

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Rahul Chaudhary (Judicial Member)]**

ITA Nos. 4057/Mum/2019
Assessment year: 2014-15

**Deputy Commissioner of Income Tax
Central Circle- 7(3) Mumbai**

..... Appellant

Vs.

Lotus Logistics & Developers Ltd
419, Laxmi Plaza, Laxmi Industrial Estate
New Link Road, Andheri, Mumbai 400 053 [PAN: AABCL1198G]

.....Respondent

and others (As per annexure 1 attached)

Appearances by

Nikhil Chaudhury, Commissioner (DR), for the revenue
Rushabh Mehta, CA, for the assessee

Date of concluding the hearing : 23/02/22
Date of pronouncement of this reference : 25/02/22

SPECIAL BENCH REFERENCE

Per Pramod Kumar, VP:

1. One of the issues which have come up for our adjudication in this appeal, in substance, is the Assessing Officer's grievance raising the question as to whether or not **"the learned erred in deleting the addition of Rs 26,59,63,357 made by the Assessing Officer as unexplained cash credit received from Divine Tradecom Pvt Ltd (DTPL, in short) in the form of share capital under section 68"**. This investment made by the DTPL, in equity shares of Rs 10 each at a premium of Rs 121.37 per share, was for amount of Rs 32.90 crores, but then the offset of Rs 6,30,36,643 is given by the Assessing Officer on account of additions made in the hand of the other group companies, and the net amount of Rs 26,59,63,357 was added to the income of the assessee as an unexplained credit. It is deletion of this addition by the learned CIT(A), vide order dated 28th March 2019 for the assessment year 2014-15, which is now impugned in appeal before us.

2. Very briefly stated, the relevant material facts, as discernible from material on records, are as follows. The DTPL is a Kolkata based company with a share capital of Rs 2.45 crores, and reserves and surpluses, from issuance of shares at premium, at Rs 46.50 crores. It shows an interest income of Rs 38.31 lakhs on the incomes side, and apart from bad debt provision at Rs 42 lakhs and director's remuneration of Rs 26.35 lakhs, entire expenses of Rs 19,259 during the year, on the expenses side. On 2nd December 2014, investigation wing officials recorded statement of one person (hereinafter referred to as PKP), who was a

director in the said company. In this statement, it was inter alia stated (a) that PKP was a salaried employee earning Rs 20,000 p.m. and did not have any significant savings or assets beyond co-ownership in a flat costing Rs 18 lakhs; (b) that PKP was a dummy director in 20 companies including DVPL; and (c) that almost all the companies in which PKP was director were jamakharchi companies, i.e. companies without any significant business and primarily used for financial manoeuvres. Within a day of giving this statement, however, PKP filed a police complaint against mental torture, harassment and unlawful detention by the income tax officials, and within a week of this statement being recorded, PKP retracted his statement before the Metropolitan Magistrate, Kolkata. In the retraction statement, PKP's stand was that these companies were involved in genuine business activities. It was in this backdrop that the Assessing Officer questioned bonafides of this share subscription by the DTPL. The Assessing Officer noted that the share subscriptions were by private placements and relied upon the analysis of legal position in the light of Hon'ble Delhi High Court's judgment in the case of CIT Vs Nova Promoters and Finlease Pvt Ltd [(2012) 18 taxmann.com 271 (Del)]. It was also noted that there was a full-fledged racket providing accommodation entries and the common directors in many such companies, including DVPL. It was also noted that DVPL, alongwith two other companies- namely Rowland Trexim Pvt Ltd and Bhawana Computers Pvt Ltd had invested Rs 118 crores in the group companies of the assessee, and the very group companies of the assessee, in which such huge investments were made, had eventually purchased all the three companies for an overall consideration of Rs 5 crores. The transaction thus was, taking these three companies together, that a company invests Rs 118 crores in Lotus group companies, and the companies so investing the money in Lotus group companies buy these investment companies for Rs 5 crores. The transaction was analyzed in the assessment order as follows:

6.14 One more important fact worth noticing is that the companies with huge reserves of 118 Crores have been bought for as minimum amount as 5 Crores. The reasons for the same has been explained in the due diligence report that the company has given huge amount of loan which has become bad. It was found that the company has given loan to Lotus group, Patel/Patni Group and Gothi who are inter connected (Please refer the statement of Shri Ashok Agarwal). Thus, the money was already lying with the companies; however, they bought the company for the sake of formality and give it a color of genuineness. More interestingly, after the companies have been bought by the Lotus Group, the loans became recoverable. Thus, the entire modus operandi reveals that the company has been incorporated to infuse the own unaccounted money by creating the layers of company. At the first layer, the unaccounted money has been given to the entry providers to make investment in some other Kolkata based companies. At the second layers the companies in which investments were shown have made investments in Rowland Bhavana and Divine and at third layer those companies are bought by the Lotus Group at very minimal price to give it a color of genuineness to the whole transaction.

6.15 If sources of funds infused by Divine Rowland and Bhawana for providing unsecured loans and share application money to Lotus Group are examined then it becomes crystal clear that the above transactions made by the Lotus Group are mere accommodation entries. Some of companies identified during the course of search and survey belongs to identified entry operators. In the past these entry operators [Shri Anand Sharma, Shri Pankaj Agarwal, Shri Vikas Choudhary, Shri Jivendra Mishra, Shri Janardan Chokhani, Shri Narendra

Kumar Jain, Shri Prakash Jajodia, Shri Subhash Kumar Agarwal, Shri Amit Kedia, Shri Abhishek Chokani, Shri Uday Shankar Mahawar, Shri Subhash Agarwal, Shri Praveen Agarwal] have accepted before the Department that they are in the business of providing accommodation entries and only for that purpose they have created shell companies for carrying out these activities They provide accommodation entries in lieu of cash, by rotating these cash in numerous self controlled shell entities, which is also the fact in the case of above three entities which were acquired by the Lotus Group.

3. It was, inter alia, in this backdrop that the Assessing Officer concluded that the amounts received by the assessee as share capital lack genuineness and these amounts were added to the income of the assessee. While doing so, he also referred to, rather extensively, from the statement of PKP as recorded by the investigation wing, and about how a transaction as a part of such financial maneuvering cannot be treated as a genuine transaction. However, when matter was carried in appeal before the Commissioner (Appeals), she noticed that the assessee has furnished (a) PAN Card of investor; (b) ITR Acknowledgement along-with computation of income of the investor company; (c) Financial statements of the investor company; (d) Bank Statement of the investor company highlighting the share application money invested ; (e) Copy of duly signed Share Application forms of the investor; (f) Copy of the Return of Allotment (Form 2) filed with the Registrar of Companies; (g) Copy of boards' resolution of the appellant company for issuing shares at premium and allotment of shares to the investor company; (h) Copy of Offer letter given by the assessee to the investor dated 02.08.2013; (i) Copy of letter showing acceptance to the offer of shares filed by the investor dated 06.08.2013; (j) Copy of Affidavit of Mr. Bhagwanji Patel ; (k) Copy of letter given by the assessee to the investor for intimation of allotment dated 02.11.201; (l) Retraction Statement of Shri Pradeep Poddar dated 09.12.2014; (m) CBDT Letter F.No.286/98/2013-IT(Inv II) dt. 09.01.2014; and (n) Judgment of Hon'ble Gujrat High Court (Ramanbhai B Patel and Chetnabhen J Shah). She further observed as follows:

7.7 The expression “nature and source” has to be understood together as a requirement of identification of the source and the nature of the source, so that the genuineness or otherwise could be inferred. The Hon’ble Supreme Court, in Kale Khan Mohd. Hanif vs. CIT [1963] 50 ITR 1, pointed out that the onus on the assessee has to be understood with reference to the facts of each case and proper inference drawn from the facts. If the prima facie inference on the fact is that the assessee’s explanation is probable, the onus will shift to the Revenue. As far as the creditworthiness or financial strength of the creditor/subscribers is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its account to enable it to subscriber to the share capital. Once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to prove the matter further.

7.8 Element of credit worthiness and satisfaction of AO thereafter is subjective and requires more efforts/inquiry on the part of the AO to give a finding in the order that investor is not credit worthy. The AO must make proper enquiry before making any addition. In Khandelwal Constructions v. CIT 227 ITR 900(Gau.) it has been held that section 68 empowers the Assessing Officer to make enquiry. If he is satisfied that these entries are not genuine he

has every right to add these as income from other source. But before rejecting the assessee's explanation, A.O. must make proper enquires and in the absence of proper enquiries, addition cannot be sustained.

4. It was also noted that in view of the CBDT instruction dated 18th December 2014 has directed the field authorities to focus on collection of evidences rather than confession or admission about additional income, and that this instruction has been relied upon by Hon'ble Gujarat High Court to hold that an addition cannot be made on the basis of admission simplicitor. The impugned addition was thus deleted. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

5. When this bunch of appeal came up for hearing before us, our attention was invited to a large number of decisions of the coordinate benches which hold that once all such material, such as mentioned in paragraph 3 above, are filed by the assessee, the onus shifts on the department to prove that the share capital subscription is genuine, and there is no specific findings by the Assessing Officer to disprove the transactions either. In the 16 page note filed by the learned counsel, numerous decisions of the coordinate benches and judgments from Hon'ble Courts above have been filed to buttress this point. As we take note of this plea, we are also alive to the fact that certain coordinate benches have taken a different path, for example in **DCIT Vs Leena Power Tech Engineers Pvt Ltd [(2021) 130 taxmann.com 341 (Mum)]**, authored by one of us (i.e. the Vice President) wherein it is observed that **"genuineness of a transaction is one of the most important, foundational and critical factors in determining whether explanation given by the assessee is acceptable or not is its genuineness and this genuineness is to be examined in the light of ground realities, rather than random extracts from judicial precedents isolated from their true context as an exposition of law on a standalone basis. Undoubtedly, that is a subjective exercise, but that cannot be excuse enough to fight shy of this call of duty and not to probe the matter properly for taking a well considered call on whether the impugned share application monies received, in this case, a genuine transaction or not. Being superficial in approach is not only against the ethos of the judiciary, but certainly an antithesis for justification of the specialized Tribunals like this Tribunal. Unlike in a court of law, this Tribunal has the benefit of expertise of technical members, from accountancy and revenue service background, and the least expected of them is to ensure that the facts are properly analyzed, in the light of expert domain knowledge they have or they are legitimately expected to have, and set out the same before application of the legal principles on those facts"**. This decision, in turn, follows an earlier decision of the Tribunal, in the case of **Pawankumar M Sanghvi Vs ITO [(2017) 81 taxmann.com 308 (Ahd)]** which has been confirmed right upto Hon'be Supreme Court. We see no meeting ground between these two streams of decisions. For example, if we follow the path taken by the coordinate benches in the cases where production of the evidences showing identity of parties and money having been routed through banking channels, in the absence of any findings to show lack of genuineness, we should unhesitatingly uphold taking the amounts outside the ambit of the unexplained credits under section 68. On the other hand, if we follow the path of putting genuineness to test on the basis of an overall larger picture and ground realities, it will be difficult to overlook all the red flags raised by the case history such as of a man of limited means being director in score of companies, the fact that some companies investing Rs 118 crores in the assessee group, could be purchased by the group entities for just Rs 5 crores, the fact that every time DTPL had to make payments to the assessee company, there were similar credits in its bank accounts of the DTPL from different sources, the fact that DTPL's annual office expenses were less than Rs 20,000, the fact that the DTPL made this investment at a

huge premium and there is no justification on record for such a huge premium-that too through a private placement, and the fact that DTPL aptly meets the description of shell companies which are used for financial manoeuvrings. The phenomenon of shell companies being used for financial manoeuvrings and even money laundering, as even Hon'ble Prime Minister took note of in his 2017 independence day address, is not an open secret- secret if it is; we, as a specialized Tribunal, cannot even pretend to be so naïve to be oblivious of it. When we so look at this case without any blinkers on, the share capital transaction in question can be anything but genuine, and genuineness is a critical factor for deciding whether or not a transaction can be said to be unexplained credit under section 68. Clearly, therefore, there is no meeting ground in the approaches so adopted by the coordinate benches.

6. As for the coordinate bench decisions, these decisions deserve utmost respect and serious consideration. The need for continuity, certainty and predictability in the administration of justice, as recognized by Hon'ble Supreme Court in the case of **Union of India Vs Paras Laminates Pvt Ltd [(1991) taxmann.com 31 (SC)]** by observing that “**persons affected by decisions of Tribunals or Courts have a right to expect that those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters.....lest such judicial inconsistency should shake public confidence in the administration of justice**” can hardly be over-emphasized. In order to ensure that there is consistency in approach, it is time that the matter is referred to a larger bench so that a reasonably uniform stand can be adopted in such cases, and some broad parameters can be set for taking calls in such cases. We have no doubt about what needs to be done in this case and in which manner the matter needs to be examined in greater detail, and we are of the considered view that the approach adopted by Leena Power (*supra*) is the right course, but we have to be equally respectful to contrary approaches adopted by the coordinate benches, and leave the matter to a larger bench to take an appropriate call and also to give requisite guidance for the division benches. Such a divergence of approach by the division benches, howsoever bonafide, has to be avoided, and an authoritative decision by a larger bench, which will constitute binding precedent for all the division benches, can certainly bring an end to this divergence of approach.

7. It is in this background, and for the detailed reasons set out above, that we direct the Registry to place the matter before Hon'ble President, for taking a call on our recommendation for constitution of a bench of three or more members to decide this bunch of appeals.

Sd/-
Rahul Chaudhary
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 25th day of February, 2022

Copies to: (1) *The appellant* (2) *The respondent*
(3) *CIT* (4) *CIT(A)*
(5) *DR* (6) *Guard File*

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai

Annexure 1 to the Special bench reference

ITA Nos. 3697 & 3698/Mum/2019
Assessment years: 2008-09 & 2015-16

M/s. Lotus Logistics & Developers Pvt. Ltd., **Appellant**
*1301, 13th levels, Lotus Trade Centre,
Near D N Nagar Metro, New Link Road, Andheri (W),
Mumbai 400053 [PAN: AABCL1198G]*

Vs.

Deputy Commissioner of Income Tax,
Central Range-7(3), Mumbai **Respondent**

ITA Nos. 4039, 4044, 4058/Mum/2019
Assessment years: 2008-09, 2010-11 & 2015-16

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai **Appellant**

Vs.

M/s. Lotus Logistics & Developers Pvt. Ltd., **Respondent**
*1301, 13th levels, Lotus Trade Centre,
Near D N Nagar Metro, New Link Road, Andheri (W),
Mumbai 400053 [PAN: AABCL1198G]*

CO No. 44/Mum/2021
Arising out of ITA No. 4044/Mum/2019
Assessment year: 2010-11

M/s. Lotus Logistics & Developers Pvt. Ltd., **Cross objector**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AABCL1198G]*

Vs.

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai **Respondent**

ITA No. 1482/Mum/2019
Assessment year: 2012-13

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai **Appellant**

Vs.

M/s. Lotus Engicon Pvt. Ltd., **Respondent**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053 [PAN: AABCL4505H]*

CO No. 109/Mum/2021
Arising out of ITA No. 1482/Mum/2019
Assessment year: 2012-13

M/s. Lotus Engicon Pvt. Ltd.,**Cross objector**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AABCL4505H]*

Vs.

Deputy Commissioner of Income Tax,**Respondent**
Central Circle-7(3), Mumbai

ITA No. 2341/Mum/2019
Assessment year: 2012-13

Deputy Commissioner of Income Tax,**Appellant**
Central Circle-7(3), Mumbai

Vs.

M/s. Lotus Realtors**Respondent**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AADFL8838J]*

CO No. 111/Mum/2021
Arising out of ITA No. 2341/Mum/2019
Assessment year: 2012-13

M/s. Lotus Realtors**Cross objector**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AADFL8838J]*

Vs.

Deputy Commissioner of Income Tax,**Respondent**
Central Circle-7(3), Mumbai

ITA No. 2340/Mum/2019
Assessment year: 2011-12

Deputy Commissioner of Income Tax,**Appellant**
Central Circle-7(3), Mumbai

Vs.

M/s. Lotus Spaces Pvt. Ltd.,**Respondent**
*204, Rajshree Accord, Telli Gali X Lane,
Andheri (E), Mumbai 400069 [PAN: AADCP5843J]*

CO No. 112/Mum/2021
Arising out of ITA No. 2340/Mum/2019
Assessment year: 2011-12

M/s. Lotus Spaces Pvt. Ltd.,**Cross objector**
*204, Rajshree Accord, Telli Gali X Lane,
Andheri (E), Mumbai 400069 [PAN: AADCP5843J]*

Vs.

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai**Respondent**

ITA Nos. 1484, 1485 & 1593/Mum/2019
Assessment years: 2013-14 to 2015-16

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai**Appellant**

Vs.

M/s. Lotus Buildspace LLP**Respondent**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AAEFL2464P]*

CO No. 43/Mum/2021
Arising out of ITA No. 1484/Mum/2019
Assessment year: 2013-14

M/s. Lotus Buildspace LLP**Cross objector**
*419, Laxmi Plaza, Laxmi Industrial Estate,
New Link Road, Andheri (W) Mumbai 400053
[PAN: AAEFL2464P]*

Vs.

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai**Respondent**

ITA Nos. 3115 & 3040/Mum/2019
Assessment year: 2011-12

Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai**Appellant**

Vs.

M/s. A M Construction**Respondent**
*Lotus Pride, 6th Floor, Vallah Road,
Vile Parle(W) Mumbai 400069 [PAN: AANFA2827N]*

ITA No. 3041/Mum/2019
Assessment year: 2012-13

**Deputy Commissioner of Income Tax,
Central Circle-7(3), Mumbai**

.....Appellant

Vs.

M/s. A M Developers and Realtors
8/A Kismat Nagar CST Road Kurla (W),
Mumbai 400069 [PAN: AAUFA4101C]

.....Respondent

Sd/-
Rahul Chaudhary
(Judicial Member)
Mumbai, dated the 25th day of February, 2022

Sd/-
Pramod Kumar
(Vice President)

Copies to:

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(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

*Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*