

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3998/MUM/2014  
Assessment Year: 2010-11**

Income Tax Officer 8(2)(2),  
Room No. 212/216A, 2<sup>nd</sup>  
floor, Aayakar Bhavan, M.K.  
Road, Mumbai-400020.

M/s Lotus Grih Nirman  
Vs. Pvt. Ltd. 419, Laxmi  
Plaza, Laxmi Industrial  
Estate, Link Road,  
Andheri (W), Mumbai-  
400059.

**PAN No. AABCL0864D**

**Appellant**

**Respondent**

Revenue by : Mr. Rajesh Kumar Yadav, DR  
Assessee by : Mr. Rushabh Mehta, AR

Date of Hearing : 25/07/2018  
Date of pronouncement : 18/10/2018

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the revenue. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-17 [in short 'CIT(A)'], Thane and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the revenue read as under:
  1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in deleting the addition of Rs.2,44,50,000/- made under

section 68 of the Income tax Act, on the ground that the identity and creditworthiness of the share applicant as well as the genuineness of the transaction were proved?

2. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in deleting the addition of the aforesaid amount on the ground that the addition was perverse having regard to the evidence and the material on record.
  3. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in holding that only own funds have been utilized by Bhawana Computers Pvt. Ltd. for making share application of Rs.2,44,50,000/-, despite the fact that the share applicant has failed to explain the nature and source of deposits which preceded the payments of share application money.
  4. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in negating the action of AO in view of the fact that Bhawana Computers Pvt. Ltd, had no accumulated profit as on 31.03.2010.
  5. On the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to take notice of decision of Hon'ble Delhi High Court in the case of Nova Promoters & Finlease (P) Ltd. 18 Taxmann.com 217 and the decision of Hon'ble Jurisdictional High Court in the case of M/s Major Metals Limited 19 Taxmann.com 176.
  6. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.
3. In the instant case, the disputed point is the share application money of Rs.2,44,50,000/- received by the assessee from M/s Bhawana Computers Private Limited (in short 'BCPL'). During the course of assessment proceedings, the Assessing Officer (AO) asked the assessee

to provide details in order to establish the capacity of BCPL and the genuineness of transaction. In response to it, the assessee filed *vide* letter dated 07.01.2013 copy of return, computation of income, statement of accounts, annual report and bank statement of BCPL. The AO drew a conclusion that BCPL might be an associate/group company of the assessee. He also observed that as per the balance sheet, BCPL had no accumulated profits; in fact it had accumulated loss of Rs.1,33,413/-. The total capital base of the company was Rs.39,24,060/- and the entire reserve and surplus of Rs.37,85,81,940/- was the security premium received by BCPL. During the Financial Year (FY) 2009-10, BCPL had received share capital subscription of Rs.12,98,000/- along with share premium of Rs.12,85,02,000/- @ Rs.99 per share. The company had no investment or fixed asset. With the above observations, the AO came to a finding that BCPL had no business credentials to command security premium as huge as Rs.37,85,81,940/-. To ascertain the facts, the AO issued notice u/s 133(6) to BCPL and in response to it, he received a copy of its bank account indicating payment of share application money to the assessee. The AO on perusal of the bank statement found that the payment of share application money were preceded by deposits of money from unknown sources. BCPL had not explained the source and nature of such deposits. Though BCPL claimed to have been engaged in the business of share trading, the AO found that almost all the payments and receipts in the above bank account are in round figures.

In response to a query raised by the AO to explain as to why the share application money of Rs.2,44,50,000/- received from BCPL should

not be treated as its income, the assessee filed a reply which has been extracted at para 4.2 of the assessment order dated 20.03.2013. The AO was not convinced with the said explanation of the assessee for the reason BCPL had neither demonstrated its income generating capacity to command a share premium of Rs.90 per share nor utilized the share premium account as per law. The share premium received by the BCPL, which subscribed share capital in the assessee-company was itself suspicious and not sufficient to prove its capacity to introduce the share application money. With the observation that the assessee is engaged in circular transaction by introducing its own money, the AO made an addition of Rs.2,44,50,000/- received from BCPL as unexplained cash credit u/s 68 of the Act.

4. Aggrieved by the order of the AO the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) observed that the AO safely ignored the reply filed by the assessee on 11.03.2013 which explained fully the identity, capacity of the investor and genuineness of transaction. The investor company is in existence for a period of more than six years and its own funds aggregated to Rs.38,25,06,000/-. Moreover, the said investor company i.e. BCPL was not having secured or unsecured loans, which suggested that its own funds were used in making share application of Rs.2,44,50,000/-. Thus the Ld. CIT(A) observed that in case of BCPL, the assessee had discharged its onus relating to the identity, capacity of the subscriber and genuineness of the transaction. Further, the share application money of Rs.2,44,50,000/- was received by account payee cheques. The Ld. CIT(A)

found that (i) the audited financial statement of BCPL for the relevant period and the bank statements show that it had creditworthiness, (ii) BCPL is also regularly filing its annual accounts with ROC and the same is available for public inspection.

In view of the above facts, the Ld. CIT(A) relying on the decision in *CIT v. Sophia Finance Ltd.* (1993) 113 CTR (Del) (FB) 472, *CIT v. Dolphin Canpack Ltd.* (2006) 204 CTR (Del) 50, *CIT v. Lovely Exports (P) Ltd.* (2008) 216 CTR (SC) 195, the order of the Bombay High Court in *CIT v. Creative World Telefilms Ltd.* (ITA No. 2182 of 2009 decided on 12.10.2009), the order of the Karnataka High Court in *Madhuri Investments (P) Ltd. v. ACIT* (ITA No. 110 of 2004 decided on 18.02.2006) & *CIT v. Arunananda Textiles (P) Ltd.* (ITA No. 1515 of 2005 decided on 02.03.2010), *CIT v. AKJ Grenites (P) Ltd.* (2007) 212 CTR (Raj) 25, *CIT v. Steller Investment Ltd.* (1991) 192 ITR 287 (Del), *CIT v. Divine Leasing & Finance Ltd.* (2007) 207 CTR (Del) 38, *CIT v. Oasis Hospitalities (P) Ltd.* (2011) 238 CTR (Del) 402 and *CIT v. People General Hospital Ltd.* (2013) 356 ITR 65 (MP), deleted the addition of Rs.2,44,50,000/- made by the AO.

5. Before us, the Ld. DR, relying on the order of the AO submits that in the instant case the share premium of the company has not been used for the purposes specified in section 78(2) of the Companies Act. Also reliance is placed by him on the decision in *CIT v. Precision Finance P. Ltd.* (Cal) 208 ITR 465 for the proposition that cash credit can be assessed even if transaction is through cheques. It is stated by him that the genuineness of transaction is in doubt in the instant case as brought

out by the AO. Thus the Ld. DR submits that the AO has rightly made the addition of Rs.2,44,50,000/- u/s 68 and the same be restored.

6. On the other hand, the Ld. counsel of the assessee submits that the Ld. CIT(A) has dealt with the issue of section 78(2) of the Companies Act, 1956 in his order dated 07.03.2014 and rightly held that the utilization of the share premium by the investor company to invest in shares of the assessee-company has nothing to do with the income of the assessee-company.

Further relying on the order of the Ld. CIT(A), the Ld. counsel submits that in the instant case the assessee has discharged its burden regarding identity, creditworthiness of the shareholder, and the genuineness of the transaction.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for decisions are given below.

We find that the assessee has made a disclosure in its 'Notes to Accounts' and Form No. 3CD, the details of payments made to parties covered u/s 40A(2) of the Act. Therefore, the observation of the AO at para 4.1 of his order dated 20.03.2013 that "from the details brought on record in respect of BCPL, it is seen that it is apparently associate/group concern of the assessee company" is misplaced. In the instant case the AO failed to examine the reply dated 11.03.2013 filed by the assessee. The said reply explains the identity, capacity of the investor and genuineness of the transaction. The share application money of Rs.2,44,50,000/- was received by the assessee by account payee

cheques through regular banking channels. The Ld. CIT(A) has rightly observed at para 1.3.4 of his order dated 07.03.2014 that “even if the investor company has utilized the share premium balance to apply for shares in the appellant company, the AO cannot add that amount in the income of the appellant company, just because of an unsatisfactory utilization of share premium account of the investor company”.

It is well-settled that in order to discharge the onus, the assessee must prove the following:

- (i) the identity of the creditor,
- (ii) the capacity of the creditor to advance money; and
- (iii) the genuineness of the transaction.

After the assessee has adduced evidence to establish prima facie the aforesaid, the onus shifts to the department as held in the decision in *Shankar Ind v. CIT* 114 ITR 689; *Prakash Textile v. CIT* 121 ITR 890; *CIT v. United* 187 ITR 596; *Rajshree v. CIT* 256 ITR 331; *Ashokpal v. CIT* 220 ITR 452; *CIT v. Metachem* 245 ITR 160; *CIT v. Shree Gopal* 204 ITR 285.

However, we find that the AO has failed in the instant case to find fault with the submissions made by the assessee. The AO could have made investigations to find out the truth of the case. On the other hand, the AO has resorted to general propositions.

To sum up, in the instant case, the AO has failed to draw any adverse conclusion on the basis of material evidence that the receipt of

cash credit of Rs.2,44,50,000/- from BCPL is not a genuine one.  
Therefore, we uphold the order of the Ld. CIT(A).

8. In the result, the appeal is dismissed.

**Order pronounced in the open Court on 18/10/2018.**

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 18/10/2018

*Rahul Sharma, Sr. P.S.*

**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,

(Sr. Private Secretary)  
**ITAT, Mumbai**