

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

ITA No. 7825/Del/2017
(Assessment Year: 2012-13)

M/s. SRM Securities Pvt. Ltd, 2608 to 2613 & 2637, Plot No. 252 and 253, Gurudwara Road, Karol Bagh, New Delhi PAN: AAOCS5259G	Vs.	DCIT, Central Circle-25, New Delhi
(Appellant)		(Respondent)

Date of Hearing	12/10/2018
Date of pronouncement	11/12/2018
For Appellant	Shri Hiren Mehta CA
For Revenue	Shri S. S. Rana CIT DR

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT (A)-29, New Delhi [the Ld CIT -A] dated 12.12.2017 for the Assessment Year 2012-13 where the addition the hands of the assessee with respect to share allotment to 13 companies was added u/s 68 of the Income tax Act [the Act] by the Ld Deputy Commissioner of Income Tax, Central circle-25, New Delhi [the Ld AO] was made by the assessment order passed u/s 143(3) of the act on 30/3/2015.
2. The assessee has raised the following grounds of appeal:-

- “1. That on the facts and circumstances of the case and in law, the order passed by CIT (A)-29, New Delhi (hereinafter referred to as CIT (A)), is bad in law.
2. That on the facts and circumstances of the case and in law the CIT (A) was not justified in upholding the action of AO in making an addition of Rs. 5,00,00,000/- by treating the share application money received during the assessment year under consideration as unexplained cash credit u/s 68 of the Income Tax Act.
3. That the CIT (A) was not justified in upholding the action of AO in making impugned addition and erred in not adjudicating the following specific grounds raised by the appellant
 - 3.1 proper and reasonable opportunity was not provided during the course of assessment proceedings.
 - 3.2 copies of confirmation, ITR, Balance Sheet of all the companies who invested in share capital in the assessee company were duly filed during the assessment proceedings to prove the identity, genuinity and credit-worthiness whereas the same have been overlooked by AO.
 - 3.3 AO lost sight of the fact that the shares allotted to investing companies were not bought back till date and are still existing in the name of investing companies.
 - 3.4 at the fag-end of assessment proceedings i.e. only on 23.03.2015 the assessee company was required to produce Directors of investing companies and as such proper and reasonable opportunity was not provided by the AO.
 - 3.5 as sufficient compliance was made to notice issued u/s 133(6) by the investing companies on 16.03.2015 establishing the fact of all these entities were genuinely existing, which has been overlooked by the A.O.
 - 3.6 AO relied upon the statement of the promoters of the assessee company namely Sh. Ashok Goel & Sh. Praveen Gupta without providing a copy of the said statement for rebuttal and cross-examination, which is against the proposition of law laid down by the

Delhi High Court in CIT vs. Best Infrastructure (India) Pvt. Ltd. in ITA No. 12/2017 vide order dated 01.08.2017.

- 3.7 *AO has relied upon the inquiries conducted by Investigation Wing on the investing companies without providing any opportunity to the assessee for a rebuttal during the entire assessment proceedings inspite of issuing specific questionnaires dated 20.01.2015 and 18.03.2015.*
- 3.8 *AO has relied upon the inquiries conducted in respect of investing companies based out of Kolkata without confronting with the findings of these inquiries to the assessee for a rebuttal and clarification.*
- 3.9. *AO has relied upon the statement of Sh. Rajesh Kumar Aggarwal recorded by DDIT (Inv), Unit-IV(l), Kolkata without providing a copy of the said statement for rebuttal and cross-examination of Sh. Rajesh Kumar Aggarwal which is against the proposition of law laid down by the Delhi High Court in CIT vs. Best Infrastructure (India) Pvt. Ltd. in ITA No. 12/2017 vide order dated 01.08.2017.*
- 3.10 *A.O. has relied upon the statement of Sh. Radhey Shyam Bansal recorded by DDIT (Inv), Unit-I(2), New Delhi, without providing a copy of the said statement for rebuttal and cross-examination of Sh. Radhey Shyam Bansal.*
- 3.11 *AO has relied upon the financial parameters of the investing companies on the basis of field inquiries conducted by Investigation Wing, New Delhi without confronting the findings of such inquiry and providing an opportunity for rebuttal to the assessee company during the course of assessment proceedings.*
- 3.12 *AO has relied upon the inquiries conducted by Investigation Wing with the bank accounts of the investing companies by calling for information from respective banks while the same was not confronted during the course of assessment proceedings for rebuttal nor the contents of such inquiries were made available to the appellant company for clarification.”*

3. This appeal is filed by the assessee against the order of The Commissioner Of Income Tax Appeals – 29, New Delhi dated 12/12/2017 wherein the addition under section 68 made by the Learned Assessing Officer of INR 50,000,000/- was confirmed. This is the solitary issue in the appeal of the assessee.
4. The brief fact shows that assessee is a company who filed the return of income on 29/9/2012 declaring a loss of INR 154985/-. The case was selected for scrutiny. Search on SRM group of cases and certain survey operation were carried out on 15/10/2013 and after that the case of the assessee was also centralized with that group. Pursuant to search action and post-search enquiries, SRM group was alleged to have introduced in the books of accounts of the main companies of the group used in unaccounted money in the form of share capital with very high premium, during financial year 2010 – 11 and 2011 – 12 through a larger number of Delhi and Calcutta-based unknown and non- descript companies. Based on this allegation, case of the assessee was examined.
5. The learned assessing officer found that assessee has issued shares to 13 companies who are based in Delhi and Kolkata. The assessee was asked to prove the identity and creditworthiness of the parties as well as the genuineness of the transactions. The assessee submitted letter dated 10/2/2015 and 5/3/2015. The bank statement, audited Annual accounts t as well as the details of PAN number and the copies of income tax returns were submitted along with confirmations. The learned assessing officer was dissatisfied with the explanation of the assessee. Thereafter the learned assessing officer issued notices under section 133 (6) of the act to all the companies. Out of the 18 companies 7 companies submitted the confirmation along with acknowledgement of the return of income filed with the annual accounts to the assessing officer. Therefore the learned assessing officer was of the view that all the share applicants failed to submit the requisite details and documents asked for and only part compliances were made by the aforesaid companies. He consequently held that assessee has failed to satisfy all the conditions of section 68 of the income tax act as the financials of the companies are also weak to show that they are not capable of investing such a huge sum in the assessee company.

The entries reflected in the bank statement as per the learned assessing officer clearly indicated the modus operandi of an entry operator company as they are doing no business in just engaged in giving and taking entries living nominal balance in the state bank account. He therefore rejected the contention of the assessee that the transactions under consideration were not in the sense of accommodation entries but are legitimate and genuine transactions. He further stated that during the course of search and survey proceedings the promoters of the group companies of SRM group Shri Ashok Goel , Pradeep Goel and Praveen Gupta were questioned on this issue's and allowed them an opportunity to explain the above investment of 133 companies including the 13 investor companies in the assessee. AO noted that none of the promoters were able to give any convincing reply to prove the genuineness of the above investment. He further stated that the directors of the group feign ignorance regarding the allotment of shares to corporate entities and stated that Shri Praveen Gupta and Sri Bansal, auditor are aware about the issue of the allotment of the shares. During the course of search. Sri Praveen Gupta could not produce proof of dispatch of share certificates, share application form or any other documentary proof evidencing the genuineness of the investment made by the different companies and its group companies. Further, as Mr. Praveen Gupta in case of search on another company M/s Goel Exim India private limited offered a sum of INR 40 – 45 crore as voluntary disclosure of share capital and share premium for FY 2010 – 11 and 2011 – 12. The learned assessing officer also stated that summons were issued by the investigation wing under section 131 (1A) of the income tax act to the directors of the several companies. However, none of the principal officer and directors of the investing companies based in Delhi made compliance of the summons. Many of the summons returned unserved with postal remarks that 'no such person on such address'. He further referred to some enquiries made by the investigation wing of income tax Department at Calcutta. Later on he looked into the balance sheet of the various companies and stated that from the financial of the investor companies, it was clear that the gross receipt in turnover of these companies are extremely low and profit before tax is either negative and in most of the cases is at a lower side which proved that these

companies are only conduit companies created for the sole purpose of transferring money to the beneficiary company without paying any substantial amount of taxes and is also benefiting the beneficiary company by providing accommodation entry thereby saving the beneficiary company from paying of substantial amount of taxes. He further stated that the bank statement from the bankers of these 133 companies were called for by the investigation wing which were analyzed and it was found that the entries are credited in the bank account through transfer and on the same date money is debited to the account of those companies leaving nominal balance in the account. He therefore based on these enquiries conducted by the investigation wing, relied upon the decision of the honourable Delhi High Court in case of CIT vs. Nipun builders and developers private Ltd held that the assessee has failed to show the genuineness of the credits and creditworthiness of the share applicants. Accordingly, he made an addition of INR 50,000,000 in the hands of the assessee vide order dated 30/3/2015 determining total income of the assessee at INR 49845015/- against the returned the loss of INR 154985/-.

6. The assessee aggrieved with the order of the learned AO preferred an appeal before the learned Commissioner of Income Tax Appeals. The learned CIT – A, held that during the course of search and survey operation appellant was given sufficient opportunity of being heard and they were confronted with all the facts including the whereabouts of the share applicants in the detail and documents and the result of notices issued under section 133 (6) of the act. He therefore held that there is no merit in the argument of the appellant that reasonable opportunity was not given. He further held that the assessee has failed to prove the identity of the alleged share holder, creditworthiness of the shareholders and the genuineness of the transactions. Accordingly he dismissed the appeal of the assessee and confirmed the addition under section 68 of the income tax act. Therefore, the assessee is in appeal before us.
7. The learned authorised representative submitted that the appellant company is a part of the SRM group and is engaged in the activity of future options trading for clients and commodity exchanges. During the assessment proceedings INR 50,000,000 were issued as share capital to 13

companies and to discharge the initial onus of the assessee, it submitted the copies of the confirmation, income tax return, balance sheet and profit and loss account, bank statement of the shareholders in respect of the share capital and share premium before the assessing officer. He submitted that the assessing officer has not made any enquiry but has completely relied upon the enquiry conducted by the investigation wing with respect to 133 companies. He further stated that the companies are assessed to income tax and are regularly filing the return of income. The bank statements are also available with the assessing officer, which did not show that they have deposited any cash in the bank accounts those companies. He submitted that the learned assessing officer did not conduct any enquiry but has relied upon the enquiries conducted by the investigation wing. He further stated that the learned assessing officer should have issued summons to the companies or asked the assessee to produce the directors et cetera but the learned assessing officer has not done so. He also relied on the statement recorded by the investigation wing of the directors of the SRM group but not the directors of the assessee. He stated that the directors were not at all examined during the course of assessment proceedings. He further stated that the assessing officer has merely carried out the calculative analysis of the balance sheet but has not found that how the companies have recorded the amount of investment in their annual accounts but has merely looked into the profit and loss statement of those companies. These companies have huge capital available with them. Therefore they have invested in the assessee company. He further stated that the assessee has established the identity, creditworthiness and genuineness of the about transaction by the initial discharge of the onus cast upon the assessee but the learned assessing officer, without making any enquiry has made the addition under section 68 of the income tax act. He further stated that the learned Commissioner of income tax appeals has also not carried out any independent enquiry but merely relied upon the observation of the learned assessing officer discarding all the evidences and judicial precedent confirmed the addition. He further stated that since the material statement used against the assessee of the investigation wing have never been confronted to the assessee or given copies of that statement, he

therefore stated that when the assessee was not at all confronted for clarification of the details, which are collected by the investigation wing in case of SRM group related to the assessee, assessment order on the same ground is invalid. He referred to the decision of the CIT vs. Sunita Dadha of the honourable Supreme Court in SLP number 49432/2018 dated 28/3/2018. He further stated that there is no admission in the statements of the directors of the SRM group with respect to the share capital of the assessee, there is no impact on the ground that Goyal exim has disclosed any unaccounted income. Therefore, he submitted that the learned AO is incorrect in relying upon those statements. He further relied upon the host of the other decisions on the issue of taxability under section 68 of the income tax act

8. The learned departmental representative submitted that the assessee has failed to prove the identity, creditworthiness of the shareholders as well as the genuineness of the transactions. He extensively referred to the enquiries conducted by the investigation wing and submitted that the addition has been rightly made by the learned assessing officer and confirmed by the learned Commissioner of income tax appeals. He further relied upon the decision of CIT vs. MAF capital private limited 361 ITR 258, CIT vs Navodaya castles private limited 367 ITR 306, Konark structural engineering private limited vs DCIT 90 taxmann.com 56, Prem casting private limited vs CIT, 88 taxmann.com 189, along with the decision of the honourable Delhi High Court in case of CIT vs. Nova promoters and Finlease private limited 342 ITR 169. In the end he referred to the decision of the honourable Delhi High Court in case of principal Commissioner of income tax vs. Bikram Singh.
9. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly the assessee has issued share capital to 13 companies in the range of INR 4,000,000 to INR 2,500,000. To prove the creditworthiness of these companies assessee submitted with respect to all 13 companies
 - i. Confirmation of accounts
 - ii. copy of share application money forms where the complete details of the name and address , bank account number, PAN, details

of the directors coupled with memorandum and articles of association of the company investors

- iii. copy of income tax returns
- iv. copy of permanent account number,
- v. copy of the bank statement for the relevant period and
- vi. Copy of the audited balance sheets of those companies.

The learned assessing officer issued notices under section 133 (6) of the income tax act to some of the companies and out of which 7 companies have responded by submitting the bank statement, income tax return and balance sheet and profit and loss account of those companies along with the confirmation. After that the ld AO has not carried out any investigation/ inquiry of those shareholders. The learned assessing officer has mostly relied upon the search proceedings in SRM group and statement of 3 directors of that group recorded during search. However, it is a fact that none of these statement showed that the assessee has surrendered any sum on account of this transactions. Further, Shri Praveen Gupta, the director of the company has confirmed and submitted the requisite detail during the course of search proceedings about all these companies. Some other companies disclosed some unaccounted money cannot be used against the assessee without carrying out detailed inquiry and proving the claim of the assessee as false. Based on this information gathered by the investigation wing at that particular time, collected the bank statement of these companies from the bankers. The summons was also issued by investigation wing only which is apparent at para number 24 of the assessment order. Therefore on reading of the assessment order it is apparent that assessing officer has not issued any summons to any of the investor companies, he has also not called the information from the bankers or has verified the premises of those companies whether they are carrying on any business. He even did not call information from the Income tax officer of those companies about the assessment status and activities of those companies. Assessing officer has only heavily relied on the statement of Sri Rajesh Kumar Agarwal recorded at para number 29 of the assessment order as well as Shri Rakesh Bansal at para number 34 of his assessment order recorded by investigation wing. However, admittedly,

copies of the statement of these parties were not given to the assessee as well as no opportunity to further rebut any of the findings was given to the assessee. On the issue of the financial parameters of the investing companies, learned assessing officer has merely looked at the returned income of that assessee, where the complete balance sheet is available to him audited by the chartered accountant and also produced before the income tax authorities along with the return of income. The learned assessing officer should have enquired about the source of funds of these companies by issuing summons to the directors of those companies which the learned assessing officer has failed to do so. He could have also examined the fact that when these companies are having low income wherefrom they are getting money to invest in the assessee company. As the fund have been undeniable shown in the annual accounts, there are definitely sources of those funds which are routed through the balance sheet only if not through the profit and loss account. Furthermore, even the banking enquiries were conducted by the investigation wing only with respect to 133 companies, learned assessing officer has not even done the enquiries with the banks with respect to these 13 companies to examine who are the directors of those companies, who are operating the bank account and where from the money is coming in the bank account of those companies as well as nature of business activities carried out by these companies. When it is the allegation of the AO that these assessee are not carrying any business, it did not prompt the ld AO to enquire with the banker that how in absence of any business these companies are operating the accounts with those banks and substantial sums are transferred from those accounts. He should have also enquired why the banks have not reported that transaction as suspicious transactions. No such inquiries are made by the ld AO. It is not the allegation of the AO that the investments in appellant are not appearing in the balance sheet of investor companies. Para number 39 of the assessment order clearly shows that the learned assessing officer has only seen that certain transfer entries are coming in those bank accounts and the amounts are issued by debit to the various other parties. However, unless the assessing officer proves that these companies, receives the funds were only for providing the accommodation

entry to the appellant, addition under section 68 cannot be upheld, When assessee has discharged its initial burden of proving the identity, creditworthiness of the parties and genuineness of the transactions. Ld AO must reach to the submission of the assessee by conducting exhaustive inquires to throw back the onus on the assessee. Further non receipt of the details u/s 133 (6) should be the trigger point to make further inquires; it is not the resting point. In the present case, the fact shows that the assessing officer has merely relied upon the enquiries conducted by the investigation wing of the department and has not confronted the assessee with material that he has received from the investigation wing to the assessee to rebut the same. Unless the initial onus discharged by the assessee is thrown back to the assessee by AO by carrying out systematic investigation/ inquiry, addition u/s 68 cannot be upheld. According to us this issue is now squarely covered by the decision of the honourable Delhi High Court against which the SLP has been dismissed by the honourable Supreme Court recently in [2018] 99 taxmann.com 45 (SC) in Principal Commissioner of Income Tax, Central-1 *v.* Adamine Construction (P.) Ltd. wherein it has been held as under on identical facts and circumstances of the case:-

“The Assessing Officer in this case had - based upon the search conducted in the premises of a third party, issued reassessment and proceeded to add Rs. 9,30,00,000/- as unexplained investment under Section 68 of the Income-tax Act, 1961 (hereafter referred to as "the Act"). The amounts received were from 7 entities and the AO sought report from the Commissioner at Mumbai and Kolkata. The CIT (A) and the ITAT concurrently deleted the amounts brought to tax under Section 68 of the Act, holding that the relevant enquiry based upon the materials furnished by the assessee had not been made.

2. We notice that the search in the premises of the Bhushan Steel Group, had led to survey in the premises of various other assesses including M/s Adamine Construction Pvt. Ltd., and in the end the additions made in that case too were deleted. The deletion - again concurrently by the lower appellate authorities was upheld by this Court recently in respect of the same assessee for an earlier

assessment. Here too, the Court has considered the materials. What is evident is that the AO went by only the report received and did not make the necessary further enquiries - such as into the bank accounts or other particulars available with him but rather received the entire findings on the report, which cannot be considered as primary material. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO.

3. No question of law arises; the appeal is consequently dismissed.”

10. Further the honourable Supreme Court has also dismissed the special leave petition of the revenue in [2018] 98 taxmann.com 173 (SC) Principal Commissioner of Income Tax *v.* Himachal Fibers Ltd.* where the honourable Delhi High Court confirmed the deletion of addition under section 68 on account of share application money where the assessee furnished all the details about the shareholders but the AO did not conduct any further enquiry except resting his conclusions on surmises and enquiries conducted by the investigation wing.
11. Further, the decisions relied upon by the learned departmental representative in case of Konark builders (supra) was on its own facts, wherein The cheque numbers have been mentioned in the affidavits. The dates of cheques mentioned in all affidavits are 23-8-2006 and cheques had been drawn on 'V' bank. The last digit of cheque numbers is 1 and that is how a finding has been recorded that cheque books issued to all the 23 persons were of the same series and first leaf was used by all of them for allegedly making payment of the subscription. The findings of fact of the Tribunal are completely borne out from the record. Further, neither before the Commissioner (Appeals) nor before the Tribunal, the assessee offered to procure presence of those 23 persons. Therefore, there is finding of fact recorded by the Appellate Tribunal confirming the observation of the Assessing Officer that the appellant-assessee had failed to establish the creditworthiness of the subscribers and even genuineness of the transactions. Therefore, the facts of that case are clearly distinguishable.

12. Further, honourable Delhi High Court in case of Nova promoters (supra) has held that 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 share holders' 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 under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. Ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec. 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.
13. The glaring feature of the assessment proceedings conducted by the learned assessing officer is that that he has grossly relied upon the investigation, carried out by the investigation wing Kolkata on the basis of the statement of Shri Rajesh Kumar Agarwal and Shri Rakesh Bansal recorded by the Deputy Director of income tax (investigation), New Delhi and the copies of such statements were not provided to the assessee. When the copy itself was not provided of the statement recorded of the above persons, based on which the allegation of the revenue that the share applicants are accommodation entry providers, the assessee did not have any opportunity to rebut those averments made by them. The assessee did not have any occasion to ask for the cross-examination of those entry providers, unless the statement was provided to the assessee. As per principle of natural justice, it was obligatory on the part of the learned assessing officer to have provided all the materials, which were used by him against the assessee. In case, the assessing officer was relying on the statement of different persons

then the assessee will have to be given an opportunity to cross-examine them and rebut averments made by them. In such cases, otherwise additions cannot be sustained. No offer was made by the learned departmental representative that the copies of the statement of those persons or their cross-examination would be afforded by the revenue now; we do not have any option but to delete the addition made by the learned assessing officer on this count itself.

14. In view of the above facts and circumstances of the case, we do not have any option but to reverse the finding of the lower authorities and direct the learned assessing officer to delete the addition made under section 68 of the income tax act with respect to the share application/allotment to 13 companies whose details as stated supra was submitted before the assessing officer discharging initial onus and ld AO did not make any enquiry independently on those documents. Such is also the mandate of the decision of the honourable Delhi High Court in case of Nova promoters private limited (supra).
15. In the result appeal filed by the assessee is allowed.

Order pronounced in the open court on 11/12/2018.

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

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 11/12/2018

A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	