

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member]

**I.T.A. No. 1705/Kol/2016
Assessment Year: 2012-13**

Income Tax Officer, Ward-10(1), Kolkata.....Appellant

M/s. Jai Tara Carriers Pvt. Ltd.....Respondent

Block-30/3C

3rd Floor

Diamond City North

68, Jessore Road

Kolkata - 700 055

[PAN : AACCJ 3144 R]

Appearances by:

Shri Manish Tiwari, A/R, appeared on behalf of the assessee.

Shri Saurav Kumar, Addl. CIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : January 10th, 2019

Date of pronouncing the order : February 28th, 2019

O R D E R

Per J. Sudhakar Reddy :-

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax (Appeals) - 4, Kolkata, (hereinafter the 'Ld. CIT(A)'), dt. 23/06/2016, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2012-13.

2. The assessee is a company and is in the business of transport. It filed its return of income electronically for the Assessment Year 2012-13, on 29/09/2012 disclosing total income of Rs.62,580/-. The Assessing Officer completed assessment u/s 143(3) of the Act, determining the total income at Rs.1,76,62,580/-, *interalia* making an addition u/s 68 of the Act of share capital received at a premium. The addition was made by the Assessing Officer as there was no compliance from the assessee. At page 2 of the assessment order he held that the identity, genuineness and the creditworthiness of the share applicant companies have not been established and the reasons for investment in this company that has no track record and that too with huge premium is not clarified. He relied on the preponderance of probabilities and made the addition.

2.1. On appeal, the Id. First Appellate Authority deleted the addition by holding that:-

- a) The assessee has responded to the notice of the Assessing Officer and filed documents giving full details of each of the 16 share applicant companies who had subscribed to the share capital as well as share premium money raised by the assessee.
- b) The addition was made just because the assessee could not ensure the physical attendance of the directors of the share applicant companies. He held that the assessee had no power to compel the directors of the share applicant companies to appear before the Assessing Officer.
- c) The share capital reserves and surplus of each of the share applicant companies is far higher than the miniscule investment made by them in the assessee company. As a percentage of the share capital and reserves of surplus, the investment made in the assessee company by these share applicant companies ranged from 0.01% to 0.03% in cases of all companies and only in the case of M/s. Jai Tara Rice Mill, the percentage of investment was 0.20%. Thus, he held that the creditworthiness of share applicant companies are proved.
- d) On the hefty share premium, he relied on the 1st proviso to Section 68 of the Act and submitted that this proviso is applicable from the Assessment Year 2013-14 and not to the impugned Assessment Year 2012-13.
- e) That the assessee has proved the identity and creditworthiness of the share applicant companies and genuineness of the transactions.

3. Aggrieved the revenue is before us.

4. The Id. D/R, submitted that the share premium charged is excessive and this proves that the transaction is not a genuine transaction. He relies on the order of the Assessing Officer.

5. The Id. Counsel for the assessee, on the other hand submits that the assessee is not a paper company and it is a transport company having substantial turnover,

hence substantial investment was made in its equity shares. He submitted that each of the share applicant companies have furnished copy of their PAN, copy of income-tax return filed by them, copy of the annual accounts, copy of audited financial statements, copy of bank account showing the transaction, source of source etc. He filed a paper book running into 322 pages and took this Bench through the evidences filed by each of these companies in support of his contentions.

6. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

7. A perusal of the statement of profit and loss account and balance sheet of the assessee company demonstrates that the revenues from operation was Rs.33,40,000/- for the impugned Assessment Year and other income was Rs.8,92,279/-. The assessee incurred substantial expenditure towards employee's benefits, depreciation etc. It has fixed assets worth Rs.62,36,839/-. It is in the business of transport. Hence the test to be applied for such companies, in our considered opinion is not the same as that which is to be applied in case of a *jamakharchi* company or a company on paper which has net worth and no transactions or real asset base.

7.1. We now consider the documentation placed on record by share applicant companies. The ld. CIT(A) at page 11 & 12 of his order has given the following chart reflecting that the share capital & reserves appearing in the balance sheet of respective share holders. This works to negligible percentage:-

<u>Name of Share holder Companies</u>	<u>Share Capital,</u>		<u>Application</u>	<u>Percentage</u>
	<u>Reserves &</u>	<u>Surplus</u>		
Jai Tara Rice Mills Pvt. Ltd.	1,01,19,325		20,00,000	0.20
Utsav Distributors Pvt. Ltd.	2,51,09,804		5,00,000	0.02
Linkup Wintrade Pvt Ltd	31,91,03,635		12,00,000	0.01
Turtle Commercial Pvt. Ltd.	12,81,63,994		10,00,000	0.01
Sanskar Commoddeal Pvt Ltd	43,51,10,402		25,00,000	0.01
Carwin T racom Pvt Ltd	6,39,35,337		15,00,000	0.02

Rose Commodities Pvt Ltd	5,91,80,109	15,00,000	0.03
Vatsalya Steels Pvt Ltd	4,12,02,466	5,00,00	0.01
Bhagwat Kripa Trading Pvt Ltd	12,63,04,443	6,00,000	0.01
Pushpanjali Carriers Pvt Ltd	31,43,95,270	17,00,000	0.01
Khushboo Complex Pvt. Ltd.	96,60,85,930	20,00,000	0.01
Top Class Logistics Pvt.Ltd.	12,31,03,460	5,00,000	0.01
Esquire Enclave Pvt. Ltd.	1,00,03,07,030	7,00,000	0.01
Rootstar Merchandise Pvt. Ltd.	40,36,11,376	14,00,000	0.01
Sampark Advisory Services Pvt. Ltd.	50,61,95,580	5,00,000	0.01
Truthful Suppliers Pvt. Ltd.	18,31,02,852	5,00,000	0.01

7.2. A perusal of the above demonstrates that the creditworthiness of these share applicant companies is not in doubt. As far as the identity of these share applicant companies are concerned, the assessee has furnished the following details before the Assessing Officer in case of each of these companies:-

- a) Share applications
- b) ITR Acknowledgements
- c) Audited Financial Statements
- d) Relevant bank details
- e) Allotment advices

8. It is well settled that merely because the directors of the share applicant companies did not appear before the Assessing Officer, the addition could not be made. After a detailed discussion of the submission and arguments of the assessee the ld. CIT(A) at para 5.1 to 5.8 of his order held as follows:-

"5.1. I have considered the issue involved in the light of the arguments made by the appellant. I have also gone through the assessment order. The issue involved is whether the share application money with share premium aggregating to Rs.1,76,00,000/- received by the appellant invites the mischief of Section 68 of the Act or not. I have carefully perused the observations / findings recorded in assessment order where entire amount received towards allotment of 35200 equity shares of Rs.10/- each with premium of Rs.490/- was considered as unexplained cash credit u/s 68 of the Act.

5.2. The factual position emerging from audited accounts reveals that allotment of shares of Rs.10/- each were made to sixteen corporate entities for which share application money including premium of Rs.490/- each was received during year ending 31.03.2012. Accordingly, I confine attention to addition of Rs.1,76,00,000/- as unexplained cash credit u/s 68 of the Act which reads as follows:

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

5.3 According to this section, if identity, creditworthiness of the creditor and genuineness of the transaction is not proved or the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum credited may be charged to income-tax as income of the assessee of that previous year. It is observed that the addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as identity and creditworthiness of the shareholders were bogus in nature as they did not exist and the transactions were an eyewash only for bringing its black money into circulation without paying any tax to the revenue. Each of the share subscribers are regularly assessed to income tax; and the investments made by each of them are duly and fully reflected in their audited books of accounts as well as their income tax return. The appellant had duly filed its return of total income u/s 139(1) of the Act in respect of the AY 2012-13. In the course of assessment proceedings, the appellant in response to the requisitions made by the AO, from time to time, produced its audited books of accounts, filed copies of its audited annual accounts including various details and other documents as desired by the AO. The details and documents so produced and filed with the AO included, inter alia, full details of each of the sixteen share applicants, who had subscribed to the aggregate share capital as well as share premium money raised by the appellant during the assessment year under appeal. The AO, on receipt of the aforesaid details from the appellant, issued summons u/s 131 in the name of the director of the appellant company calling for personal attendance as well as furnishing documents specified therein. The various documents called for were furnished as admitted by A.O. in the order. But the director of the company could not appear in person. The said summons required, production of directors of all sixteen subscriber companies. I agree with the arguments of Ld. A/R that Directors have no power to compel the directors of shareholder companies to appear before the AO of Assessee Company. I find that entire share capital with premium i.e. Rs.1,76,00,000/- has been considered as unexplained cash credit u/s 68 merely on the ground that the directors failed to appear in person in response to summons u/s 131.

5.4 It is also observed that every share applicant in their respective replies to the summons u/s 131 of the Act furnished copies of their income tax acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of share capital issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copy of the allotment advise received by them from the appellant in respect of shares allotted to them. The return of allotment as well as the annual return for the AY 2012-13 filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, further categorically proves the fact of allotment of shares to the share applicants, as disclosed in their Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant. It is observed that share application money with share premium provided to the appellant company vis-a-vis the Share Capital & Reserves appearing in the Balance Sheet of respective share holders works to negligible percentage as shown below:

<u>Name of Share holder Companies</u>	<u>Share Capital,Reserves & Surplus</u>	<u>Application Money</u>	<u>Percentage (%)</u>
Jai Tara Rice Mills Pvt. Ltd.	1,01,19,325	20,00,000	0.20
Utsav Distributors Pvt. Ltd.	2,51,09,804	5,00,000	0.02
Linkup Wintrade Pvt Ltd	31,91,03,635	12,00,000	0.01
Turtle Commercial Pvt. Ltd.	12,81,63,994	10,00,000	0.01

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It is accordingly observed that it adequately prove their creditworthiness to make investment in the share capital of the appellant. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their capacity and source of funds, as well as the genuineness of the transactions in relation to the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal, as clearly evident not only from their respective books of accounts, but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments, and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant in relation to s. 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on the issue. I further find that another reason for drawing adverse inference by AO appears to be hefty share premium received by the appellant company from the shareholders. I have already held that 1st proviso of section 68 is applicable for AY 2013-14 and premium factor is not applicable here. I hold that the other observations are based on suspicion and surmise and hence cannot be given any credence. Since the conditions precedent for discharging of burden under the provisions of s. 68 of the Act are met with adequate evidence, the addition made under such pretext deserves to be deleted.

5.5. I find from AO's observations in the assessment order that documents file on record to prove identity, genuineness and creditworthiness have not been acted upon merely on the ground that the director of the appellant company and the subscriber company failed to appeal personally before AO and no proper reason has been explained for their non-appearance. I fully agree with the arguments of the Ld. AR that non-appearance of the Directors of the appellant company or subscriber companies cannot be a valid ground to ignore the documents available on record. I also agree that the provisions of Section 68 of the Act do not suggest any essential relation of the directors of shareholder companies.

5.6 in this respect it is relevant to refer to the decision of jurisdictional High Court in the case of CIT vs. Sagun Commercial (P) Ltd. (ITA No. 54 of 2001 dated 17.02.2011) wherein it was held as under:

"After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.

We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is dismissed."

Further, the Hon'ble jurisdictional High Court in the case of CIT vs. Gayatri Portfolio Fund (P) Ltd. (ITA No. 664 of 2004 dated 26-08-2014), it was observed as under:

"We find that the learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following observation:

".....We find that the identity of the 5 parties investing in the share capital is not in doubt. They are body corporate and their complete addresses are on record. This is the very first assessment in the file of the assessee company. The amounts were deposited by these 5 corporates per account payee cheques. These parties were not shareholders of the assessee company at the time when the case was reopened under section 147 or when the summons were issued to them. We find that the assessee has filed before the A. O. copies of share application forms duly signed along with the complete addresses of the investors along with their I. T. file numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts. In these facts we find that the assessee has discharged its initial onus to prove the identity of the investors as well their creditworthiness. It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels."

Again, the Hon'ble Jurisdictional High Court in the case of CIT vs. Sanchati Projects (P) Ltd. [ITAT 140 of 2011 dated 08.06.2011] it was observed as under :-

"It appears from record that the assessee company during the relevant assessment year under appeal raised its share capital by way of receiving share application money against 1,64,000 equity shares aggregating to Rs. 82,00,000/- from 8 different parties. The Assessing Officer, however, treated the share application money of Rs. 45,00,000/- received from five different persons as unexplained cash credit in the hands of the assessee.

According to the Assessing Officer, those parties had the same addresses as that of the assessee and they had no fixed assets and utilized their capitals in share application of the assessee company. The Assessing Officer, therefore, was of the view that the money ultimately went to the beneficiary through these companies and there, was no advertisement even

published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant /companies were assessed to the tax and their PAN and acknowledgement of I. T. Returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and, thus, according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing officer failed to establish that the share applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of share capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the share applicants.

We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of Rs. 45,00,000/- done by the Assessing Officer. We are of the view that the order impugned does not suffer from any defect whatsoever and question of substantial error of law arises justifying our interference.

The appeal is, thus, summarily dismissed. “

5.7 Further this decision of the Hon'ble Delhi High Court was approved by the Hon'ble Supreme Court in CIT vs. Lavelly Exparts Ltd. (2008) 216 CTR 195 (SC) wherein it was held as under:

“2. Can the amount of share money be regarded as undisclosed income under section 68 of I. T. Act, 1961? We find no merit in this Soeciel Leave Petition for the Simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law.”

“5.8 Therefore, considering the totality of the facts and circumstances of the case, I find substance in the arguments of the AR that the appellant has made its case that the identity of the share applicants are established beyond doubt and an enquiries made by the AO there is no. adverse finding reached on this aspect. Admittedly, all the share applicants are existing assesseees under the Act and that same of them were subject to scrutiny assessment during the same period which establishes the identity and authenticity of the share applicants. About the genuineness of the transactions there is neither any adverse finding in the assessment order nor which is subversive to. the facts brought a record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to. the share capital is proved by submission of their return, audited annual accounts, their bank statement and replies to summons u/s

131 of the Act as depicted in the foregoing. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by A.O. is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital do not warrant the inference that such share application monies received is unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect in view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of Rs.1,76,00,000/- in respect of sixteen shareholders. Thus, Ground Nos. 1 to 4 of the appeal are allowed."

We find that the revenue has not brought out any evidence to controvert the findings of the Id. CIT(A). We find no infirmity in the order of the Id. CIT(A) and uphold the same.

9. In the result, appeal of the revenue is dismissed.

Kolkata, the 28th day of February, 2019.

Sd/-
[S.S. Viswanethra Ravi]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 28.02.2019
{SC SPS}

*Copy of the order forwarded to:
1. M/s. Jai Tara Carriers Pvt. Ltd*

*Block-30/3C
3rd Floor
Diamond City North
68, Jessore Road
Kolkata - 700 055*

2. Income Tax Office, Ward-10(1), Kolkata

- 3. CIT(A)-*
- 4. CIT- ,*
- 5. CIT(DR), Kolkata Benches, Kolkata.*

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches