IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 3940/Del/2015
Assessment Year: 1997-98

DCIT, CIRCLE 19(1), ROOM NO. 221, C.R. BUILDING, I.P. ESTATE, NEW DELHI **(APPELLANT)**	VS.	OKARA AGRO INDUSTRIES LTD. 803, VIKRAM TOWER, RAJINDER PLACE, NEW DELHI **(RESPONDENT)**

Department by : SHRI S.S. RANA, CIT(DR)
Assessee by : NONE

ORDER

PER H.S. SIDHU, JM

This appeal by the Assessee is directed against the Order dated 06.10.2017 of the Ld. CIT(A)-2, New Delhi pertaining to assessment year 1997-98 on the following grounds:-

> *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.5,23,42,500/- on account of share / equity capital without appreciating the fact that the assessee has failed to produce evidence.*
>
> *2. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.21,80,11,355/- on account of unsecured loans without appreciating the fact that the assessee has failed to produce evidence.*

3. "On the facts and in the circumstances of the case, the Ld. ClT(A) has erred in deleting the addition of Rs.9,45,25,367/- on account of sundry creditors being the investor fund collected through Sugam Scheme without appreciating the fact that the assessee has failed to produce evidence.

4. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.ll,20,17,167/- on account of fixed assets without appreciating the fact that the assessee has failed to produce evidence.

5. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.l,00,000/- on account of vehicle running and maintenance expenses without appreciating the fact that the assessee has failed to produce evidence.

6. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the 1/5th addition of RS.44,888/- out of car depreciation of Rs.2,24,440/- due to personal use by directors without appreciating the fact that the assessee has failed to produce evidence.

7. The appellant craves to be allowed to add any fresh ground(s) of appeal and/or delete or amend any of the ground(s) of appeal.

2. The brief facts of the case are that the original assessment in this case was completed u/s. 143(3) (in short "Act) on 27.3.2000 on total income of Rs. 55,73,77,005/-. No appeal against this order was filed by the assessee company. Later on, the Ld. CIT(A)-II, Delhi, New Delhi while examining the possibilities of recovery of demand in this case for the AY 1997-9 and earlier years noted that the order passed u/s. 143(3)

of the Act on 27.3.2000 for AY 1997-98 on total income of Rs. 55,73,77,005/- creating a demand of Rs. 39.96 crores and penalty order u/s. 271(1)9c) passed on 28.9.2000 levying penalty of Rs. 23.84 crores needs review. The assessment was, therefore, set aside by the Ld. CIT, Delhi-II, New Delhi vide her order passed u/s. 264 of the I.T. Act on 15.3.2001 in respect of assessment order u/s. 143(3) of the Act and penalty order u/s 271(1)(c) of the Act with the direction to AO to reframe the assessment after giving due opportunities to the assessee and after collecting full facts from crime Branch authorities as also taking note of judicial pronouncement if received by them. In order to give opportunities of being heard to the assessee a letter dated 22.1.2002 alongwith notices u/s. 143(2) and 142(1) of the I.T. Act, were sent to the assessee company and also on various occasions and in response to the same a letter dated 7.2.2002 a letter received from Sh. Narinder Jit Singh through registered post wherein he has submitted that he has been in judicial custody in Tihar Jail in various cases of economic offences since 29.6.1998 and that all records pertaining to books of accounts, balance sheet, profit and loss account, bank account etc. were seized by the Crime Branch and are presently under the direct custody of the Hon'ble Delhi High Court and hence he is unable to furnish any detail or evidence in support of his contention at this point of time. After perusing the same, the AO observed that out of three Directors of the Coy. the two Directors namely Sh. Inderjit Sahni and Sh. Jagdeep Singh Sahni had expired in March and August, 1998 respectively and the 3rd Director Sh.

Narinder Singh Sahni is in judicial custody since June, 1998. In case Sh. Narinderjit Singh, Ex-Director of the Company is unable to attend the assessment proceedings, the company should depute an authorized representative on its behalf like Sh. Sanjeev Wadhera, CA who had attended the assessment proceedings earlier for AY 1996-97. The assessment proceedings for the year under consideration cannot be withdrawn as requested by Sh. Narinder Jit Singh ex Director of the company in his above referred letter dated 2.2.2002. AO noted that since the assessee company has failed to attend the assessment proceedings with details / information to be filed in support of its contention, no information / detail was collected from the Crime Branch as in the absence of assessee company's details, it is difficult to correlate information available with the Crime Branch and pass the assessment order as per accounting principles and make additions only after proper verification. Hence, AO has no alternative except to complete the assessment for the year under consideration on the same figure as completed on 27.3.2000 at Rs. 55,73,77,005/-. Therefore, assessment was made at Rs. 55,73,77,005/- wherein various additions have been made vide order dated 22/3/2002 passed u/s. 264/143(3) of the Act. Against the assessment order dated 22.3.2002, assessee appealed before the ld. CIT(A) who vide his impugned order dated 17.3.2015 has partly allowed the appeal of the assessee. Aggrieved with the impugned order the Revenue is in appeal before the Tribunal.

3. Learned CIT(DR) relied upon the order of the AO and in support of his claim he filed the Written Submissions, which read as under:-

> *1. A copy of order u/s 264 dated 15.03.2001 & order u/s 143(3) dated 27.03.2000 is enclosed.*
>
> *2. Ld CIT(A) was not justified in deleting additions to equity, unsecured loans and sundry creditors of Rs. 5,23,42,500/-, Rs21,80,11,355/- & Rs. 9,45,25,367/:*
>
> *(i) She deleted the additions only on the ground that there was no doubt about existence of depositors.*
>
> *(ii) The assessee has failed to discharge onus regarding identity of investors, their credit worthiness and genuineness of the transactions*
>
> *(iii) In the absence of any details or documentary evidence regarding additions to equity, unsecured loans and sundry creditors, Ld CIT(A) was not justified in deleting the additions*
>
> *1. PCIT Vs NRA Iron & Steel (P.l Ltd. [20191 103 taxmann.com 48 (SCl (Copy Enclosed)*
>
> *where Hon'ble Supreme Court reverse order of lower Authorities holding that where there was failure of assessee to establish credit worthiness of investor companies, Assessing Officer was justified in passing*

assessment order making additions under section 68 for share capital 1 premium received by assessee company. Merely because assessee company had filed all primary evidence, it could not be said that onus on assessee to establish credit worthiness of investor companies stood discharged

2. *PCIT Vs NOR PROMOTERS PVT LTD (2019-TIOL-172-HC-DEL-ITl*

where Hon'ble Delhi High Court held that a case involving make-believe paperwork to camouflage the bogus nature of the transactions is to be treated as unexplained credit u/s 68

3. ITO Vs Synergy Finlease Pvt. Ltd (ITA No.4778IDeI/2013)

where Hon'ble ITAT Delhi held that where investor of share application money had nominal income and cheques ahd been received just before issue of cheques for share application money, creditworthiness was not proved and addition u/s. 68 was sustained.

4. CIT Vs MAF Academy (P.) Ltd (361 ITR 258) (Copy Enclosed)

where Hon'ble Delhi High Court held that where assessee, a private limited company, sold its shares to unrelated parties at a huge premium and thereupon within short span of time those shares were purchased back even at a loss, share transactions in question were to be regarded as bogus and, thus, amount received from said transactions was to be added to assesee's taxable income under section 68 It was held as follows:

"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."

5. CIT Vs Navodaya Castle Pvt Ltd [2014] 3671TR 306 (Del) (Copy Enclosed)

where Hon'ble Delhi High Court accepted that since the assessee was unable to produce the directors and the principal officers of the six shareholder companies and also that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer had observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.

"20. Now, when we go to the order of the Tribunal in the present case, we notice that the Tribunal has merely reproduced the order of the Commissioner of Income-tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its co-ordinate Bench in the case of MAF Academy P. Ltd., a decision which has been overturned by the Delhi High Court, vide its judgment in CIT v. MAF Academy P. Ltd. [2014] 206 DLT 277 ; [2014] 36 ITR 258 (Delhi)). In the impugned order it is accepted that the assessee was unable to produce directors and

principal officers of the six shareholder companies and also the fact that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.

21. In view of the aforesaid discussion, we feel that the matter requires an order of remit to the Tribunal for fresh adjudication keeping in view the aforesaid case law."

Navodaya Castle Pvt Ltd Vs CIT (2015-TIOL-314-SC-IT) (Copy Enclosed)

SLP of assessee dismissed by Hon'ble Supreme Court

6. Pratham Telecom India Pvt Ltd Vs DC IT (2018-TIOL-1983-HC-MUM-IT) (Copy Enclosed)

where Hon'ble Bombay High Court held that mere production of PAN numbers & bank statements is sufficient enough to discharge the burden on taxpayer to escape the realms of Section 68

7. CIT Vs Nipun Builders & Developers (P.) Ltd (30 taxmann.com 292, 214 Taxman 429, 350 ITR 407, 256 CTR 34) (Copy Enclosed)

where Hon'ble Delhi High Court held that where assessee failed to prove identity and capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68. It was held as follows:

"12. A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the AO and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee's own monies were brought back in the form of share application money. As noted in the earlier paragraph, it is not the burden of the A 0 to prove that connection. There has been no examination by the Tribunal of the assessment proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the

genuineness of the transactions. No attempt was made by. the Tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under Section 68. With respect, it appears to us that there has only been a mechanical reference to the case-law on the subject without any serious appraisal of the facts and circumstances of the case.

13. We, therefore, answer the substantial question of law framed by us in the negative, in favour of the revenue and against the assessee. The appeal of the revenue is allowed with no order as to costs."

8. CIT Vs Nova Promoters & Finlease (P) Ltd (18 taxmann.com 217, 206 Taxman 207, 342 ITR 169, 252 CTR 187) (Copy Enclosed)

where Hon'ble Delhi High Court held that amount received by assessee from accommodation entry providers in garb of share application money, was to be added to its taxable income under section 68. It Was held as follows:

"41. In the case before us, not only did the material before the Assessing Officer show the link between the entry providers and the assessee-company, but the Assessing Officer had also provided the statements of Mukesh Gupta and compliance with the rules of natural justice. Out of e 22 companies whose names figures in the information given by them to the investigation wing. 15 companies had provided the so-called "share subscription monies" to the assessee. There was thus specific involvement of the assessee-company in the modus operandi followed by Mukesh Gupta and Rajan Jassal. Thus, on crucial factual aspects the present case stands on a completely different footing from the case of Oasis Hospitalities (P) Ltd. (Supra).

42. In the light of the above discussion, we are unable to uphold the order of the confirming the deletion of the addition of Rs. 1,18,50,000 made under section 68 of the as well as the consequential addition of Rs. 2,96,250. We accordingly answer the substantial questions of law in the negative and in favour of the department. The assessee shall pay costs which we assess at Rs. 30,000/-."

9. CIT Vs Ultra Modern Exports (P.) Ltd (40 taxmann.com 458, 220 Taxman 165) (Copy Enclosed)

where Hon'ble Delhi High Court held that where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer sent notices to share applicants which returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68. It was held as follows:

"9. 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 (P.) Ltd. 's case (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 (P) Ltd. (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 gamer a colossal amount of Rs. 4.34 Crores, this Court is of the opinion that the CIT (Appeals) and the ITA T fell into error in holding that AO could not have added back the said amount under Section 68. The question of law consequently is answered in favour of the Revenue and against the assessee."

10. CIT Vs N R Portfolio Pvt Ltd [2014] 42 taxmann.com 339 (Delhi)/[2014] 222 Taxman 157 (Delhi)(MAG)/[2014] 264 CTR 258 (Delhi) (Copy Enclosed)

where Hon'ble Delhi High Court held that if AO doubts the documents produced by assessee, the onus shifts on assessee to further substantiate the facts or produce the share applicant in proceeding. It was held as follows:

"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, PAN Nos. 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, controls and manage them."

10 PCIT Vs Bikram Singh [201D 85 taxmann.com 104 (Delhi)/[201D 250 Taxman 273 (Delhi)/[201D 399 ITR 407 (Delhi) (Copy Enclosed)

where Hon'ble Delhi High Court held that even if a transaction of loan is made through cheque, it cannot be presumed to be genuine in the absence of any agreement, security and interest payment. Mere submission of PAN Card of creditor does not establish the authenticity of a huge loan transaction particularly when the ITR does not inspire such confidence. Mere

submission of 10 proof and the fact that the loan transactions were through the banking channel, does not establish the genuineness of transactions. Loan entries are generally masked to pump in black money into banking channels and such practices continue to plague Indian economy."

4. In this case, Notice of hearing to the assessee was sent by the Registered AD post, in spite of the same, assessee, nor its authorized representative appeared to prosecute the matter in dispute, nor filed any application for adjournment. Keeping in view the facts and circumstances of the present case and the issue involved in the present Appeal, we are of the view that no useful purpose would be served to issue notice again and again to the assessee, therefore, we are deciding the present appeal exparte qua assessee, after hearing the Ld. DR and perusing the records.

5. We have heard the Ld. DR and perused the records especially the impugned order and the written submission filed by the Ld. CIT(DR). We find that the judicial decisions relied upon by the Ld. CIT(DR) have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in hand. However, we find that Ld. CIT(A) has elaborately discussed the grounds no. 1 to 4 vide para no. 7.1 to 7.3 at page no. 4-5 of the impugned order. For the sake of clarity, we are reproducing herewith the relevant findings of the Ld. CIT(A) as under:-

"7.1. The 1st and 2nd addition is on account of addition to equity & to unsecured loans & sundry creditors amounting to Rs.5,23,42,500/- & RS.21,80,11,355/- & RS.9,4525,367/-. The CIT on this issue in the order u/s. 264 had stated as under:-

"In the light of the status report of the Crime Branch Delhi Police the assessment framed for AY 1997-98 where substantially large additions have been made on account of additions to share equity capital, additions as unsecured loans, additions on account of non-confirmation of sundry creditors and also on account of addition to the fixed assets on account of no supporting evidence having been filed: appears to be erroneous. The assessment is also erroneous as both the credits and debits have been added simultaneously. This has resulted into double additions, even if merits of the addition is not considered It is erroneous to make addition in respect of both the debit and the side. In the light of the fact that 1500 investors have filed FIR's & law suits claiming about Rs.15 crores as paid by them. The additions made on account of creditors, addition on account of the share equity capital and addition on account of the unsecured loans, on the grounds that confirmation and supporting evidence were not filed, does not appear to be justified Crime Branch status report clearly establishes that the assessee had collected funds from public at large and had not repaid them and therefore, law suits have been filed by the investors. In the light of this the addition on this score is apparently wrong on facts.

There is an appeal filed against this order as there was no business carried on by the assessee company after June, 1998 as the only surviving director of the company was in jail.

In view of this the assessing officer was left with no alternative but to pass an ex-parte penalty order imposing the penalty of RS.23,84,OO,510/- as otherwise the penalty action would have got barred by limitation of time.

The penalty order dated 28.09.2010 suffers from the same flaw as those pointed out for assessment order u/s 143(3) for this year. The penalty order was also not served as the same is returned back with the remarks by the postal authorities that the 'assessee left without address. "

Objective examination of the above facts clearly brings out that both the orders u/s 143(3) passed on 27.03.2000 and the penalty order u/s 271(1)(c) passed on 28.09.2000 are erroneous and prejudicial to the interest of the revenue being wrong on facts which is established by the number of law suits filed by the investors claiming their money is back and hence the money brought in the books of the company as share capital and loans was not necessarily and entirely assessee's own income from undisclosed sources which could be taxed u/s 68 of the I. T. Act, 1961. In any case the addition in respect of both the credit and debit in obviously incorrect and against established principles of accounting. Under the circumstances, it is clear that the AO needs to co-relate information available with the Crime Branch and pass the assessment order as per accounting principles and make additions only after proper verification. The assessment needs to be set aside under section 264 of the I. T. Act, 1961 as erroneous order would not be implacable and would hinder collection. In any case the assessee's properties stand attached against the earlier years demands of the assessee which are substantial and therefore, the interest of the revenue is not lost even when the assessment order and

penalty orders for AY 1997-98 are cancelled with the direction to reframe the same as per law. AO to reframe the assessment after giving due opportunity to the assessee and after collecting full facts from crime branch authorities as also taking note of judicial pronouncement if received by then.

7.2. In view thereof the addition does not stand as there is no doubt that there were depositors. The facts are that the appellant had collected funds and had not repaid them. Further there were investors who had filed law suits against the appellant for recovery of their money. Therefore, the existence of the depositors cannot be doubted. The addition on all three accounts is therefore deleted. The grounds of appeal are ruled in favour of the appellant.

7.3 The AO has added the cost of all assets purchased stating lack of evidence. However, for business purposes assets would have been purchased. I don't find any basis to sustain this addition made by the AO. The addition of Rs. 11,20,17,167/- is therefore deleted.

5.1 After perusing the aforesaid findings of the Ld. CIT(A), we are of the considered view that there is no infirmity in the aforesaid finding of the Ld. CIT(A), hence, we uphold the same and accordingly reject the ground no. 1 to 4 raised by the Revenue.

5.2 As regards ground no. 5 & 6 are concerned, we find that oOut of car running and maintenance expenses of Rs.1,OO,OOO/- was allowed on account of personal use by directors. Out of car depreciation of Rs.2,24,440/-, 1/5th was disallowed on account of personal use by directors. In the case of a company disallowance on account of personal use of vehicle cannot be made. Hence, the addition was rightly deleted by the Ld. CIT(A), which does not need any interference on our part,

therefore, we uphold the action of the Ld. CIT(A) on the issues in dispute and reject the ground no. 5 & 6 raised by the Revenue.

6. In the result, the Appeal of the Revenue is dismissed.

Order pronounced on 08/07/2019.

Sd/-	**Sd/-**
(B.R.R. KUMAR)	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:08/07/2019

SR BHATNAGAR

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT TRUE COPY

By Order,

ASSISTANT REGISTRAR