

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI O.P. KANT, ACCOUNTANT MEMBER

I.T.A. No. 4178/DEL/2012

A.Y. 2009-10

ACIT, CIRCLE-1,
AAYAKAR BHAWAN,
BHAINSALI GROUND
DELHI ROAD, MEERUT

(APPELLANT)

VS. M/S EMM VEE INFRASTRUCTURES
(INDIA) PVT. LTD.,
110-B, KRISHNA PLAZA,
GARH ROAD, MEERUT
(PAN: AABCE0893K)

(RESPONDENT)

Department by : Sh. Anil Kumar Sharma, Sr. DR

Assessee by : Sh. Chander Mehra, CA

ORDER

PER H.S. SIDHU, JM :

This appeal by the Revenue is directed against the Order of the Ld. Commissioner of Income Tax (Appeals)-Meerut dated 07.05.2012 pertaining to Assessment Year 2009-10 on the following revised grounds:-

1. Whether in the facts and circumstances of the case, the CIT(A) has erred in facts and law in deleting the addition of Rs. 3,00,00,000/- made by the AO u/s. 68 of the I.T. Act, 1961 on account of unproved share application and premium money, ignoring findings of the AO regarding

non-existence of investor companies, as a result of spot enquiries made by her and later on corroborated by the Investigation Wing, Delhi and also ignoring various case laws in this regard, whereas, net worth of the assessee company was also not in commensuration with the money received.

2. Whether in the facts and circumstances of the case, the Ld. CIT(A) has erred in facts and in law in accepting the additional evidence in the shape of assessee's affidavit in contravention of Rule 46A of I.T. Rules, 1962 and restricting the addition to total profit @9% of receipts ignoring assessee's letter regarding surrender @9% of receipts over and above the returned income, which was quite reasonable otherwise too.
3. That in the facts and circumstances of the case, the order of the CIT(A) may be set aside and that of the AO be restored.
4. That the appellant craves leave to add, modify and / or delete any ground(s) of appeal.

2. The brief facts of the case are that the assessee had filed its return of income for the relevant assessment year 2009-10 on 27.9.2009 declaring income of Rs. 25,00,928/-. The return was processed u/s. 143(1) of the I.T. Act, 1961. The case was selected for scrutiny and statutory notice u/s. 143(2) of the Act was issued on 23.9.2010 which was duly served upon the assessee. In response to the notices issued u/s. 143(2) of the Act and 142(1) of the Act, the A.R. of the assessee attended the proceedings and filed the requisite details and information from time to time. The assessee company is engaged in the business of

construction of buildings and the company has also taken contract work from ERA group company. The results declared by the assessee have been examined by the AO and assessee produced the books of accounts. In this case the AO has found that the company had received share applications from two companies amounting to Rs. 3,00,00,000/- including the share premium of Rs. 2,94,00,000/-. AO noted that net worth of the assessee company was not so high to justify having received such high share premium. AO further observed that the assessee company was also not having huge reserves in order to attract premium on shares. Hence, he added the addition u/s. 68 of the Act in the hands of the assessee by treating the amount of Rs. 3 crores paid by Approva and Shalinik as bogus and income from undisclosed sources and accordingly, assessed the income of the assessee at Rs. 37643740/- u/s. 143(3) of the I.T. Act, 1961 vide order dated 30.12.2011. Aggrieved by the assessment order dated 30.12.2011, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 07.5.2012 has deleted the addition and partly allowed the appeal of the assessee.

3. Aggrieved with the impugned order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal.

4. Ld. DR relied upon the order of the AO and reiterated the contentions raised in the grounds of appeal.

5. On the contrary, Ld. A.R. of the assessee relied upon the order of the Ld. CIT(A) and filed the Synopsis, which read as under:-

"The additions by the AO are:

A. The company received share applications from

- 1. Apoorva Leasing Finance And Investment Company Ltd.*
- 2. The Capital and Free Reserves of the company are Rs.140,325,000/-*
- 3. And has no loans from outside. Page 82 of paper book Total investments made by the investor are Rs.13,20,35,000/-*

The assessee has received Rs.2Cr

The number of companies invested are 18 including assessee.

Reflects on page 88 of the paper book (80- 124) Sr No 6 No of shares applied 80000 @ Rs.500/;. consisting Rs.5/- and premium Rs.245/- Paid up 50%. Statement recorded and confirmed Page 140 Question 11

The assessee had submitted the confirmation, on page 54 of the paper book, the copy of Form 2 being the allotment for equity shares, ROC, Kanpur being reflected on page 128 of the paper book, the Set of Balance Sheet ,Bank Statement and the copy of ITR acknowledgment

4. Shalini Holdings Ltd.

The Capital and Free Reserves of the company are Rs.124,87,30,000/-And has no loans from outside. Page 91 of paper book

Total investments made by the investor are Rs.116,95,01,200/-

The assessee has received Rs.1 Cr

The number of companies invested are 253 including assessee.

Reflects on page 95 of the paper book (80- 124) sr no 6 payments received by the assessee company are through banking channel and no cash is involved The assessee has proved the Identity, the creditworthiness and the genuineness of the transactions by submitting the Confirmation, the copy Form 2, the copy of ITR acknowledgment, the copy of Bank Statements, the set of Balance sheets and also the AO through Investigation wing had cross examined the investors who had agreed in principal for having made the investments. Pages 80 to 124 and page 135 to 144

Investigation wing question 11 and 12 page 140.

Apart from the case laws already submitted the assessee also relies on the case law in the appeal no. 333/Dell2015 in the case of MODI NAGAR ROLLS L TD Vs ADCIT, Income Tax Range 1, Ghaziabad.

The case of the assessee is similar that of the above stated case "Bench E of ITAT Delhi order pronounced on 07/08/2015"

5. The assessee has not introduced any cash. The verification can be made from the bank account statements of both the companies.

B. The additions so made in the gross receipts are 9% as agreed page 137, the copy of the order sheet of the AO, however, no deduction for the income shown has been given by the AO. An affidavit for the same was submitted before the Ld CIT(A) page 145.”

6. We have heard both the parties and perused the relevant records, especially the order of the Ld. CIT(A) and the synopsis filed by the Ld. Counsel of the assessee, as aforesaid. We find that Ld. First Appellate Authority has elaborately discussed and adjudicated the issue No.1 & 2 vide para no. 4.3 & 5.3 at page no. 21-23 and 25-26. The said relevant findings of the Ld. CIT(A) are reproduced as under:-

“4.3 I have gone through the order of the AO and considered the written submissions and arguments of the AR. I have also gone through the case laws referred to by the AO and the A.R. The AO from the records and documents submitted by the assessee, found that the company had received 'share applications from two companies amounting to Rs.3,00,00,000/- including the share premium of Rs.2,94,00,000/-. She found that the net worth of the assessee company was not so high to justify having received such high share premium. The assessee company was also not having huge reserves in order to attract premium on shares. She tried to visit the premises to have spot enquiry done but found at the

addresses given by the assessee that no company existed on those addresses. The A.O. issued a show cause to the assessee as at the addresses given and found that no company existed. She received from the A.R. the new addresses on the same day. She being in doubt issued a commission U/s 131 (d) to ACIT Circle-49(1) New Delhi to visit the new addresses. The ACIT visited the new site and as per her report she found that the building was not having any sign board or hording of the companies. She found there the office of a Company Secretary, Shri Abhimanyu Upadhaya, whose statement was recorded. Shri Upadhaya accepted that the companies were registered from his address as he was the company secretary of those companies. One of the Directors of the investor company Shri Surender Kumar Jain telephoned the ACIT(TDS) and requested to meet her and the date was fixed for 23.12.2011. However, instead of Shri Jain one Shri Bharat Bhushan appeared. His statement was recorded. As he did not know about the transactions, summons to Shri S.K. Jain were issued and his statement was recorded.

The report was submitted by the ACIT to the AO who informed that no office existed in so far as no sign board or hoarding of the companies were found. She

had taken the photographs of the building and forwarded the statements recorded to the A.O.

The A.O. formed her opinion on the basis of report and the statements recorded that the share applicants were paper companies. From bank statements of the share applicants it was seen that most of the deposits were withdrawn on the same day. She treated the share application money as bogus and added to the income of the assessee company u/s 68 of IT Act, 1961.

On the other hand the AR argued that he submitted all the documents which were the Confirmations, the Bank Statements, the set of Balance sheets, the copy of ITR and the copy of Board Resolutions. He further stated that the Director in his statement before the Commission vide question No.14 and question No. 14 had informed about the share applications and the premium paid on the share application. The AR further had given the figures of Rs.112,12,50,000/- as issued capital and free reserves of Shalini Holdings Ltd and Rs.14,86,25,000/- of Apoorva Leasing Finance & Investment Co. The investments made by the former were Rs.116,95,01,200 and of latter were Rs.13,20,35,000/-.

The number of companies in which the these companies have invested are 253 by Shalini and 21 by Apoorva. These investments made by the companies only for the year under consideration but if the total investments are taken these are much more.

Regarding the premium on shares, the AR has informed that these are taken not just on the basis of book value. There are multiple methods by which it is worked out. He further referred to the insertion of new clause in the Finance Bill, 2012, which shall tax the excess valuation other than book value u/s 56(viib) w.e.f 01.04.2013 i.e from the AY. 2013-14.

I find that there is no doubt about the identities of the companies. The genuineness of the transaction of the share application is proved by the confirmation and bank account. The confirmations have been submitted and the transaction has been made through Axis Bank vide different cheques and the copy of Bank Account has been furnished. The assessee even furnished before the AO the set of Balance sheet, the copy of acknowledgment of Income Tax Return and the copy of share application, the copy of the Board Resolution for the application for shares.

In view of the above facts and various judgments cited by the AR and the judgment of Apex Court in the case of CIT Vs Lovely Exports Pvt. Ltd (2008) 216 CTR 195 and the other cited judgments, the addition of Rs.3,00,00,000/- is deleted.

5.3 I have gone through the order of the AO and considered the written submissions and the affidavit of the Managing Director of the assessee company.

The assessee company apart from the construction activity had received a work contract from Era group for work at Noida. Labour oriented work was involved there. The assessee had arranged a supervisor who used to get the labour directly from the market and paid them on the same day. The funds used were withdrawn from Meerut banks and taken to Noida for the payments. Heavy cash was involved. The A.O. noticed from the records that the signatures on the payment sheets were in most of the cases common and being in doubt issued a show cause notice for making an addition of 10% of the gross receipts to the overall returned income, The AR on the other hand, requested the AO for making an addition @ 8% of the gross receipts but by mutual consent the MD of the assessee company Ward @9% of the gross receipts and signed

before the AO for the additions of 9% An affidavit of the MD of the assessee company has been submitted stating that he had agreed for the gross profit @ 9% of the gross receipts and not 15.97% (06.97% being taken in Profit Loss Account).

The AO had worked the additions and reduced the bank interest of Rs.15,90,787/- from the 9% receipts. The AO instead of reducing the gross profit already shown as Rs.52,15,965/- reduced the bank interest of Rs.15,90,787/-. Which resulted of taxing the gross receipts at 15.97% less Rs.15,90,787/-.

I have seen the affidavit of the Managing Director of the company and also the submissions of the AR. I have no doubt about the intentions of the assessee as they had agreed for the addition of 9% of the receipts of the work contract. I hereby direct the AO to take the profit at 9% of gross receipts and account for the profit already shown in the P&L Account.”

7. On going through the aforesaid findings of the Ld. CIT(A), we find that the AO observed that the assessee company had received share applications from two companies amounting to Rs.3,00,00,000/- including the share premium of Rs.2,94,00,000/-. AO noted that the net worth of the assessee company was not so high to justify having received

such high share premium. The assessee company was also not having huge reserves in order to attract premium on shares. AO tried to visit the premises to have spot enquiry done but found at the addresses given by the assessee that no company existed on those addresses. The A.O. issued a show cause to the assessee as at the addresses given and found that no company existed. AO received from the A.R. the new addresses on the same day. AO being in doubt issued a commission u/s 131(d) to ACIT Circle-49(1) New Delhi to visit the new addresses. The ACIT visited the new site and as per her report and found that the building was not having any sign board or hording of the companies. AO found there the office of a Company Secretary, Shri Abhimanyu Upadhaya, whose statement was recorded. Shri Upadhaya accepted that the companies were registered from his address as he was the company secretary of those companies. One of the Directors of the investor company Shri Surender Kumar Jain telephoned the ACIT(TDS) and requested to meet her and the date was fixed for 23.12.2011. However, instead of Shri Jain one Shri Bharat Bhushan appeared. His statement was recorded. As he did not know about the transactions, summons to Shri S.K. Jain were issued and his statement was recorded. The report was submitted by the ACIT to the AO who informed that no office existed in so far as no sign board or hoarding of the companies were found. She had taken the photographs of the building and forwarded the statements recorded to the A.O. The A.O. formed the opinion on the basis of report and the statements recorded that the share applicants were paper companies.

From bank statements of the share applicants it was observed that most of the deposits were withdrawn on the same day. Hence, the AO treated the share application money as bogus and added to the income of the assessee company u/s 68 of IT Act, 1961. During the assessment proceedings, A.R. of the assessee has submitted all the documents which were the Confirmations, the Bank Statements, the set of Balance sheets, the copy of ITR and the copy of Board Resolutions. Ld. AR of the assessee submitted before the AO that the Director in his statement before the Commission vide question No.14 and question No. 14 had informed about the share applications and the premium paid on the share application. The AR further had given the figures of Rs.112,12,50,000/- as issued capital and free reserves of Shalini Holdings Ltd and Rs.14,86,25,000/- of Apoorva Leasing Finance & Investment Co. The investments made by the former were Rs.116,95,01,200 and of latter were Rs.13,20,35,000/-. The number of companies in which the these companies have invested are 253 by Shalini and 21 by Apoorva. These investments made by the companies only for the year under consideration but if the total investments are taken these are much more. Regarding the premium on shares, the AR has informed that these are taken not just on the basis of book value. There are multiple methods by which it is worked out. He further referred to the insertion of new clause in the Finance Bill, 2012, which shall tax the excess valuation other than book value u/s 56(viib) w.e.f 01.04.2013 i.e from the AY. 2013-14. Therefore, there is no doubt about the identities of the companies. However, the genuineness of the

transaction of the share application is proved by the confirmation and bank account. The confirmations have been submitted and the transaction has been made through Axis Bank vide different cheques and the copy of Bank Account has been furnished. The assessee even furnished before the AO the set of Balance sheet, the copy of acknowledgment of Income Tax Return and the copy of share application, the copy of the Board Resolution for the application for shares. Therefore, the Ld. CIT(A) has relied upon the judgment of Apex Court in the case of CIT Vs Lovely Exports Pvt. Ltd (2008) 216 CTR 195, as referred by the Ld. AR of the assessee before him and hence, rightly deleted the addition of Rs.3,00,00,000/-, which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the revised ground no. 1 raised by the Revenue. Our aforesaid view is fortified by the ITAT, 'E' Bench, New Delhi decision dated 07.8.2015 passed in the case of Modinagar Rolls Ltd., Modinagar, Ghaziabad vs. Additional Commissioner of Income Tax, Range-I, Ghaziabad in ITA No. 333/Del/2015 (AY 2010-11) wherein the Tribunal has treated the transaction of the two firms i.e. M/s Apoorva Leasing Finance & Investment Pvt. Ltd. and M/s Shalini Holdings Ltd. as genuine, which are involved in the present case also.

7.1 As regards ground no. 2 is concerned, we find that the assessee company apart from the construction activity had received a work contract from Era group for work at Noida. Labour oriented work was involved there. The assessee had arranged a Supervisor who used to get

the labour directly from the market and paid them on the same day. The funds used were withdrawn from Meerut banks and taken to Noida for the payments. Heavy cash was involved. The A.O. noticed from the records that the signatures on the payment sheets were in most of the cases common and being in doubt issued a show cause notice for making an addition of 10% of the gross receipts to the overall returned income. The AR on the other hand, requested the AO for making an addition @ 8% of the gross receipts but by mutual consent the MD of the assessee company Ward @9% of the gross receipts and signed before the AO for the additions of 9% An affidavit of the MD of the assessee company has been submitted stating that he had agreed for the gross profit @ 9% of the gross receipts and not 15.97% (06.97% being taken in Profit Loss Account). The AO had worked the additions and reduced the bank interest of Rs.15,90,787/- from the 9% receipts. The AO instead of reducing the gross profit already shown as Rs.52,15,965/- reduced the bank interest of Rs.15,90,787/-. Which resulted of taxing the gross receipts at 15.97% less Rs.15,90,787/-. Ld. CIT(A) after considering the affidavit of the Managing Director of the company and also the submissions of the AR had observed that there is no doubt about the intentions of the assessee as they had agreed for the addition of 9% of the receipts of the work contract. Hence, Ld. CIT(A) has rightly directed the AO to take the profit at 9% of gross receipts and account for the profit already shown in the P&L Account, which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and dismiss

the ground no. 2 raised by the Revenue. We further note that since the Assessee has not filed any Application under Rule 46A of the I.T. Rules, 1962, hence, the question of contravention of Rule 46A does not arise.

8. In the result, the Appeal filed by the Revenue stands dismissed.

Order pronounced on 19/06/2017.

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

Date:19/06/2017

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

Sd/-

(H.S. SIDHU]
JUDICIAL MEMBER

TRUE COPY
By Order,

Assistant Registrar,
ITAT, Delhi Benches