

➤ **Commissioner Of Income Tax v/s Nova Promoters & Finlease (P) Ltd**

342 ITR 169 (Delhi HC)

AN ANALYTICAL VIEW

(SHARE APPLICATION MONEY ADDED TO INCOME U/S 68 OF THE INCOME TAX ACT, 1961)

By PARAS KOCHAR, Advocate

A large number of decisions have been given by various Tribunals, High courts and Apex court in respect of Share Application Money Received or Share Capital raised by Private Limited Companies and Public Limited Companies. A number of Supreme Court decisions have already covered Section 68 of the Income Tax Act, 1961. But Share Capital amount has been dealt by the Judicial Authorities in different context. The controversy in respect of Share Application Money or Share Capital was more or less resolved after two judgements passed by the Apex Court as mentioned below –

- 1) **CIT VS LOVELY EXPORTS (P) LTD 216 CTR (SC) 195**
- 2) **DIVINE LEASING AND FINANCE LTD (2008) 299 ITR 268**

But very recently the Delhi High Court has passed a land mark judgement in **NOVA PROMOTERS AND FINLEASE PVT LTD** passed on 15th February 2012, in which most of the important decisions which are in favour of the Assessee have been discussed in length and the Delhi High Court has decided in favour of the revenue. Now, the revenue authorities in several proceedings are using the decision in Nova Promoters and Finlease Pvt Ltd (Supra) as tool for addition of share capital.

The facts of the cases are as follows –

The Assessee Company which is a Private Limited Company filed its Return of Income for the Assessment Year 2000-2001. The return was processed u/s 143(1) of the Income Tax Act, 1961. During the Financial Year 2004-05, the Assessing officer got a letter from Director of Income (Investigation) Delhi, that the Assessee company has arranged accommodation entries in grab of the Share Application Money amounting to Rs 1,85,00,000/- for the Assessment Year 2000-2001. It was further stated in the said letter that two persons namely Sri Mukesh Gupta and Sri Rajesh Jassal has given statement to the Investigation Wing that they had provided accommodation entries to the Assessee Company. The necessary documents such as copy of statement, CD showing such transactions was also provided to the Assessing Officer and therefore, the Assessing Officer reopened the Assessment u/s 148 of the Income Tax Act, 1961. The Assessing Officer provided the evidences sent by the Investigation Wing to the Assessee Company on its request. The summons issued to some of the share applicant companies remained un-served and some of

the summons were served but remained un-complied with. The summons served to Sri Rajesh Jassal and Sri Mukesh Gupta also remained un-complied with. The Inspector was also deputed to serve the summons. The Inspector reported that the parties were not existing or available at their addresses. Thereafter, the Assessing Officer asked the Assessee Company to produce the Share Applicant Companies and its Directors. The Assessee Company could not produce the same. However, the Assessee Company filed two affidavits of Sri Rahesh Jassal and Sri Mukesh Gupta in which it was stated that their statements were taken under pressure by the Investigation Wing, however, the transactions were genuine. But the Assessing Officer made addition of Rs. 1,85,00,000/- in the hands of the Assessee Company U/s 68 of the Income Tax Act, 1961 rejecting the explanation of the Assessee and also made an addition of commission for arranging the entries.

The Assessee Company challenged the jurisdiction of the Assessing Officer to reopen the case and passing order u/s 147 of the Income Tax Act, 1961 and also challenged the addition made in respect of Share Application monies as well as commission on such amount by filing an Appeal before the learned CIT (Appeal) who accepted that the reopening of the case was rightly made by the Assessing Officer. The CIT (Appeal) directed the Assessing Officer to examine the veracity and genuineness of the affidavits and to verify the genuineness of the transactions of the Assessee Company in respect of Share Capital.

The Assessing Officer submitted a Remand Report. The finding noted in the said remand report is briefly mentioned below –

- A)** The affidavit is not sworn by the two deponents and hence not admissible as evidence.
- B)** The Assessee could not produce the deponents in spite of several reminders and hence they could not be examined.
- C)** The deponents in response to the summons u/s 131 of the Income Tax Act, 1961 had admitted before the Investigation Officer that the transactions made with the Assessee Company were not genuine and were accommodation entries.
- D)** The summons issued to the principal officers of the companies could not be complied with and the Inspector also could not trace such persons at their addresses.
- E)** There was also non-compliance to summons issued to principal officers of share applicants companies and the deponents of the affidavits by the Assessing Officer during Remand proceeding.

It was reported by the Assessing Officer that on the basis of above finding that transactions were not genuine and the assessee was misleading the Income Tax Department. The CIT (Appeals) after considering the Remand Report, Submission of the Assessee and other evidences and facts concluded that the Assessing Officer was not justified in making addition in respect of share capital as well as the commission and therefore, deleted the additions made

by the Assessing Officer. In arriving at this conclusion, the CIT (Appeal) recorded his finding as under –

- (a)** The Assessing Officer has disregarded the documentary evidences adduced by the assessee such as confirmation from the share applicants, their Income Tax file numbers, certificate of incorporation of those companies, records of the Registrars of Companies (ROC) generated from the website, affidavits filed in support of the fact of advancing share applications monies etc.
- (b)** The Income Tax Inspector, who reported that the share applicant companies did not exist at the given addresses, did not make any further effort to find out the latest whereabouts of the Companies. The Assessing Officer could have found the latest addresses through the Postal Department.
- (c)** Even though the summons served on some of the Investor Companies remained un-complied with, the Assessing Officer did not initiate any action against them for non-compliance, despite possessing enough power to enforce their attendance.
- (d)** The subscriptions for the shares were received through cheques.
- (e)** The Investor-companies were active as per the website of the Ministry of Corporate Affairs and they were duly registered with ROC.
- (f)** Those companies were also having their Income Tax PAN numbers and regularly filed Return of Income.
- (g)** No material was brought on record by the Assessing Officer to show that the affidavits filed by the Directors of the Investor Companies were not genuine. No enquiries were conducted about the contents of the affidavits. Even during the Remand proceedings the Assessing Officer did not make any attempt to discredit the affidavits and merely stated that the summons issued to the deponents on 24th April, 2009 (in the course of the remand proceedings) remain un-complied with. The result is that the contents of the affidavits have not been disproved. It also shows that the parties (deponents) were present at the given addresses against whom action could have been taken.
- (h)** No material was brought on record by the Assessing Officer independently of the information received from the Investigation Wing of the Income Tax Department to show that the monies represented the assessee's undisclosed income.

Aggrieved by the order of CIT (Appeal), the revenue filed an appeal before the Hon'ble ITAT in respect of merit of the case. The ITAT decided the issues in favour of the Assessee on the similar reasons given by the CIT (Appeal) and Hon'ble Delhi High Court reversed the order of the Tribunal.

The Hon'ble Delhi High Court has cited the case of **CIT Vs Durga Prasad More (1971) 82 ITR 540** and stated that –

“It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.”

There was no evidence that cash was given by the Assessee to the share applicants against cheques received on account of share capital received. Such transactions were not rare also; rather such transactions are very common for businessman. The Hon'ble Delhi Court also discussed the decision in **Mehta Parikh and company (1956) 30 ITR 181** Cited by the appellant before ITAT. It was stated that unless the deponent appears, the veracity of the affidavit cannot be examined. Since there was no appearance in this case, the ITAT should not have relied on the affidavit of the two persons. In such circumstance, the Hon'ble Court should have set-aside the case back to the lower authorities.

The Hon'ble Delhi High Court has also dealt the important decisions in **CIT v/s Lovely Exports (P) Ltd (Supra) and Divine Leasing and Finance Ltd (Supra)** on which the lower authorities have mainly relied upon. The Hon'ble High Court has stated that the facts of above cited Supreme Court Judgements are different than facts of this case. The 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 in respect of their identity, creditworthy and genuineness 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 u/s 68 of the Income Tax Act, 1961 and the remedy open to the revenue is to go after the Share Applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessee's bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly

indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the Revenue Authorities into the activities of such "entry providers".

The Hon'ble high court has relied on this judgement only because the parties could not explain the recital of the documents as there was no other reason. It was not considered by them that the companies which had subscribed for shares of the appellant company had huge paid up capital and reserve. Further, the Hon'ble High Court of Delhi has failed to take cognisance of few facts of the case that the department could not prove in this case that there was any payment of cash in lieu of cheque being received by the Assessee Company. Further, the department had no evidence in its possession other than the confessional statement of the above mentioned persons. The Hon'ble Court has also not relied on various documents of registrar of companies submitted by the Assessee before the Assessing Officer. The Hon'ble justice also failed to take note of the fact that the statement cannot be basis of addition or disallowance if corroborative evidence is not found. The Hon'ble High Court has given more weightage to the statements of two persons in comparison to various other authenticated documents produced before the learned Assessing Officer by the Assessee Company. It was also important to consider that share applicant companies were assessed to tax and no adverse inference had been drawn against them by the Assessing Officer under whom such companies were assessed. Furthermore, the cross examination of the witnesses could not be made although notice to them was served in respect of affidavit sworn by them.

Therefore, it would be more fare and logical to send this case for Remand to the Assessing Officer with specific directions before coming to any conclusion.