

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.3395/Del/2015
Assessment Year: 2007-08**

Asstt. Commissioner of Income-tax, vs SMC Power Generation Ltd.
Central Circle-4, New Delhi. R/o E-13/29, 2nd Floor,
Harsha Bhawan, New Delhi
PAN: AAGCS3066B

**C.O. No.436/Del/2015
(In ITA No.3395/Del/2015)
Assessment Year: 2007-08**

SMC Power Generation Ltd., vs Asstt. Commissioner of Income-tax,
R/o E-13/29, 2nd Floor, Central Circle-4, New Delhi. Harsha
Bhawan, New Delhi.
PAN: AAGCS3066B

(Appellant)

(Respondent)

Assessee by:

S/Shri Salil Aggarwal &
Shailesh Gupta, Advocate

Revenue Respondent by: Smt. Sulekha Verma, CIT DR

Date of hearing: 03.12.2018
Date of Pronouncement: 10.12.2018

ORDER**PER K. NARASIMHA CHARY, JM**

Challenging the order dated 24.3.2015 in Appeal No.98/14-15 passed by the learned Commissioner of Income-tax(Appeals)-23, New Delhi {for short "ld. CIT(A)}, revenue preferred the appeal whereas assessee preferred the Cross Objection challenging the assessment order.

2. Briefly stated facts relevant for the disposal of this appeal are that during search and seizure operation that were conducted on 04.08.2011 in the case of M/s SMC Power Generation Ltd, some incriminating papers were found which indicated purchase/sales of milk and milk products outside the books of account. Based on these documents, a director of the assessee company admitted undisclosed income of Rs.93 lacs in his individual capacity. However, these transactions do not relate to the assessee company. In the present case, the earlier assessment for AY 2007-08 had been completed u/s 143(3) of the Income Tax Act, 1961 (for short hereinafter referred to as "the Act") wherein the source of share capital was examined by the revenue on the basis of evidence filed by the assessee and no adverse view had been taken. However, in the present proceedings u/s 153A of the Act, consequent to the search, for the reasons recorded in the assessment order, the revenue has treated the share premium received as unexplained credit u/s 68 of the Act. Learned AO further added a sum of Rs.7467/- being the share of director's remuneration/sitting fee out of the total income earned during the year under consideration by allocating it to the exempt unit.

3. Aggrieved by such an addition, assessee preferred appeal before the Ld. CIT(A). The objection of the assessee to the action of the revenue is that the burden of proof cast upon the assessee had been fully discharged and that there was no material before the AO to reach the conclusion that he has reached. It was further submitted by the assessee before the learned CIT(A) that the Inspector's report had not been made available for reply. The assessee has also objected that in the absence of any adverse evidence, the revenue could not change its opinion having accepted the share capital earlier on the same set of facts and evidence. Learned CIT(A) directed the ld. AO to furnish the inspector's report to the assessee and heard the assessee on the justification for the share premium charged. Thereupon, learned CIT(A) referred to his orders in the case of M/s Mool Chand Steels P. Ltd. ("MSL"), another company belonging to the assessee group in Appeal No.107/14-15 for the AY 2006-07.

4. Learned CIT(A) further observed that all the 22 companies are existing assessees on the record of the department and have been regularly filing the returns under the Companies Act and that the learned AO himself based some of his findings on the fact that it is only by looking into the data base of some of these companies found that the income was insufficient to support the investment. Further, while referring to the case of M/s MSL, ld. CIT(A) opined that there appears to be reasonable basis for the assessee to raise share capital with premium and the value of the share premium received in excess of the fair market value of the shares allotted was made taxable u/s 56(2)(vii) only w.e.f. asstt. year 2013-14.

5. In these circumstances, learned CIT(A) was of the opinion that the revenue has reached different views in the assessment framed u/s 143(3) on the earlier occasion and in the assessment framed u/s 153A in the present appeal without any contrary evidence and these two views militate against each other. Learned CIT(A) held that the earlier view must prevail as there is no evidence to support the subsequent view and that the assessee had discharged its primary onus of establishing the transaction not only once but twice and the conclusions reached by the learned AO in the present assessment to hold that the share premium unexplained does not have any basis. He, therefore, deleted the addition of share capital/premium. Specific finding of the learned CIT(A) is that while in para 4 of the assessment order, the addition proposed was only Rs.29,70,00,000/-being the share premium received, the addition finally made was Rs.30,00,00,000/- being the entire share capital which appears to be a mistake and the entry of Rs.30 crores in the computation part has to be ignored.

6. In so far as the computation of eligible deduction u/s 80IA is concerned, learned CIT(A) held that each expense cannot be allocated to the unit enjoying concessional taxation; this is not mandated by law nor factually liable; that a director is director for the whole of the company and not only for its unit; that it is not necessary that services of the directors are essential to run the business of the eligible unit; that in multi unit companies a unit is managed by the local manager; and in any case the assessee could not be said to misreport a negligible sum of RS.7467/-. He, therefore, deleted this addition also.

7. Challenging the same, revenue is before us in this appeal stating that the learned CIT(A) erred in deleting the addition of Rs.30 crores and RS.6467/- as stated above.

8. It is the argument of the learned DR that in the case of Sohail Financials Ltd. In ITA No.4867/Del/2011, the Tribunal held that there is relationship of Tarun Goyal and his accomplice in making investment at huge premium and having regard to the circumstances and human probabilities, there is no reason to invest these companies in the shares of the assessee company at such a huge premium and to such situation, the ratio of the decision of the Hon'ble apex court in the case of Sreelekha Banerjee's case (1963) 49 ITR (SC) 112 is squarely applicable.

9. Per contra, it is the submission of the ld. AR that in the search conducted on 4.8.2011, no incriminating material qua the assessee was found and for this precise reasons the addition made in the case of the assessee for the AY 2006-07 was deleted by the learned CIT(A) and was confirmed by the Tribunal in ITA No.4798/Del/2015 by order dated 13.8.2018. The ratio of the decision of the Hon'ble Apex court in the case of CIT vs. Kabul Chawla, 380 ITR 573 is applicable and in the absence of any incriminating material available qua the assessee qua the assessment order, it is not open for the revenue to make any addition. He further submitted that the decision of the first appellate authority in the case of M/s MSL belonging to the assessee group for the Asstt. Year 2006-07 was confirmed by a coordinate bench of this Tribunal in ITA No.2544/Del/2015. He, therefore, submits that the assessee's case is squarely covered by the decision of a coordinate bench of this tribunal in assessee's own case for the AY 2006-07 and for want of any incriminating

evidence, and therefore, the revenue has no jurisdiction to reopen the concluded assessment in the case of the assessee.

10. He further submitted that in the assessment u/s 143(3) of the Act by order dated 17.8.2009 vide para 5, learned AO considered this issue at length and accepted the submissions of the assessee and, therefore, the revenue cannot take a different view subsequently in the absence of any incriminatory evidence or change of circumstance. He, therefore, prayed to dismiss the appeal of the revenue and to uphold the findings of the learned CIT(A).

11. We have gone through the record. There is no dispute that in the search that took place on 4.8.2011 in the case of M/s SMC Power Generation Corporation Ltd. belonging to the assessee group no incriminatory material qua the assessee qua the assessment order was found. Further, it is also an admitted fact that in the assessment proceedings u/s 143(3) vide paragraph 5, learned AO considered the aspect relating to the share capital and did not draw any adverse inference. For the Asstt. Year 2006-07 on similar facts, a coordinate bench of this Tribunal considered the plea of the assessee vide Cross Objection No.457/Del/2015 in the light of the decision of the Hon'ble Apex court in the case of Kabul Chawla (supra) and recorded a finding that in the absence of any incriminatory material that was found during the search qua the assessee qua the assessment order does not open for the revenue to reopen the concluded assessments. With the said observations in ITA No.4798/Del/2015, a coordinate bench of this tribunal allowed the Cross Objection of the assessee and dismissed the appeal of the revenue preferred against the findings of the learned CIT(A) deleting the addition made on the basis of information received by the learned AO that the assessee received

share capital and share premium from the entities whose genuineness and identity and creditworthiness were not found to have been proved to the satisfaction of the Ld. AO.

12. Learned CIT(A) vide para 3.7 observed that in the case of M/s MSPL, which is another group of company of the assessee, for the Asstt. Year 2006-07, the first appellate authority referring to the facts involved in these matters, deleted the addition with the following observations:

“3.2 Facts are that search and seizure was conducted u/s 132 on 04.08.2011 in the SMC Group of cases to which the appellant company belongs. The appellant group raised capital privately from the market in its various constituent companies during the years 2005-06 to 2009-10 to fund its business expansion. Prior to the search, assessment was completed u/s 143(3) in some cases wherein the share capital / share application received by the appellant was duly examined and accepted as genuine by the revenue. During the search, no evidence has been found to indicate that the share capital / premium were raised in lieu of any collateral payment / compensation. In the assessments completed u/s 153A in this round after the present search action, a reference has been made to the statement of one Sh. Tarun Goyal, director of various companies having their offices at 13 / 34, WEA, Karol Bagh, New Delhi, recorded on 14.12.2010, based on which it has been concluded by the revenue that the appellant received share capital / premium by way of accommodation entries from companies controlled by the said Sh. Goyal. It transpires that Sh. Goyal was earlier subjected to search u/s 132 on 15.09.2008. In the said search and during his tax proceedings, Sh. Goyal admitted to have provided accommodation entries to various groups, viz. Best Group, Mittal Group, Basant Bansal Group and Katni Group of companies.

3.3 I have examined the said statement of Sh. Goyal. In his answer to Q.4, he refers to a bank account of his company is HDFC Bank, Old Rajinder Nagar, bearing no. 0261500016747. In his answer to Q.5, he admits of having provided accommodation entries to the above-named four groups and clarifies that the methodology adopted was that he deposited cash in certain bank accounts and issued cheques against such cash deposits. Sh. Goyal further clarifies that cases, wherein the cheques issued were not

preceded by cash deposits, were genuine business transactions. The same stand has been repeated in his answer to Q.9 by Sh. Goyal. In his reply to Q.10, Sh. Goyal states that he had submitted detailed list of accommodation entries relating to cash of Rs.40 crore deposited in various bank accounts. In the entire statement of Sh. Goyal, nowhere name of the appellant company or the SMC / Moolchand / Madhusudan group or any related entity has been mentioned. It is seen from the record that the share capital / premium in the appellant company was subscribed by M/s GeefceeFinance Ltd. (GFC) through its bank account with Kotak Mahindra Bank; Arya Samaj Road, Karol Bagh bearing no.61732000004160; and not through its account with FIDFC Bank, Ofd. Rajinder Nagar as mentioned in the said statement of Sh. Goyal. It is further seen that there is no cash deposit preceding the cheques issued by GFC to the appellant from its said account with Kotak Mahindra Bank. There are indeed transfer deposits from M/s Tejasvi, M/s Kartik and M/s Venus, possibly other companies owned / controlled by Sh. Goyal. However, the names of these companies from which the money was sourced into the account of GFC, are nowhere mentioned / admitted in the statement of Sh. Goyal as entities providing accommodation entries. No case has been made out that cash had been deposited in the bank accounts of these entities before transferring the funds to the bank account of GFC. The details of accommodation entries provided by Sh. Goyal have also not been relied upon by the revenue in the assessment order. The AO was specifically asked vide letter dated 27.11.2015 to provide the basis / evidence on which he had reached the conclusion that the appellant had raised the share capital / premium through accommodation entries. However, no such basis / evidence has been provided or brought on record.

3.4 The appellant, on the other hand, has provided justification for the share capital / premium raised, by quoting the share prices of other listed companies in similar business, and claimed that the premium received was much less compared to the market price commanded by the said companies. As the appellant was successfully in the same line of business and wanted to raise resources to expand its business activities, including by way of public issue of shares, it initially raised such resources from the private capital market and the premium received was consistent with the practice in the same line of business. The claim of the appellant was put to independent test against information regarding movement of the share market in India as per the following table:

BSE SENSEX

Year	Open	High	Low	Close
2000	5,209.54	6,150.69	3,491.55	3,972.12
2001	3,990.65	4,462.11	2,594.87	3,262.33
2002	3,262.01	3,758.27	2,828.48	3,377.28
2003	3,383.85	5,920.76	2,904.44	5,838.96
2004	5,872.48	6,617.15	4,227.50	6,602.69
2005	6,626.49	9,442.98	6,069.33	9,397.93
2006	9,422.49	14,035.30	8,799.01	13,786.91
2007	13,827.77	20,498.11	12,316.10	20,286.99
2008	20,325.27	21,206.77	7,697.39	9,647.31
2009	9,720.55	17,530.94	8,047.17	17,464.81
2010	17,473.45	21,108.64	15,651.99	20,509.09
2011	20,621.61	20,664.80	15,135.86	15,454.92
2012	15,534.67	19,612.18	15,358.02	19,426.71
2013	19,513.45	21,483.74	17,448.71	21,170.68
2014	21,222.19	28,822.37	19,963.12	27,499.42
2015	27,485.77	29,844.16	26,776.12	28,533.97

It is seen that the share market consistently rose from the year 2000 up to the year 2007. Thereafter, it crashed in 2008 due to the global economic slowdown consequent to the US Sub-Prime Crisis, but again recovered during 2009 & 2010 to the level of 2007. I find that the appellant group has raised its share capital / premium during the years 2006-07 and 2009-10, periods when the share market was at its peak and would have facilitated raising capital. It appears that the subsequent market declines in 2008-09 and 2011 discouraged the group from going public and deferring its business expansion plan. It is also relevant that although the share market has recovered from 2012, the Indian economy has not been performing well in the period 2012 to 2014.

3.5 No doubt, appellant group received back control of the shares subscribed by the eventual transfer of such shares to its other group companies. No doubt the appellant company stood benefited by the amount of premium received. But having considered the rival claims, I am of the considered opinion that in the absence of any evidence to indicate that share capital / premium was raised through dubious means or against collateral undisclosed payments / consideration, and in view of the indication that the appellant may have raised capital genuinely for genuine business needs, no case of addition of the share capital / premium is made out as unexplained credits in the books of the appellant company u/s 68 of the Act. I hold accordingly.

3.6 In the case of M/s SMC Power Generation Ltd., during the assessment u/s 153A for AY 2007-08, the existence of Subscribing company GFC was verified through the inspector of the department who found the said company at the given address. In fact, the existence of the said company is not in doubt and the additions have been made on the basis of three facts - (i) private raising of capital with premium, (ii) repurchase of the shares by other group companies at par. and (iii) statement of Sh. Traun Goyal stating that he was providing entries. We have seen above that there is no evidence, nor any indication in the statement of Sh. Traun Goyal, that any consideration was paid by the appellant group for the share capital, including share premium, raised. We have also seen that the periods in which the capital was raised were when the Indian economy and its stock markets were doing well. Therefore, even if the appellant group and its companies stood to benefit, by way of buy-back at par of its shares issued at premium, it cannot be concluded, in the absence of any evidence, that the capital so raised was unexplained. Having searched the appellant and not found evidence to support its claims, the addition made by the revenue is founded on mere suspicion and lacks any credible basis. I hold accordingly.

3.7 It is relevant to note that the appellant group, including the appellant company, was earlier subjected to search and seizure on 06.03.2006 and assessment was completed in the case of this appellant vide order dated u/s 143(3) wherein the returned income of Rs.4,05,332/- was accepted. During that search undisclosed income of Rs.8,00,00,000/- was admitted in various hands (individuals, HUFs & directors / 'shareholders of group companies). No undisclosed income was declared or assessed in respect of the appellant company, including any share capital. Accordingly, I also hold that as the assessment was earlier completed u/s 143(3) wherein the share capital had been scrutinized and accepted by the revenue, holding the same share capital as unexplained in the present reassessment u/s 153A tantamounts to change of opinion not backed by any evidence and, therefore, not legally sustainable.

3.8 In view of the above, the addition of Rs.80,00,000/- made as unexplained credit u/s 68 is deleted. These grounds of appeal are allowed accordingly.”

13. The above finding of the first appellate authority, in the case of M/s MSPL which is another group of company of the assessee, for the AY 2006-07 were confirmed by a coordinate bench of this Tribunal in ITA No.2544/Del/2015 vide order dated 10.10.2018. In such decision also, it was categorically observed by the Tribunal that in the search nothing incriminatory could be found against that group entity also as such by applying the ratio of

the decision in the case of Kabul Chawla (supra), the Tribunal allowed the contentions of the assessee.

14. Referring to the 22 companies enumerated by the learned AO in his order involved in this matter, learned CIT(A) as a matter of fact recorded that the existence of all these companies were doubted by the ld. AO inasmuch as it is only by looking into the data base of these companies, learned AO found that some of the subscribing companies have insufficient returned income . It is relevant to note that the observations made by the learned CIT(A) in Para 3.6 in the appeal of M/s MSL touching the facts of the present case in hand. Inasmuch as the order of the first appellate authority in Appeal No.107/14-15 for the AY 2006-07 were upheld by this Tribunal in ITA No.2244/Del/2015, the correctness of such observations cannot be re-agitated in this appeal. For these reasons, we are of the considered opinion that reopening of the proceedings in the absence of any incriminatory material is bad under law and the assessment order dated 31.3.2014 is liable to be quashed. Accordingly, we quash the same.

15. In the result, appeal of the revenue is dismissed and the Cross Objection of the assessee is allowed.

Order pronounced in the Open Court on 10th December, 2018.

Sd/-

sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**(K. NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 10th December, 2018

VJ

Copy forwarded to:

1. Appellant
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4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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