

IN THE INCOME TAX APPELLATE TRIBUNAL  
"H" Bench, Mumbai  
Before S/Shri B.R.Baskaran (AM) & Amarjit Singh (JM)

I.T.A. No. 3843/Mum/2016 (Assessment Year 2012-13)

Ratnakar Infrastructure Pvt. Ltd. 101, Gagangiri Tower, 25/29 Dr. Deshmukh Lane, V.P. Road, Mumbai-400 004. PAN :AAECR8108B (Appellant)	Vs.	ITO Ward 5(3)(1) 256, Aayakar Bhavan M.K. Road Mumbai-400020. (Respondent)
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Assessee by	Dr. P. Daniel
Department by	Shri Saurabh Deshpande
Date of Hearing	3.5.2018
Date of Pronouncement	16.5.2018

O R D E R

Per B.R. Baskaran (AM) :-

The appeal of the assessee is directed against the order dated 28-03-2016 passed by Ld CIT(A)-10, Mumbai and it relates to the assessment year 2012-13. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.270.15 lakhs made by the AO u/s 68 of the Act.

2. The facts in brief are that the assessee is an investment company. During the year under consideration, it issued shares to certain companies on private placement basis, besides issuing rights shares to the existing shareholders. The AO noticed that the assessee has issued 180100 shares of Rs.10/- each at a premium of Rs.140/- each on private placement basis and thus collected Rs.270.15 lakhs from the following companies:-

- (a) Alaska Commerce P Ltd - 56,700 shares - Rs.85,05,000.00
- (b) Dev Share Trading P Ltd - 33,350 shares - Rs.50,02,500.00
- (c) Prajan Trading P Ltd - 33,350 shares - Rs.50,02,500.00
- (d) Printage offset P Ltd - 23,350 shares - Rs.35,02,500.00
- (e) Urjita Commerce P Ltd - 33,350 shares - Rs.50,02,500.00

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Rs.2,70,15,000.00

3. The AO asked the assessee to prove the above said receipts as per the provisions of sec. 68 of the Act. There is no dispute with regard to the fact that the assessee furnished all the evidences and documents to prove the identity of the share applicants, credit worthiness of share applications and genuineness of transactions. The AO also issued notices u/s 133(6) and summons u/s 131 of the Act to the above said share applicants and the summons were served. Even though they furnished all the documentary evidences in response to the notices issued by the AO, yet they did not appear before the AO.

4. The AO noticed that all the above said five companies were having bank account with Indore branch of Axis Bank. He noticed that their business operation was small and were having meager income. However, they were having enough sources to make the above said investments in the assessee company. The AO also collected bank statements of these companies from Axis bank and noticed that these companies have received funds through banking channels immediately before issuing cheques to the assessee company. The funds have been transferred from another company named M/s Trinity Marketing & Trading. He also noticed that the said bank account was subsequently closed by November 2011. Accordingly the AO asked the assessee to prove the genuineness of share application money again.

5. In response thereto, the assessee furnished a copy of valuation report on the basis of which the share premium amount of Rs.140/- per share was determined. It also furnished copies of minutes books, documents filed with Registrar of Companies, Share application forms, share certificates to show that the transactions were genuine. The assessee submitted that the notices issued u/s 133(6) of the Act and the summons issued u/s 131 of the Act were served upon the share applicants. The assessee also submitted that the applicants have furnished all documents as sought for by AO, but only failed to appear in person. Accordingly it was contended that there is no reason to make any addition u/s 68 of the Act.

6. Since the assessee failed to produce the share subscribers before him, the AO took the view that the claim of share subscription is untenable. Accordingly he took the view that the collection of share capital and share premium was a sham transaction. The AO also placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd. Accordingly the AO took the view that the assessee has failed to prove the identity, creditworthiness and genuineness of transactions. Accordingly he assessed the amount of Rs.270.15 lakhs as income of the assessee u/s 68 of the Act.

7. The Ld CIT(A) also confirmed the addition and hence the assessee has filed this appeal.

8. The Ld A.R submitted that the AO has not disputed the fact that the assessee as well as the share subscribers have furnished all the details/documents to prove the identity of the subscribers, credit worthiness of subscribers and genuineness of transactions. He submitted that the assessing officer has made this addition only for the reason that the assessee could not produce the share subscribers before the AO. The assessing officer has also examined the bank accounts of the subscribers and has observed that the funds have been transferred to the account of share subscribers from another company. He has also observed that the said bank accounts have been closed subsequently. However, the fact remains that the assessing officer was satisfied that the subscribers were having funds and thus credit worthiness is proved.

9. The ld A.R submitted the assessee has discharged the initial burden of proof placed upon it u/s 68 of the Act. Relying upon the decision rendered by Hon'ble Gauhati High Court in the case of CIT Vs. Sangamitra Bharali (2014)(361 ITR 481), the Ld A.R submitted that the assessee is not required to prove source of sources. The Ld A.R submitted that the decision rendered by Hon'ble Supreme Court in the case of Orissa Corporation P Ltd (1986)(159 ITR

78) also affirms the above said view. He submitted that the Hon'ble Punjab & Haryana High Court has held in the case of CIT Vs. Varinder Rawley (2014)(336 ITR 232) that "where the assessee shows that the entries regarding credit in the third party account were in fact received from third party and are genuine he discharges the onus. He submitted the decision in the case of Major Metals has been rendered by Hon'ble Bombay High Court in peculiar facts of that case, as clarified by Hon'ble High Court in the case of Khubchandani Healathparks Pvt Ltd vs. ITO (W.P No.3027 of 2015 dated 10-02-2016).

10. He submitted that the proviso inserted in sec. 68 of the Act by Finance Act 2013, wherein the assessee is required to prove source of sources is held to be prospective in nature by Hon'ble Bombay High Court in the case of CIT Vs. Gagandeep Infrastructure P Ltd (2017)(349 ITR 680). He submitted that non-appearance of creditor before the AO cannot be the reason to make addition u/s 68 of the Act as held by Bombay High Court in the case of CIT Vs. Orchid Industries P Ltd (ITA No.1433 of 2014 dated 05-07-2017)(Bom HC). He submitted that the Mumbai bench of Tribunal has followed the decision rendered by Hon'ble Bombay High Court, referred above, in the following cases:-

- (a) Prin. CIT Vs. SDB Estates P Ltd (ITA No.1356 of 2015)
- (b) ITO Vs. M/s Sringeri Technologies P Ltd (ITA No.3924/Mum/2014)
- (c) DCIT Vs. M/s Alcon Biosciences P Ld (ITA No.1946/Mum/2016)

11. He further submitted that the share capital and share premium collections towards capital account and hence they cannot be taxed as income as held by Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd Vs. Union of India (2014)(368 ITR 1).

12. The Ld D.R, on the contrary, reiterated the deficiencies pointed out by the AO, viz., the share subscribers did not appear before the AO; the transfer of money to the account of share subscribers by a single company and further

the closure of bank accounts of all the share subscribers. He further submitted that the issue under consideration should be examined by applying test of human probabilities and surrounding circumstances as held by the Hon'ble Supreme court in the case of Sumati Dayal (214 ITR 801). The Ld D.R submitted that the test of genuineness of transactions would fail, if we examine the issue by applying test of human probabilities and surrounding circumstances. He submitted that the Hon'ble Bombay High Court has applied the above said case in the case of Killick Nixon Ltd (ITA No.5518 of 2010 dated 06-03-2012).

13. The Ld D.R relied upon the decision rendered by Ahmedabad bench of Tribunal in the case of ACIT Vs. Nakoda Fashion (P) Ltd (2018)(92 taxmann.com 46), wherein the addition of share capital collections was upheld. Accordingly the Ld D.R submitted that the order passed by ld CIT(A) should be upheld.

14. In the rejoinder, the Ld A.R submitted that all the share applicants are income tax assesseees having PAN number and the notices/summons issued to them have been duly served. Accordingly he submitted that the identity has been proved. He further submitted that the assessee has furnished financial statements and the AO himself has observed that the subscribers are having resources. Hence the credit worthiness has been proved. The assessing officer has also accepted the fact that the funds were transferred through banking channels and hence the genuineness of transactions also stands proved. Accordingly he submitted that the assessee has discharged the onus placed upon it and hence no addition u/s 68 is called for.

15. We have heard rival contentions and perused the record. We notice that the assessing officer has made the impugned addition u/s 68 of the Act. The AO did not dispute the fact that the assessee has furnished all the documents to prove the identity of the share subscribers, credit worthiness of share subscribers. We notice that the genuineness of transactions have also been

proved by the assessee, since the transactions have been carried through banking channels. However the AO was having different view, which we shall discuss in the ensuing paragraphs.

16. We notice that the AO has made the addition u/s 68 of the Act mainly for the reason that the share subscribers did not appear before him in response to the summons issued by him. We notice that the Hon'ble Bombay High Court has held in the case of CIT Vs. Orchid Industries P Ltd (ITA No.1433 of 2014 dated 05-07-2017)(Bom HC) that non-appearance of creditor before the AO cannot be the reason to make addition u/s 68 of the Act. We have noticed that the assessee has furnished all the details relating to share subscribers in order to discharge the initial burden of proving the identity of the subscribers, credit worthiness of subscribers and genuineness of transactions. At this stage, it may be relevant to refer to the following observations made by Hon'ble Supreme Court in the case of Orissa Corporation P Ltd. (supra):-

*“In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises.”*

17. We notice that the AO has placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Major Metals, without discussion as to how the said decision is applicable to the facts of the present case. The Hon'ble Bombay High Court has observed in the case of Khubchandani Healathparks Pvt Ltd vs. ITO (supra) that the decision in the case of Major Metal has been rendered in the peculiar facts present in that case. We notice

that the AO has not brought parity of facts between the present case and Major metals.

18. We further notice that the AO has doubted the genuineness of transactions on the basis of the fact that the bank accounts kept with Axis bank have been closed by the share subscribers subsequently. We are unable to understand as to how the AO could draw adverse inferences on the basis of this information without making further enquiries. The assessee has shown that the share subscribers are registered under Companies Act and they are also income tax assessee's filing return of income regularly. It is also not the case of the AO that the share subscribers have closed down the business permanently. The AO has also not ascertained the reasons for closing the bank accounts kept with Axis Bank. The AO has also not ascertained as to whether the share subscribers are having any other bank account or opened a new bank account. Without ascertaining these facts, in our view, the AO could not have doubted the genuineness of transactions and drawn adverse inference against the assessee on the basis of information received from Axis Bank.

19. The AO himself has observed that the share subscribers had enough funds for making investments in the company. The Hon'ble Gauhati High Court has held in the case of CIT Vs. Sangamitra Bharali (supra) that the assessee is not required to prove source of sources. The Finance Act 2013 has brought an amendment in sec. 68 of the Act, as per which, the source of sources has to be proved. However, the said amendment is held to be prospective by Hon'ble Bombay High Court in the case of Gagandeep Infrastructure P Ltd (supra).

20. Before us, the Ld A.R placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd Vs. Union of India (supra) in order to contend that the share capital and share premium are received on capital account and they cannot be considered as revenue receipt.

However, on perusal of the decision rendered by Hon'ble Bombay High Court, we notice that the Hon'ble High Court has rendered the decision in the context of provisions of sec. 2(24)(xvi) and sec. 56(2)(viib) of the Act. In the instant case, the addition has been made by the AO u/s 68 of the Act, which is a deeming provision to assess cash credits shown as capital receipts in the books of account, if the assessee fails to discharge the initial burden of proof placed upon it. Hence we are of the view that the reliance placed by the assessee on the decision of Vodafone India Services P Ltd is misplaced.

21. In view of the foregoing discussions, we are of the view that the assessee has discharged the initial burden of proof placed upon it u/s 68 of the Act. We notice that the AO has not disproved the documents/evidences furnished by the assessee with any other credible material, meaning thereby, the AO has not discharged the burden of proof shifted to his shoulders. In view of the documentary evidences furnished by the assessee to support its case and in view of the fact that the AO has not disproved them, we are of the view that the test of human probabilities could not be applied in the instant case. We also notice that the various reasoning given by the AO would fail in view of the various decisions discussed above. Hence we are of the view that the Ld CIT(A) was not justified in confirming the addition made by the AO u/s 68 of the Act.

22. Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the impugned addition made u/s 68 of the Act.

23. In the result, the appeal of the assessee is allowed.

Order has been pronounced in the Court on 16.5.2018.

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

Sd/-  
(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 16/5/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)  
ITAT, Mumbai

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