

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI**

**BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.1365/Del/2009
Asstt. Year: 2005-06

ITO Ward-14(4) New Delhi.	Vs.	Primeland Real Estates Pvt. Ltd. 7 th Floor, Meridian Commercial Tower Windsor Place, Janpath New Delhi – 110 001
(Appellant)		(Respondent)

Department by:	Ms. Nidhi Srivastava, CIT(DR)
Assessee by :	Shri Tarandeep Singh, Advocate
Date of Hearing	16/10/2019
Date of pronouncement	10 /01/2020

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal has been filed by the Revenue being aggrieved by order dated 15th January, 2009 passed by the Ld. Commissioner of Income Tax (Appeals)-XVII, New Delhi {CIT (A)} for Assessment Year 2005-06.

2.0 Brief facts of the case are that during the year under consideration the assessee company was engaged in the business of real estate development. Return declaring total income of Rs.1,07,963/- was filed by the assessee. The Assessing Officer (AO), vide assessment order dated 31st December, 2007, passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') assessed the total income at Rs. 38,34,11,034/- after making an addition u/s 68 of the Act on account of Share Application Money of Rs.38,33,03,071/-. The assessee company had received share application money from its Directors as under:

<i>"S. No.</i>	<i>Name of the Director</i>	<i>Share application Money</i>
1.	<i>Sh. Bhanu Choudhrie</i>	<i>Rs. 7,28,93,499.40</i>
2.	<i>Sh. Sumant Kapur</i>	<i>Rs.16,44,15,381.70</i>
3.	<i>Sh. Dhruv Choudhrie</i>	<i>Rs. 7,29,11,400.00</i>
4.	<i>Sh. Sudhir Choudhrie</i>	<i>Rs.38,31,03,071.21"</i>

2.1 During the course of assessment proceedings, the assessee filed confirmations from the Directors which stated that the Directors had paid the share application money out of income earned outside India which was sent through foreign remittances. The Directors also submitted bank details, confirmation letters and copies of their Income Tax Returns. The assessee company

also furnished copies of passports of the Directors. From the perusal of the details furnished by the assessee, the AO observed that the remittances received by the assessee company against the Share Application Money from the Directors were as under:

*“Beneficiary A/c Prime Land Real Estate Pvt. Ltd.
ICICI BANK A/c 007105001972*

<i>Name of Remitter</i>	<i>Date</i>	<i>Rs.</i>
<i>Sudhir Choudhrie</i>	<i>26.07.2004</i>	<i>10,615,877/-</i>
	<i>27.08.2004</i>	<i>10,000,000/-</i>
	<i>12.10.2004</i>	<i>13,718,085/-</i>
	<i>04.11.2004</i>	<i>17,268,939/-</i>
	<i>13.12.2004</i>	<i>87,85,460/-</i>
	<i>19.01.2005</i>	<i>1,09,05,000/-</i>
	<i>08.03.2005</i>	<i>15,89,429/-</i>
<i>Dhruv Chowdhrie</i>	<i>26.07.2004</i>	<i>1,06,16,800/-</i>
	<i>19.01.2005</i>	<i>1,74,48,000/-</i>
	<i>18.02.2005</i>	<i>1,95,34,500/-</i>
	<i>24.02.2005</i>	<i>1,52,56,500/-</i>
	<i>03.03.2005</i>	<i>1,01,55,600/-</i>
<i>Bhanu Chowdhrie</i>	<i>26.04.2004</i>	<i>1,06,15,877/-</i>
	<i>27.08.2004</i>	<i>1,00,00,000/-</i>
	<i>03.09.2004</i>	<i>1,00,00,000/-</i>
	<i>04.11.2004</i>	<i>17,467,179/-</i>
	<i>07.12.2004</i>	<i>86,58,520/-</i>
	<i>19.01.2005</i>	<i>1,09,05,000/-</i>
	<i>14.03.2005</i>	<i>53,14,989/-</i>
<i>Sumant Kapur</i>	<i>29.04.2004</i>	<i>5,44,27,500/-</i>
	<i>24.08.2004</i>	<i>50,19,766/-</i>
	<i>10.01.2005</i>	<i>5,05,72,800/-</i>
	<i>03.03.2005</i>	<i>5,43,95,315/-</i>

Total amount remitted through foreign link 38,33,03,071/-”

2.2 The AO also perused the income tax returns filed by the Directors and in the order of assessment it has been observed by him as under:

“From the copies of Income Tax Returns of the four directors it is seen that Income shown in their return for A.Y. 2005-06 and 2006-07 are as follows :

<i>Name</i>	<i>PAN</i>	<i>Gross total Income (A.Y.2005-06)</i>	<i>Gross total Income (A.Y.2006-07)</i>
<i>Dhruv Choudhrie</i>	<i>AADPC4041Q</i>	<i>1,239,806/-</i>	<i>14,44,982/-</i>
<i>Bhanu Choudhrie</i>	<i>AAFPC3778A</i>	<i>4,31,556/-</i>	<i>1,32,290/-</i>
<i>Sudhir Choudhrie</i>	<i>ADQPC8926L</i>	<i>10,50,736/-</i>	<i>10,78,319/-</i>

Income Tax Return for the A.Y. 2005-06 of Shri Dhruv Chowdhrie shows that income of Rs.11,47,913/- and Rs.89,613/- has been declared under the head ‘Income from House property’ and ‘Income from Other Sources’ respectively.

Shri Bhanu Chowdhrie S/o Shri Sudhir Chowdhrie has declared income of Rs.4,31,556/- only under the head ‘Income from Other Sources in the A.Y.2005-06.

Income Tax Return for A.Y. 2005-06 of Sri Sudhir Chowdhrie shows that income of Rs.9,66,700/- and Rs.96,036/- has been declared under the head ‘Income from House Property’ and ‘Income from Other Sources’ respectively.”

2.3 It was concluded by the AO that the assessee had not produced details of income earned by the Directors from foreign sources. Creditworthiness of the Directors was, therefore,

doubted and the AO held that the share application money of Rs. 38,33,03,071/- received by the assessee is income as envisaged u/s 68 of the Act. Addition was made to total income in this regard by concluding as under:

“The assessee company could not prove the creditworthiness of the persons advancing share application money to it. Therefore, the provisions of section 68 is clearly attracted in this case. In various judicial pronouncement the provisions of section 68 has been explained and it has been held that for justifying any credits in books of account, the assessee must prove identity, capacity of the creditors and genuineness of creditors. In this context the decision reported in 131 Taxman 391 (2003), 49 ITR 112 (SC), 50 ITR 1 (SC), 98 ITR 337 (SC), 161 Taxman 169 (SC), 53 ITR 623 (SC) and 34 ITR 807 (SC) are relied upon and the ratio of judgements in those cases are applicable to the facts of the case under assessment. Under the circumstances these 4 credits amounting to Rs.38,31,03,071/- found unexplained and treated as undisclosed income of the assessee company for the year under consideration u/s 68. Accordingly the same is included in total income of the assessee. Net addition Rs.38,33,03,071/-.”

2.4 Being aggrieved by the addition made above, the assessee filed an appeal before the Ld. CIT (A). During the course of appellate proceedings detailed submissions were made by the

assessee. The Ld. CIT (A) found merit in the submissions advanced by the assessee and he directed for deletion of the impugned addition by observing as under:-

“I have carefully considered the facts of the case, order of the AO and submissions made by the ld. AR. It is observed that in compliance of the notice of the AO, the Appellant company had provided the basic details of the four shareholders giving their names, addresses, their PAN Nos. as well as the details of cheques etc. through which the share application money was sent to the appellant company. The appellant also furnished the credit worthiness certificates of the shareholders as provided by these shareholders to the company. The AO, however, was not satisfied with the details provided by the appellant company and held that the credit worthiness and genuineness are not proved as the payment by cheque is not conclusive evidence of the credit worthiness of the payer. Such a view was formed by the AO on the basis of Supreme court decision reported in 214 ITR 801 (SC). On the other hand, it is claimed by the Ld. AR that as far as onus of the appellant company with regard to the share application money is concerned the same stands proved as the identity of the share holders is not in doubt at all as they are Income Tax payee. Furthermore, the AO of the appellant company had already passed on the information of the investment made by the shareholders to the AOs of the said shareholders and thereafter notice u/s 148 were issued to such shareholders. Copy of the assessment orders passed

u/s 148/143(3) of three shareholders namely Sh. Sudhir Choudhrie, Sh. Bhanu Chaudharie and Sh. Dhruv Chaudharie were also produced to point out that on one hand the addition for the same amount has been made in the hands of the appellant company whereas similar addition has also been made on substantive basis in the hands of these shareholders. In the light of this, it was contended by the ld. AR that taxing same income as unexplained investment on substantive basis in two hands shows that the AO is himself is not sure in this regard. As regards the fourth shareholder i.e., Sh. Sumant Kapur, it is pleaded that the same is a U.K. citizen and his source of income is not originated in India, accordingly in view of the settled law, as followed in the cases of DCIT vs. Finlay Corporation Ltd. 2003 – (ID4) GJX-0021 TDEL and Saraswati Holding Corpn. Vs. DDIT Circle 2(2), International Taxation, New Delhi 2007-(ID3)-GJX-0243-TDEL by ITAT Delhi, the same cannot be added u/s 68 in the hands of company. There is forcer in the argument of the ld. AR specifically in the light of few recent decisions of jurisdictional High Court in the cases of M/s Divine Leasing & Finance Ltd. 299 ITR 268 and Lovely Exports (P) Ltd. as well as the order of Hon’ble Apex Court in the case of M/s Lovely Export (P) Ltd. 216 ITR 195 wherein the Supreme Court has held that “if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO than the Department is free to reopen their assessments in accordance with law”. This decision was delivered while

dismissing the special leave petition of the Department. Further, in another recent decision the jurisdictional Delhi High Court in the case of M/s Value Capital Services (P) Ltd. has held that there is an additional burden cast on the Revenue to prove that the investment made by the share applicants actually emanated from the coffers of the assessee for treating it undisclosed income. By these recent decisions of the Hon'ble Apex Court and the Jurisdictional Delhi High Court, the existing law regarding the addition of share capital u/s 68 is almost settled and it can be concluded that in a case where the assessee has been able to prove the identity of the shareholders then even if it appears that the credit worthiness of the alleged shareholders is not satisfactorily proved, then addition should be made in the hands of the shareholder and not the appellant company. In the instant case action has already been taken in the hands of three shareholders and in these cases additions have already been made in their respective cases. The fourth shareholder is a foreign citizen whose sources of funds are not located in India. Therefore, considering the totality of facts and circumstances, I am of the view that the AO has not been able to prove by any positive evidence that either the shareholders are not existent persons or the contribution shown as share capital contribution of the shareholders have actually come out of the income of the appellant company. Therefore, in the light of the aforesaid recent judicial pronouncements, the impugned additions made u/s 68 in respect of the share capital contribution by the shareholders, whose identity has

been proved, in the hands of the appellant company not justified, hence the same are deleted.”

2.5 Being aggrieved, the department is now in appeal before us and has raised the following grounds of appeal:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition of Rs. 38,33,03,071/- made u/s 68 of the I.T. Act on account of unexplained credits shown as share capital contribution by the shareholders by relying on the decisions in the cases the facts and circumstances in which were totally different from the facts and circumstances of the case under consideration as the shareholders who it is claimed to have applied for shares in assessee company are also the directors in the assessee company whereas in the cases relied up to it is not so.*
2. *The appellant craves to be allowed to add, delete or amend any other grounds of appeal.*

3.0 It was submitted by Ld. CIT (DR) that the assessee has not been able to substantiate the credit worthiness of the four directors who have introduced share capital during the year under consideration. The Ld. CIT(DR) relied upon the judgment of the Hon'ble Apex Court in its recent judgement in the case of ACIT vs. NRA Iron & Steel Pvt. Ltd. reported in 412 ITR 161 (SC).

It was stated by the Ld. CIT(DR) that although the identity and genuineness of the transaction is not in dispute, however, the assessee has not been able to negate the objections raised by the AO that creditworthiness of the directors has not been substantiated.

4.0 Per contra Ld. AR, Shri Tarandeep Singh, vehemently supported the findings recorded in the impugned order. It was submitted by the Ld. AR that during the course of assessment proceedings, following documents/evidences were furnished by the assessee in order to substantiate the identity, genuineness and creditworthiness of the Shareholder Directors:

- Confirmation received from directors stating that the amount invested by them as share application money has been made out of income earned outside India and brought into India through banking channels.
- Vide letter dated 22nd June 2007 copies of Foreign Inward Remittance Certificate were submitted.
- Permanent Account Numbers of the Directors were also provided in the confirmation letters.
- Copies of the Income Tax Returns submitted in the case of the directors were submitted.

- To prove the credit worthiness and identity of the directors, copies of passport and certificate issued by Marshall & Associates, Certified Public Accountants, based at Sharjah, United Arab Emirates were produced.

4.1 The Ld. AR further submitted that the order of assessment in the instant case is dated 31st December, 2007 and premised upon the findings recorded by the AO in the order of the said order of assessment, notices u/s 148 of the Act were issued by the AO of the concerned directors proposing to reopen and assess their case. In this regard, the Ld. AR relied upon the order of the Coordinate bench of the ITAT in the case of ACIT vs. Sudhir Chaudhrie & Others reported in 55 ITR (Trib.) 681 (Del). Relying upon the decision of coordinate bench it was submitted by the Ld. AR that on one hand the AO of the assessee company is doubting the creditworthiness of the Directors and on the other hand the AO of the Directors has alleged that during the year under consideration their residential status in India is “Resident” premised upon high gravity of personal and economic relationship of the Directors with India. It was submitted by the Ld. AR that post reassessment proceedings of the Directors there

can be no further doubts regarding either the genuineness of the transaction of share capital or their identity and creditworthiness. It was also submitted by the Ld. AR that, undisputedly, the remittance of Share Capital was received from abroad through a recognized mode of remittance as mandated by the Reserve Bank of India (RBI) and that the genuineness of FIRC's furnished by the assessee have not been doubted by the AO. As regards the judgment of the Hon'ble Apex Court in the case of NRA Iron & Steel (supra) relied upon by the Ld. CIT (DR), it was submitted by the Ld. AR that the said judgment is distinguishable on facts and further the ratio propounded by the Hon'ble Supreme Court in the said judgment supports the case of the assessee. The Ld. AR further relied upon following judicial pronouncements:

- (i) Russian Technology Centre Pvt. Ltd vs DCIT reported in 155 TTJ 316 (Del.) as upheld by Delhi High Court in CIT vs Russian Technology Centre Pvt. Ltd in ITA No. 547, 549 & 555 of 2013
- (ii) Order dated 19th February, 2007 passed by Hon'ble Delhi High Court in the case of CIT vs M/S Pondy Metal and Rolling Mill (HC)

- (iii) Order dated 8th January 2008 passed by Hon'ble Supreme Court in case of CIT vs M/S Pandy Metal & Rolling Mills (P.) Ltd. in SLP No. 12860 of 2007
- (iv) Finlay Corporation Ltd reported in 86 ITD 626 (Del.)
- (v) Saraswati Holding Corpn. In. vs DDIT reported in 111 TTJ 334 (Del.)

5.0 We have heard the rival submissions and have also considered the material available on record. We find considerable merit in the submissions advanced by the Ld. AR. The AO has not doubted the genuineness of FIRC's furnished by the assessee. Share Capital has been remitted through *modus* recognized by the RBI. Moreover source of money received is undisputedly from abroad. The AO has not conducted any independent enquiry to doubt or disbelieve the evidences submitted by the assessee during the course of assessment proceedings. The sole independent enquiry conducted was by issuing notices u/s 148 to the Directors. Even those proceedings resulted in substantial compliance. Coordinate bench of the Tribunal vide order dated 6th March, 2017 reported in 55 ITR (Trib.) 681 (Del) has, after considering the facts in the case of the Directors, held that as per provisions of section 6 of the Act the residential status of Directors is "Non-resident". The judgment of the Hon'ble Apex

Court relied upon by the Ld. CIT (DR) does not support the case advanced by the Revenue. We find that the judgment of the Apex Court in NRA Iron and Steel (supra) is not applicable to the assessee as the facts are distinguishable. In NRA's case, the AO had issued notices under section 133 (6) of the Act and the parties were non-existent and did not respond, whereas in the present case the shareholder directors were existing and have also responded and participated in the reassessment proceedings initiated against them. They have admitted to them having invested in Share Capital of the assessee Company. Neither the AO of assessee company nor the AO of the Directors have alleged that the source of Share Capital was from assessee Company. None of them have doubted the FIRC's submitted by the assessee and the directors. The Assessee has filed all relevant evidences proving the identities and the credit worthiness of the Directors which also have not been doubted by the AO. The AO has not appreciated that the return of income filed by the Directors will only include incomes from sources in India considering that their residential status is that of a 'Non-resident'. Moreover, the CA certificate filed has also been rejected by the AO on whimsical grounds without bringing on record facts to objectively disbelieve

the same. We also note that the ratio laid down by the Hon'ble Apex Court in NRA's case (supra) on the contrary supports the case of assessee. As regards onus, Hon'ble Apex Court in NRA's case (supra) has held as under:

"This Court in the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.

8.3 With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge.

The Delhi High Court in CIT v. Oasis Hospitalities (P.) Ltd. [2011] 9 taxmann.com 179/198 Taxman 247/333 ITR 119, held that:

"The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."

It has been held that merely proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.

In Shankar Ghosh v. ITO [1985] 13 ITD 440 (Cal.), the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The loan amount was rightly held to be the assessee's own undisclosed income.

8.4 Reliance was also placed on the decision of CIT v. Kamdhenu Steel & Alloys Limited [2012] 19 taxmann.com 26/206 Taxaman 254 [2014] 361 ITR 220 (Delhi) wherein the Court that:

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise is going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness.

.... ..

11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

(i) The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

(ii) The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

(iii) If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.”

5.1 In the present case, undisputedly, the enquiry conducted by the AO has not unearthed anything negative so as to disbelieve the evidences furnished by the assessee in support of genuineness, identity and credit worthiness of the shareholders directors. Under the circumstances, we are of the considered view that the order of the Ld CIT (A) is correct and needs no interference. Accordingly we dismiss the grounds raised by revenue by upholding the order of Ld CIT (A).

6.0 In the final result, the appeal of the revenue is dismissed.

sd/-

**(PRASHANT MAHARISHI
ACCOUNTANT MEMBER**

sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 10/01/2020

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Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi