the transaction and he further observed that there are immediate transfer entries preceding the issue of cheques. AO was also of the view that share allotment made to this company according to form No.2 submitted to the ROC on 02.10.2008, further Form No.2 was submitted to the ROC on 29.12.2008. This shows that the share applicants' money was kept as it is by the assessee for more than 3 years.

5. Against the order of the AO the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals), who deleted the addition as the assessee has proved with documentary evidence the identity, creditworthiness and genuineness of the transaction. The learned Commissioner of Income-tax (Appeals) was also of the view that the assessee has

already requested to verify further details by issue of notice u/s 133(6) which came back un-served and further as per the Inspectors report such company were also not found in the existence. Further, the share applicants company has independently submitted the conformation regarding share application money along with necessary documents directly to the AO. Regarding the notice un-served as well as the Inspector's Report the assessee could not be found fault with. Aggrieved by the order of the learned Commissioner of Income-tax (Appeals) revenue is in appeal before us.

6. It was contended by the Id DR before us that the learned Commissioner of Income-tax (Appeals) has relied on the orders of the Hon'ble Supreme Court in the case of Lovely Export Pvt. Ltd. 216 CTR 195 (SC) cannot be extended to this situation whether accommodation entry profits make investment in the assessee company and further the decision of the Hon'ble Supreme Court is not applicable whether share applicants money is not received in public issue.
7. Against this the Id AR submitted that evidence are submitted before the AO in case each of the share applicants showing their confirmation from return of income, balance sheet, their certificate of incorporation and their bank statement. After showing us all these documents it was submitted that the assessee has fully discharged its onus cast upon it u/s 68 of the Act. Though notice u/s 133(6) came back un-served the assessee persuaded and in turn those parties filed their confirmation before the AO independently. After that there is no enquiry made by the AO. Hence in the above circumstances the

addition u/s 68 cannot be made. Further the assessee advanced his argument and submitted that the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Vrindavan Farms (P) Ltd. in ITA No.71 & 72 of 2015 order dated 12th August 2015 covers the issue in favour of assessee wherein on the identical facts and circumstances the Hon'ble High Court has confirmed the action of the ITAT in deleting the addition u/s 68 of the Act.

8. We have carefully considered the rival contention. In this case it is apparent that the amount of Rs.58 lacs has been received as share application money by the assessee was duly explained before AO submitting complete details with respect to the Certificate of Incorporation of the applicants money, confirmation of those share applicants showing their Permanent Account No and where they are assessed, bank statement of share applicants showing the issue of cheques to the company, income tax return of the share applicants and balance sheet of the share applicants. This shows that the assessee has completely discharge its onus cast u/s 68 of the Act to prove the identity, creditworthiness and genuineness of the transaction. Ld CIT (A) has decided this issue as under :-

“6. I have carefully considered the assessment order and the submissions made by the Id. AR. It is argued by the Id. AR that the above share application money was received from a number of corporate entities by account payee cheques. The investor companies are duly registered with the ROC. The appellant had filed copy of affidavits from the Directors of the said companies confirming the purchase of shares, copy of share application forms, copy of Bank statements, copy of Income-tax returns, copy of audited Balance Sheet and Profit & Loss account, copy of certificate of incorporation, copy of share certificates and copy of ROC website showing the

name of the above companies etc. in support of its claim at the assessment stage. It is argued by the Id. AR that in the above background, the assessee had discharged its onus of establishing the identity and credit worthiness of the shareholders and the genuineness of the share transactions and the impugned addition made by the AO merely on the ground that Principal Officer of the shareholder companies could not be produced before the AO is illegal. Further, it is argued that although in the assessment order the AO has relied on certain enquiries/investigations made by the Investigation Wing, the appellant was not provided with any material in this regard and no opportunity of cross-examination was granted to the appellant. Perusal of the impugned assessment order shows that the above objections were also raised by the Id. AR before the AO during the assessment proceeding. It had also been argued before the AO that the material collected at the back of the assessee cannot be used against the assessee unless opportunity of cross-examination is provided. As per the assessment order, the AO issued notices u/s 133(6) to the investor companies which came back unserved and as per the Inspector's report such companies were also not found to exist at the said addresses. On this, it is argued by the Id. AR that the assessee was not in a position to produce the Principal Officers and the said companies had independently furnished confirmation regarding share application money along with necessary documents directly with the AO. argued that since the share application money had been received from corporate entities, the said amounts cannot be added in the hands of the appellant company, even the shareholders are alleged to be bogus. The Id. AR has accordingly argued that the said addition of Rs. 58,00,000/- u/s 68 is illegal. The Id. AR has relied upon a plethora of case laws in support of his claim. On careful consideration of the matter, the above contention of the Id. AR is found to be factually correct.

6.1. Further, I find that apart from the case laws relied upon by the Id. AR, the established legal position on the subject under consideration as adopted in a large number of case laws is as follows :

6.1.1. As held in the case of R. B. Mittal v. CIT 246 ITR 283 (AP) in an enquiry u/s 68, the rule of audi alteram partem has to

be observed and the assessee must be given a fair and reasonable hearing to discharge the burden cast on him u/s 68 of the Act.

6.1.2. Further, it is settled law that in the matter of cash credit, the initial onus lies on the assessee to prove the genuineness of the transaction alongwith the identity of the lender/investor and his creditworthiness. Having done so, the appellant in the instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the AO to disprove the claim of the assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so would vitiate the addition made on this count. Reference in this regard can be made the decisions in the case of CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and CIT v. Rohini Builders 256 ITR 360 (Guj.). It was also held in the case of CIT v. Bedi & Co. P. Ltd. (1998) 230 ITR 580 (SC) that where prima-facie the inference on facts is that the assessee's explanation is probable, the onus will shift to the revenue to disprove it and the assessee's explanation in such case cannot be rejected on mere surmises. Further, it was held in Khandelwal Constructions v. CIT (1997) 227 ITR 900 (Gau.) that since the satisfaction of the AO is the basis for invocation of the powers u/s 68, such satisfaction must be derived from relevant factors on the basis of proper inquiry by the AO and such inquiry must be reasonable and just.

6.1.3 It is also settled law that it is mandatory for the AO to confront the assessee with any material collected by the AO at the back of the assessee, and in case of statement of third party recorded at the back of the assessee, opportunity of cross examination has to be offered to the assessee, failing which the said material/statement etc. will be rendered on unreliable and additions made on the basis of such material/statement etc. shall be rendered illegal. Reference in this regard can be made to the decisions in the case of R.B. Shreeram Durga Prasad 176 ITR 169 (SC), 125 ITR 713 (SC), Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174 Taxmann 440 (Raj.) and Laxman Bhai Patel (order of Hon'ble Gujarat High Court dated 22.07.2008 in ITR no. 41/1997).

6.1.4. Further, in the case of NP. Garodia (order dated 13.01.2009 of Hon'ble P & H High Court in ITA no. 808 of 2008) and in the case of Brij Pal Sharma (order dated 17.02.2009 in ITA no. 685 of 2008 of Hon'ble P & H High Court) it was held that where the assessee provides identity and details pertaining to the lenders/creditors and is unable to produce them and requests the AO to issue summons u/s 131 for their attendance, it is the duty of the AO to issue such summons, failing which the addition would get deleted. It is also held in CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and Anis Ahmed 297 ITR 441 (SC) that mere non-production of the lender/shareholder cannot be a ground for making addition u/s 68.

6.1.5. Similarly as held in the case of CIT v. Metachem Industries (2000) 245 ITR 160 (MP) where a credit is shown to have come from a person other than the assessee, there is no further responsibility of the assessee to show that it has come from accounted source of the lender, as long as the fact that he had made the advance and was capable of making the advance are established. It was held by the Hon'ble Madras High Court in Hastimal (S) v. CIT (1963) 49 ITR 273 that after a lapse of decade, the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of a capital contribution, but also the origin of origin and source of the source.

6.1.6. Further, I find that the Apex Court in CIT v Lovely Exports (P) Ltd. (2008) 216 CTR 195 held that the even if the share application money received by the appellant company is from alleged bogus shareholder, whose identity is produced by the appellant company, the revenue can always proceed against such shareholders and if necessary reopen their individual assessment. Similar decision is also taken in the case of CIT v. Steller Investment Ltd. (1991) 192 ITR 287 (Del.), (2000) 251 ITR 287 (SC), CIT v. Sophia Finance Ltd 2005 ITR 98 (Del.)(FB), CIT v. Divine Leasing & Finance Ltd. (SLP no. CC 37572008 arising out of ITA no. 53/2005 of the High Court of Delhi), CIT (Kolkata) v. M/s Shipra Retailers (P) Ltd. (SLP no. CC 451/2008 arising out of ITA no. 576/2004 of the High Court of Calcutta), CIT v. Pondy Metal & Rolling Mills (P) Ltd. (SLP no. CC 12860/2007 arising out of ITA no. 788/2006 of the High Court of Delhi) and CIT v. General Exports Ltd. (SLP no.

21349/2007 arising out of ITA no. 880/2006 of the High Court of Delhi) . Following the aforesaid decision of the Apex Court in CIT v. Lovely Exports (P) Ltd. (supra), the Hon'ble Mumbai High Court in the recent judgement in the case of CIT v Creative World Telifilms Ltd. (order dated 12.10.2009 in ITA(L) no. 2182 of 2009) has held as under:

" The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgement of the Apex Court in the case of CIT vs. Lovely Exports (P) Ltd. reported in (2008) 216 CTR 195 (SC) wherein the Apex Court observed 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 can always proceed against them and if necessary reopen their individual assessments. In the case in hand, it is not disputed that the assessee has given the details of name and address of the shareholders, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the assessing officer to make proper investigation and reach the shareholders. The assessing officer did nothing except issuing summons which was ultimately returned back with an endorsement 'not tenable'. In our considered view, the assessing officer ought to have found out their details through PAN Card, Bank Account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the assessing officer. In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal. In the result, the appeal is dismissed in liminni with no order as to costs."

Similar decision has also been taken by the Hon'ble Chhattisgarh High Court in ACIT v Venkateswar Ispat Pvt. Ltd. (2009) 319 ITR 393."

9. Further Though notice u/s 133(6) is issued by the AO could not be served on the share applicants and Inspector's report also shows that this companies do not exists at the given address, we are of

the view that no fault can be found against the assessee for this. Instead of the assessee has persuaded these companies to file confirmation independently along with all the requisite details and those parties have responded submitting independent information before the AO. The AO instead of making any further enquiry with respect to those details has tried to analyze information contained in those submissions. According to us he should have proceeded to make inquiries with the assessing officers of those share applicant companies and should also have used extensive powers granted to him u/s 131 of the Act when there was an information available that these companies are dubious. Instead, Ld AO walked on the path shown by the assessee to issue notice u/s 133(6) of the Act. Ld AO found there is meager balance in the bank account of that company after issue of the cheques of share application to the assessee. It is not the case of the AO that money that has been deposited with the assessee company which is not properly explained. We failed to understand how the remaining meager bank balance in the bank account of share applicants can affect the transaction entered into by the share applicants with the assessee company. Further the late allotment of shares made by assessee to the share applicant may result in to some contravention of the Companies Act 1956 however that cannot be used for making an addition u/s 68 of the act as same is irrelevant. The Id DR could not controvert any of the findings given by the learned Commissioner of Income-tax (Appeals) and no infirmity was pointed out. In view of the above we confirm the order of the

learned Commissioner of Income-tax (Appeals) for deleting the addition made u/s 68 of the Act of Rs.58 lacs.

10. Regarding the grounds of revenue that decision of the Supreme Court in the case of Lovely Exports (Supra) cannot be relied upon where there is no public issue of the share were submitted with Hon'ble Delhi High Court, the Hon'ble High Court has considered this issue in following the decision of Pvt. Ltd company where public issue was not in question and therefore following those decision we reject the argument of the revenue that decision of the Lovely Exports (supra) cannot be applied in case of Pvt. Ltd. where there is public issue.

a. CIT V Shri Ram Syal Hydro (P) Ltd 196 Taxman 441

b. CIT V HLT Finance (P) Ltd 12 taxmann.com 247

c. CIT V Orbital Comm (P) Ltd 327 ITR 560

11. In the result the appeal of the revenue is dismissed.

Order pronounced in the open court on 25.01.2016.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 25/01/2016

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi