

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

**BEFORE SHRI JOGINDER SINGH (VICE PRESIDENT) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3164/MUM/2017
Assessment Year: 2012-13**

Income Tax Officer
6(1)(2), R. No. 508, 5th
floor, Aayakar Bhavan,
M.K. Road, Mumbai-
400020.

Appellant

M/s Amirashmi Finstock
Pvt. Ltd. 205, Kailash
Plaza, V B Lane,
Ghatkopar (E), Mumbai-
400077.

**PAN No. AAICA2050R
Respondent**

**C.O. No. 279/MUM/2018
(ITA No. 3164/MUM/2017)
Assessment Year: 2012-13**

M/s Amirashmi Finstock
Pvt. Ltd. 205, Kailash
Plaza, V B Lane,
Ghatkopar (E), Mumbai-
400077.

**PAN No. AAICA2050R
Appellant**

Income Tax Officer
6(1)(2), R. No. 508, 5th
floor, Aayakar Bhavan,
M.K. Road, Mumbai-
400020.

Respondent

Revenue by : Mr. Satish Chandra Rajore, DR
Assessee by : Mr. Atin S. Mehta, AR

Date of Hearing : 08/01/2019
Date of pronouncement : 30/01/2019

ORDER

PER N.K. PRADHAN, AM

The appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-33, Mumbai [in short

‘CIT(A)'] and arises out of the order passed u/s 143(3) of the Income Tax Act 1961, (the ‘Act’). The cross-objection filed by the assessee is against the order of the Assessing Officer.

2. The ground of appeal filed by the Revenue reads as under:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.4,35,00,000/- u/s 68 of the Act, on account of Unexplained Share Premium.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.4,35,00,000/- without appreciating the fact that the genuineness of the share premium amount and the creditworthiness of the companies has not been established by the assessee as these companies which subscribed to the Shares had been formed only on paper without having any substantial business activities and are operated and controlled by Shri Shirish C. Shah.

3. The cross objections filed by the assessee are as under:

1. The AO erred in on facts and in law in making addition of Rs.4,35,00,000/-
2. The AO failed to appreciate that section 68 of the Income Tax Act, 1961 does not apply to share capital and/or share premium subscription for the assessment year under consideration.
3. The AO did not make available/did not grant inspection to the respondent of the materials based on which such addition is made, despite the request of the respondent during assessment.
4. The AO did not grant cross examination of the parties to the respondent despite the request of the respondent during assessment.

4. The assessee filed its return of income for the assessment year (AY) 2012-13 on 21.09.2012 declaring total income at Rs.290/-. During

the course of assessment proceedings, the Assessing Officer (AO) asked the assessee to prove the identity, genuineness and creditworthiness of the persons from whom the assessee had received share premium of Rs.8,45,50,000/-. In response to it, the assessee filed confirmation along with copy of return including profit and loss account and balance sheet of the concerned entities. The AO observed that the concerned entities were managed by Mr. Shirish Chandrakant Shah, who was entry provider. The AO observed that a search and seizure action was conducted by the Income Tax Department in Surat and statement of Shri Shirish C. Shah was recorded u/s 132(4) of the Act on 13.04.2013. In answer to question No. 7 of the statement recorded during the course of search, Shri Shah himself stated that listed companies like Empower India Ltd., Prabhav Industries Ltd., Secunderabad Health Care Ltd., Vishesh Infotechnics Ltd., Dhanush Technologies Ltd., Aadhar Venture India Ltd., Sanguine Media Ltd, Emporis Projects Ltd., Avance Technologies Ltd. and Shri Ganesh Spinners Ltd. were managed and controlled by him. He further clarified that he was using these listed companies for providing accommodation entries of share capital/premium, share application, unsecured loans (one time).

In response to a show cause notice issued by the AO, the assessee filed a reply dated 25.03.2015 which has been extracted by the AO at para 6 of his assessment order. However, the AO was not convinced with the above reply of the assessee for the reason that "as the assessee-company's representative requested to cross examine vide letter dated

25.03.2015, he has been already asked to produce the mentioned parties to prove the genuineness of the transaction, but he failed to do so”.

Thus the AO made an addition of Rs.4,35,00,000/- u/s 68 of the Act on the reason that the assessee has received share premium from the companies of Shri Shirish C. Shah, who stated himself to be providing accommodation entries.

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). In the order dated 03.02.2017, the Ld. CIT(A) observed that the AO has made the addition solely on the basis of the statement recorded u/s 132(4) of Shri Shirish C. Shah on 13.04.2013. The assessee claimed that since it did not know Shri Shah, it was not possible for it to produce him for examination. Thus the Ld. CIT(A) held that the assessee established the identity, creditworthiness and genuineness of share application money by furnishing the complete details of the subscriber of the shares i.e. board resolution, copies of applications, confirmation and bank statement and copy of ITR-V and latest address and full set of audited accounts. The Ld. CIT(A) further observed that the AO has not denied these evidences and also not established the link between Shri Shirish C. Shah and investors of the assessee-company. Relying on the decision in *M/s Superline Construction P. Ltd.* vide ITA No. 3645/Mum/2014 for AY 2007-08 dated 30.11.2015 and *M/s Creative World Telefilms Ltd.* (earlier known as Link International Service Pvt. Ltd.) vide ITA (L) No. 2182 of 2009 dated 12.10.2009, the Ld. CIT(A) deleted the addition of Rs.4,35,00,000/- made by the AO u/s 68 of the Act.

6. Before us, the Ld. DR submits that the assessee company has received share premium from the companies of Shri Shirish C. Shah who stated himself to be providing accommodation entries. In this context, the Ld. DR refers to answer to question No. 7 of the statement recorded u/s 132(4) during the course of search on 13.04.2013. Thus the Ld. DR submits that the addition of Rs.4,35,00,000/- made by the AO be restored.

7. On the other hand, the Ld. counsel of the assessee submits that the respondent has established the identity, genuineness and creditworthiness of the transactions and same is evident by observations/conclusions of the Ld. CIT(A) *vide* para 6.4 and 6.5 of the order dated 03.02.2017. The Ld. counsel files a Paper Book (P/B) containing (i) appeal submissions (ii) decision in *Superline Construction Pvt. Ltd. & others* by ITAT Mumbai, (iii) copy of Form 5 of Ministry of Corporate Affairs for increasing authorized share capital of the assessee, (iv) copy of Form 23 of Ministry of Corporate Affairs for resolution for increasing authorized share capital of the assessee, (v) copy of Form 2 of Ministry of Corporate Affairs for allotment of shares by the appellant, (vi) copy of letter of authority, (vii) the set containing copies of documents of share subscribing company Aadhar Ventures India Ltd., Sanguine Media Ltd. and Emporis Projects Ltd., (viii) decision of Bombay High Court in *Creative World Telefilms Pvt. Ltd.* of 2009.

The Ld. counsel further files a P/B containing decision in *CIT v. M/s Gagandeep Infrastructure Pvt. Ltd.* (ITA No. 1613 of 2014) of Bombay High Court, *Pr. CIT v. M/s SDB Estate Pvt. Ltd.* (ITA No. 1356 of

2015) of Bombay High Court, order of the ITAT dated 30.11.2015 in the case of *M/s Supreline Construction P. Ltd. & others*, and the decision in *CIT v. Pranav Foundations Ltd.* (2014) 51 taxmann.com 198 (Madras).

The Ld. counsel also relies on the latest decision of the Hon'ble Supreme Court in the case of *CIT v. Sunita Dhadda* (Department's SLP No. 9432/2018, dismissed) and mentions the following :

“S. 143(3)/292C: if the AO wants to rely upon documents found with third parties, the presumption u/s 292C against the assessee is not available. As per the principles of natural justice, the AO has to provide the evidence to the assessee & grant opportunity of cross-examination. Secondly evidences cannot be relied on as if neither the person who prepared the documents nor the witnesses are produced. The violation of natural justice renders the assessment void. The Dept cannot be given a second chance (All judgments considered.”

The Ld. counsel further submits that the assessee would not like to press the 3rd and 4th ground of cross objection.

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

In response to a query raised by the AO during the course of assessment proceedings, the authorized representative of the assessee-company filed a reply vide letter dated 25.03.2015 stating *inter alia* that reasonable opportunity be given to examine the documents on the basis of which allegation has been made; cross-examine the parties which is alleged to be bogus etc.

Also in the cross objection the assessee has stated that the AO did not make available to the respondent of the materials based on which such addition is made, despite the request of the respondent during assessment. Also it has been stated in the cross objection filed by the assessee that the AO did not grant cross-examination of the parties to the respondent, despite the request of the respondent during assessment.

In the case of *Sunita Dhadha*(supra), the Hon'ble Rajasthan High Court *vide* order dated 31.07.2017 in ITA No. 197/2012, taking into consideration the observation made by the Tribunal regarding not allowing cross-examination of Mr. Thakkar from whose documents, the amount is alleged to have been taken in the interest of the assessee, held the finding recorded by the Tribunal as just and proper and answered the issues in favour of the assessee and against the Department. The SLP filed by the Department against this order has been dismissed by the Hon'ble Sepreme Court.

A proper hearing must always include a 'fair opportunity' to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Lord Denning in *Kanda v. Government of Malaya* [1962] AC 322 has added :

"If the right to be heard is to be real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

We find that the Ld. CIT(A) has failed to appreciate the relevance of cross-examination in the instant case.

8.1 Examined on the touchstone of the above position of law, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after examining the aforesaid parties and allowing the assessee opportunity to cross-examine them. We direct the assessee to file the relevant documents/evidence before the AO.

Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalising the order.

As the matter has been restored to the file of the AO to make a *de novo* order, we are not adverting to the case laws cited by both the sides.

9. In the result, the appeal filed by the Revenue is allowed for statistical purposes. The cross objections filed by the assessee are partly allowed.

Order pronounced in the open Court on 30/01/2019.

Sd/-
(JOGINDER SINGH)
VICE PRESIDENT

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

Mumbai;

Dated: 30/01/2019

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