

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri J.Sudhakar Reddy, AM & Hon’ble Shri S.S. Viswanethra Ravi, JM]

I.T.A No. 1876/Kol/2014

Assessment Year : 2010-11

I.T.O. Ward-9(1), Kolkata

-vs-

M/s Malinath Tradecon Pvt. Ltd.

[PAN: AAECM 1557 F]

(Appellant)

(Respondent)

For the Appellant : Shri Saurabh Kumar, Addl. CIT (DR)

For the Respondent : None

Date of Hearing : 01.11.2017

Date of Pronouncement : 26.12.2017

ORDER

J.Sudhakar Reddy, AM

This appeal by the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals) Central-I, Kolkata [in short the Id CITA] dated 21.07.2014 against the order passed by the DCIT, CC-VIII, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 20.03.2013 for the Assessment Year 2010-11.

2. None appeared on behalf of the assessee despite issuance of notice by RPAD. Earlier also, notices were issued by RPAD as well as through the Department. There is no response from the assessee. Under the circumstances, we dispose of this case ex parte qua the assessee on merits after hearing the Ld. DR.

3. The assessee is a company and filed its return of income electronically on 27.09.2010 declaring NIL income. The return was processed u/s 143(1) of the Act. Later survey operation was conducted u/s 133A of the Act in the business premises of

the assessee, in connection with the search operation u/s 132(1) and survey operation u/s 133A of the Act at the various premises of Shri Sagar Mal Nahata, a qualified chartered accountant and proprietor of the concern M/s S.M. Nahata & Co. as a consequence to the search and seizure operation in Bhusan Group (Chandigarh segment) of cases. Notice given u/s 143(2) of the Act was issued. The assessment was completed u/s 143(3) of the Act. The Ld. AO from Para 8 to Para 10.3 of the order held as under:

8. After considering the above mentioned facts, it is established that Mr. Loknath Sen is earning his income as salary from any other company (i.e. M/ s Sincere Multicommunity Pvt. Ltd.) and not as a directors' salary from the companies in which he is one of the directors. The directors are only the Benami Directors of all the alleged companies created only to provide accommodation entries. While going through the balance sheet of the companies it is seen that the total of share capitals of companies under consideration figures to Rs.106.53 Crores. As the companies are closely held companies, it is quite natural that the directors should have plenty of movable and immovable assets as well as huge income but the income of the director is very meagre. He is not at all rich person and doesn't live in a princely way. Though being common director in as many as nine companies given above, the income of the director is not at all commensurate with the financial position of the companies. He is the poor fellow and his name is used by his master.

8.1 The director is unaware of the owner of the business premises and he does not even know where the premises are situated. The director of any company is supposed to be well aware of the activities and businesses of the company. It is surprising that being one of the directors he was unable to throw any light on the most basic activities, as far as these companies are concerned. It is construed on the above facts he is merely an employee and has nothing to do with the functions as assigned to the post of director and acts like a puppet as instructed by some Pal Da, Ghosh Da or Bose Da.

8.2 The statement given by Mr. Loknath Sen as discussed at length above is self-speaking that he does not have any independent indulgement and activities as director in the above companies as well as he is incompetent enough to understand any of the documents of the companies. He is simply a scapegoat managed to sign on behalf of the companies to flourish fake investments as share application / share capital in the guise of legal entities. He has no control over the companies and no involvement in the everyday affairs.

9. The above enlisted nine companies have been engaged in providing accommodation entries to the four companies namely M/s Vision Steel Pvt. Ltd., M/s Marsh Steel Pvt. Ltd., M/s Jasmine Steel Pvt. Ltd. & M/s Diyajyoti Steel Pvt. Ltd. including all investments as shown in their respective balance sheets.

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Assessment Year: 2010-11

9.1 Company-wise details of accommodation entries provided to the four group companies of M/s Bhushan Power & Steel Ltd. during the F.Y. 2007- 08, 2008-09 & 2009-10 are summarized as below:

(Rs. in Crore)

Sl. No	Name of the Company	Amount to M/s. Diyajyoti Steels Pvt. Ltd.	Amount to M/s. Vision Steels Pvt. Ltd.	Amount to M/s. Marsh Steels Pvt. Ltd.	Amount to M/s. Jasmine Steels Trading Pvt. Ltd.	TOTAL
1	Abhiruchi Mercantile (P) Ltd.	0.50 (2008-09)	0.50 (2009-10)	0.45 (2008-09)	0.55 (2009-10)	2.00
2	Ashirvad Vinimay (P) Ltd.	0.54 (2009-10)	1.00 (2009-10)	0.75 (2008-09)	1.00 (2009-10)	3.29
3	Balabhadra Trading (P) Ltd.	2.50 (2008-09)	0.50 (2009-10)	-	1.90 (2008-09)	4.90
4	Malinath Tradecon (P) Ltd.	0.50 (2009-10)	0.50 (2008-09)	0.20 (2008-09)	0.50 (2009-10)	1.70
5	R.S. Coalfield (P) Ltd. (Pavapuriprabhu Tradecon Pvt. Ltd.)	-	0.30 (2008-09)	-	0.50 (2008-09)	0.80

6	Ramdoot Agencies (P) Ltd.	1.50 (2008-09)	-	1.00 (2009-10)	0.60 (2009-10)	3.10
7	Reward Sales Promotion (P) Ltd.	-	0.09 (2009-10)	-	-	0.09
8	Shantinath Tie Up (P) Ltd.	0.50 (2008-09)	0.53 (2009-10)	-	0.50 (2008-09)	1.53
9	Suskgyani Trading (P) Ltd.	0.70 (2007-08)	0.25 (2007-08)	0.75 (2007-08)	0.75 (2007-08)	2.45
TOTAL		6.74	3.67	3.15	6.3	19.86

9.2 As discussed in detail above, it is clearly established that the accommodation entries have been provided to the four companies of Bhushan Group, namely M/s Vision Steel Pvt. Ltd., M/s Marsh Steel Pvt. Ltd., M/s Jasmine Steel Pvt. Ltd. & M/s Diyajyoti Steel Pvt. Ltd. through companies including the company under consideration. M/s. R. S. Coalfield Pvt. Ltd. (Pavapuriprabhu Tradecon Pvt. Ltd.) along with other companies as listed above are in the business of nothing but providing accommodation entries through the mode of inter corporate bogus deposits/ share capital from some different set of companies having same motto by rotation of huge sums through numerous self owned and self managed fictitious companies. The alleged assessee company has arranged its fund mostly from the introduction of fake share capital in its respective balance sheet. The assessee company has issued shares at very high premiums though neither there are any

substantial profit earning activities nor its profit margin has been so attractive. No actual business is being carried out by the companies. It is very hard to believe how such a company like this can have such a goodwill and reputation in the economy to attract investments in shares having value of as many as 50 times greater than its face value especially when it has no normal business activities and having no infrastructure or staffs or even no business premises at all.

10. In view of the above, it is seen that the assessee company is a mere name lender paper company and acts as a conduit for receiving the entries and issuing the entries in the form of share applications. This is a fit case for piercing the corporate veil and examining the actual activity. Creation of documentation e.g., purchase & sale bills of shares, passing the cheques through banking channels, obtaining PAN, filing of returns with ROC, maintaining the bank accounts, share application forms, board resolutions, balance sheet, etc. have been framed. However, this documentation has been enacted wholly and exclusively for the purpose of receiving the entries and issuing the entries. The form can't undermine the substance of the transactions. This so called company is nothing but a legal fiction.

10.1 The ultimate beneficiary of-all the alleged transactions made by the above mentioned nine fake companies is M/ s Bhushan Power & Steel Ltd. and the unaccounted monies of M/s Bhushan Power & Steel Ltd. has been routed through all these bogus companies which have been shown as their investments.

10.2 Hon'ble Hight Court in the case of CIT v. Independent Media (P.) Ltd. in [2012] 210 Taxmann 14 (Delhi) has held that it is not incumbent upon the Assessing Officer, on the facts and circumstances of the case, to establish with the help of material on record that the share monies had come or emanated from the assessee's coffers. Section 68 of the Act casts no such burden upon the Assessing Officer. This aspect has been considered more than 50 years back by the Hon'ble Supreme Court in the case of A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807. To place such a burden on him, an impossible one at that, would be quite contrary to the judgments of the Hon'ble Supreme Court cited above.

10.3 Therefore, even though corporate entity has been created, this office, after considering all the facts as above, has come to the conclusion that what is apparent is not real and the alleged company does not really exist as there is no base for the transaction shown to have been conducted. Therefore, there is neither any brokerage & commission received, nor any expenses incurred nor any net profit gained. As the alleged company is nothing but a legal fiction, the gross total income, the total income as well as the tax liability is hereby treated as NIL.

4. Aggrieved, the assessee carried the matter in appeal disputing the finding of the Assessing officer that the assessee company is legal fiction and does not really exist. The Ld. CIT(A) upheld the contention of the assessee and para 14 held as under:

“14. That inference drawn by the Ld. Assessing Officer that the Appellant Assessee is a mere name lender paper company and act as a conduit for receiving the entries and issuing the entries in the form of share applications are based on surmises and wrong conclusion.”

5. Aggrieved, the Revenue is in appeal before us on the following grounds:

1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred on facts as well as in law in holding that the assessee company and its associates had given accommodation entries of Rs. 194.99 cr. To ultimate beneficiary M/s Bhushan Power & Steel Ltd.

2. That on the facts and circumstances of the case, the CIT(A) failed to appreciate that the assessee company is an entity to provide entries to M/s Bhushan Power & Steel Ltd and that assessee company is only a conduit, ignoring evidences as mentioned in the assessment order.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that this is a fit case in which corporate veil can be lifted to find out the real affairs of the assessee company.

4. That on the facts and circumstances of the case and in law, the CIT(A) has erred in giving precedence to form over the substance, ignoring the evidence mentioned in the assessment order.

5. That department craves to add, modify or alter the grounds of appeal during the course of hearing of the case.

6. After hearing the Ld. DR, we are of the considered opinion that the Assessing Officer was wrong in not assessing the company which has filed its return of income. Admittedly, the assessee company had taken accommodation entries and has also provided accommodation fees by way of share capital. While so, the Ld.AO was duty bound to examine the applicability of Section 68 of the Act. Instead of the Assessing Officer chose to hold that the assessee did not exist. Such a finding cannot be upheld. The AO has not done his duty of enquiring into the credits and passing an order on merits. There is no finding as to in which company the credit entries have been

examined on merits in the chain of transaction. No assessment order on merits has been passed.

7. The CIT(A) also failed in his duty to use his co-terminus power with that of the AO and examine the applicability of Section 68 to the facts of the assessee's case. He simply accepted the contention of the assessee that the assessee company exists and did not direct the AO to enquire on merits and given a remand report. In the result, no proper assessment has been done in this case.

8. The Honourable Delhi High Court in the case of *CIT VERSUS M/S JANSAMPARK ADVERTISING AND MARKETING (P) LTD. in ITA 525/2014, Judgement dt. 11th March, 2015*, at para 42, held as follows:-

“42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a “further inquiry” in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld.” (Emphasis ours)

Respectfully applying the proposition of law laid down in the case law to the facts of this case, we are duty bound to set aside this assessment to the file of the Assessing Officer with the direction to examine the applicability of Section 68 as well as other

provisions of Income Tax Act, 1961 and complete the assessment de novo in accordance with law.

9. In the result, the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the Court on 26.12.2017

Sd/-

[S.S.Viswanethra Ravi]
Judicial Member

Sd/-

[J.Sudhakar Reddy]
Accountant Member

Dated : 26.12.2017

SB, Sr. PS

Copy of the order forwarded to:

1. I.T.O, Ward-4(1), Kolkata, Aayakar Bhawan, 5th Floor, P-7, Chowringhee Square, Kolkata-69.
2. M/s Malinath Tradecon Pvt. Ltd., 27, Mullick Street, Kolkata-07.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary

Head of Office/D.D.O., ITAT, Kolkata Benches