

IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH, MUMBAI

BEFORE HON’BLE SHRI SANDEEP GOSAIN, JM

& HON’BLE SHRI G. MANJUNATHA, AM

आयकरअपीलसं./ I.T.A. No. 2926/Mum/2016
(निर्धारणवर्ष / Assessment Year:2012-13)

ITO – 1(1)(1), R. No. 534/579, 5 th floor, Aayakar Bhava, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s Ami Housing and Developers Pvt. Ltd. 102, Manratna Business Park, Tilak Road, Ghatkopar (E), Mumbai-400 077.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAGACA4872M		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

C.O. No. 310/Mum/2017

(निर्धारणवर्ष / Assessment Year: 2012-13)

M/s Ami Housing and Developers Pvt. Ltd. 102, Manratna Business Park, Tilak Road, Ghatkopar (E), Mumbai-400 077.	बनाम/ Vs.	ITO – 1(1)(1), R. No. 534/579, 5 th floor, Aayakar Bhava, M. K. Road, Mumbai- 400 020
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Ms. Harkamal Soni & Shri S. Rajore, DR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Pravin R. Raiyani, AR
सुनवाईकीतारीख/ Date of Hearing	:	11/04/2019
घोषणाकीतारीख / Date of Pronouncement	:	27.06.2019

आदेश / ORDER

Sandeep Gosain, Judicial Member:

The present appeal as well as cross objection have been filed by the revenue as well as assessee are against the order of Commissioner of Income Tax (Appeals)-2, Mumbai dated 28.01.16 for AY 2013-14 respectively.

2. Since, the facts raised in the appeal filed by the revenue as well as C.O. filed by the assessee are identical, therefore for the sake of convenience; they are clubbed, heard and disposed of by this consolidated order.

3. First of all we take up appeal in **ITA No. 2926/Mum/2016** filed by revenue for AY 2012-13 on the grounds mentioned herein below:-

1." Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the addition of Rs. 2.25 crores made u/s 68 of the Act in respect of the investment received as Share Application Money and Share Premium thereon"

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2.The appellant craves leave to add to amend or withdraw the aforesaid grounds of appeal.

4. As per the facts of the present case are that the assessee is a private company engaged in the business of builders and developers. The return of income had e-filed on 30.09.2012 declaring total loss of Rs. (-) 29,40,946/-. Subsequently, the case was selected for scrutiny and after serving statutory notices and seeking reply of the assessee, order of assessment was completed u/s 143(3) of the Act by the AO on 30.03.15 thereby determining the total income at Rs. 1,49,92,950/- under the normal provisions of the I.T. Act.

5. Aggrieved by the order of the AO, the assessee preferred appeal before Ld.CIT(A) and Ld. CIT(A) after appreciating the facts of the present case, had *allowed* the appeal of the assessee.

6. Now before us, the revenue as well as assessee have preferred their respective appeal/ cross objection. Firstly we are dealing with the appeal filed by the revenue.

7. The solitary ground raised by the revenue relates to challenging the order of Ld. CIT(A) in deleting the addition of Rs. 2.25 crores made u/s 68 of the Act in respect of the investment received as Share Application Money and Share Premium.

8. We have heard the counsels for both the parties at length and we have also perused the material placed on record, judgment cited by the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). Ld. CIT(A) has dealt with this ground in para no. 2 to 4 of its detailed order. The operative portion of the order of Ld. CIT(A) is contained in para no. 4 of its order and the same is reproduced below:-

DECISION :

4. The submissions made by the appellant are carefully examined with reference to the facts of the case/ material placed on the record and the relevant provisions of law as well as legal precedents.

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From a plain reading of sec. 68, it can be seen that addition can be made only when the appellant offers no explanation about the nature and source of the credit of any sum in the books or the explanation offered by him is not found satisfactory by the Assessing Officer. Appellant has furnished annexure 'A' of the Paper Book at page no. 15 from which it is seen that all said 10 companies are assessed to tax and in case of some of them, even assessment proceedings were in progress before their respective jurisdictional Assessing Officers. AO himself has discussed in the order findings given by respective jurisdictional Officers in response to enquiries made with them by the Assessing Officer. Therefore, identity of all said companies stood established and return of notices unserved is of no consequence.

It is seen from the details submitted by the appellant that copy of Bank Account of said companies are placed on the record as also copy of Bank Statements of the Appellant in which payments made/sums received are duly reflected & share certificates have been duly issued. AO has not brought out that cash was[^] deposited in Banks by said companies prior to their making investment in shares of the appellant company or that moneys invested belonged to the Appellant.

The AR of the appellant has brought to my notice the Hon'ble ITAT decision in the case of Green Infra Ltd,

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wherein it is held that the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act.

It was held by the Hon. Apex Court in the case of Lovely Exports (P) Ltd. (2008) 216CTR 195 (SC) that if share application money is received by the appellant company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money can not be regarded as undisclosed income u/s 68 of the appellant company.

Respectfully following the Hon. Apex Court decision in the case of Lovely Exports (P) Ltd. (2008) 216 CTR 195 (SC) and also Hon'ble ITAT decision in the case of Green Infra Ltd., I direct the AO to delete the addition made of Rs. 2,25,00,000/-.

9. After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find from the records that AO had made the additions after considering the entire facts of the case and found that the companies who had invested in the assessee are bogus and the transactions made by these companies

are mere accommodation entries. The detailed reasoning given by the AO is at page no. 12 to 19 of its order. After carrying out detailed investigations, the AO found:-

A) The parties were not found at the address given. All the notices LI/S 133(6) issued are return by the Postal Authority with remark not known/left Hence no reliance could be placed on the confirmatory letters.

B) Neither present address of the parties provided nor any request has been made to issue the notices u/s 133(6) on the present addresses. On the contrary, the documents are gathered by the assessee company and submitted during the proceedings without authentication by them.

C) In five cases namely M/s. Olympia sales Pvt Ltd, M/s.Nanetec technologies Pvt Ltd, M/s.Honor Trading Pvt Ltd, M/s. Anushkar Trading Pvt Ltd and M/s Suresh Rathore Consultant Pvt Ltd, no return of income was filed by the aforesaid company, consequently the question of establishment of the genuine of the transaction or the creditworthiness of the creditor did not and could not arise.

D) Mere payment by account payee cheque is not sacrosanct nor can it make a non genuine transaction genuine. In the absence of return of income, it was not possible to verify the real nature of transaction even though they are made by cheques.

E) Though Copy of balance sheet and profit and loss account of two companies viz M\s Honor Trading Pvt Ltd and M\s Anushkar Trading Pvt has been provide by the assessee company but these two companies has not filed ROI for A.Y. 2012-13.

F) The companies who have filed the ROI, the investment in share application is not reflecting in balance sheet and also observed that total application of fund is below/equal to investment made in the assessee company.

G) Mr. Pradeep Prajapati is director in company viz. M/s Nantech Technology Pvt. Ltd., M/s Olympia sales Pvt. Ltd., M/s Proud Financial Services Pvt. Ltd. and M/s Irenic Multi Trading Pvt. Ltd, who has admitted that he knew nothing about the business activities of any company in which he was director.

10 Whereas while deciding the appeal, Ld. CIT(A) had merely mentioned that on the basis of documents filed by the

assessee, the identity of all the companies stood established and the return of notices 'unserved' is of no consequence. Apart from that on the basis of copy of bank statement, it was held that prior to making investment in shares, there was no cash deposits in the bank of the said companies. The Ld. CIT(A) has nowhere discussed or decided the creditworthiness of the companies and the genuineness of the transactions. From the order of Ld. CIT(A), we found that there is not even an iota of discussion on the creditworthiness of the companies and the genuineness of the transactions.

11. Since, all the notices issued u/s 133(6) issued by the AO were returned by the postal authorities with remark 'not known /left' and none of the directors of the said companies appeared before the AO, thus AO could not get opportunity to confront the documentary evidences with the parties. The AO had recorded the categorical findings that five companies had not filed any return, thus the question of establishment of genuineness of the transaction or the creditworthiness of the directors could not be proved. For the year under consideration, we notice that the two

companies named at serial no. (E) had not even filed their return of income and in respect of the companies, who have filed their return of income, then the investment in shares is not being reflected in the balance sheet and the total application of fund is below / equal to the investment made in the assessee company. It was categorically pointed that Mr. Pradeep Prajapati, the director of the companies listed at para –G had admitted that he knew nothing about the business activities of the said companies in which he was director.

12. All the above factual findings have not been rebutted or controverted by Ld. CIT(A) while deciding the appeal in favour of assessee and deleting the additions. Even Ld. CIT(A) had not adjudicated or given any findings with regard to credibility of the investing company and genuineness of transactions. Whereas, Hon'ble Apex Court in the case of *PCIT Vrs. NRA Iron & Steel Pvt Ltd. (2019) 103 taxman.com 48(SC)*, had dealt with somewhat similar situation and concluded against the assessee as the creditworthiness of the investors and genuineness of the transactions cannot be proved.

13. Ld. CIT(A) had deleted the additions only by holding that identity of all the companies stood established. Whereas all the three important ingredients i.e. identity of the investors, creditworthiness of the investors and genuineness of the transactions should co-exist. Only because the identity of the said companies stood established, cannot be the sole criteria for deleting the additions. The Ld. CIT(A) had not controverted the factual findings recorded by AO by elaborating the documentary evidence and thus the findings of Ld. CIT(A) are not supported by any documentary evidences.

14. Be that as it may, it is the primary duty which is bestowed upon Ld. CIT(A) to bring on record the complete and all relevant facts of the case while deciding the appeal. It would be relevant here to quote from Hon'ble Delhi High Court in the case of **CIT vrs. Jansampark Advertising and Marketing Pvt. Ltd. Dated 11.03.15**, wherein it was held as under:-

35. *Assessment proceedings under the Income Tax Act are not a game of hide and seek. The inquiry in the wake of a notice under Section 148 is not an empty*

formality. It must be effective and with a sense of purpose. There is an elaborate procedure set out which requires scrupulous adherence and followed up on. In the hierarchy of the authorities, the AO is placed at the bottom rung. The two layers of appeals, before the matter engages the appellate jurisdiction of this court, are authorities vested with the jurisdiction, power and obligation to reach appropriate findings on facts. Noticeably, it is only the appeal to the High Court, under [Section 260-A](#), which is restricted to consideration of "substantial question of law", if any arising. As would be seen from the discussion that follows, the obligation to make proper inquiry and reach finding on facts does not end with the AO. This obligation moves upwards to CIT (Appeals), and also ITAT, should it come to their notice that there has been default in such respect on the part of the AO. In such event, it is they who are duty bound to either themselves properly inquire or cause such inquiry to be completed. If this were not to be done, the power under [Section 148](#) would be rendered prone to abuse.

38. *The provision of appeal, before the CIT (Appeals) and then before the ITAT, is made more as a check on the abuse of power and authority by the AO. Whilst it is true that it is the obligation of the AO to*

conduct proper scrutiny of the material, given the fact that the two appellate authorities above are also forums for fact-finding, in the event of AO failing to discharge his functions properly, the obligation to conduct proper inquiry on facts would naturally shift to the door of the said appellate authority. For such purposes, we only need to point out one step in the procedure in appeal as prescribed in [Section 250](#) of the Income Tax Act wherein, besides it being obligatory for the right of hearing to be afforded not only to the assessee but also the AO, the first appellate authority is given the liberty to make, or cause to be made, "further inquiry", in terms of sub-section (4) which reads as under:-

—The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals).

42. *The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and*

deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question.

15. Apart from above, we find that Hon'ble Apex Court in the case of **Kapurchand Shrimal Vrs. CIT 1981 131(ITR) Page 451** has held that *the duty of the Tribunal does not end with making a declaration that the assessments are illegal and it is duty bound to issue further directions. The appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute and the statute does not say that such a direction cannot be issued by the appellate authority in a case of this nature.*

16. Therefore, keeping in view the interest of justice, we *set aside* the order of Ld. CIT(A) and *remit* the matter back to the file of Ld. CIT(A) with a direction to pass afresh order and to give clear cut findings on all the three important ingredients which are enumerate above. It is needless here to mention that before passing the order, Ld. CIT(A) shall provide sufficient opportunity of hearing to the assessee. Assessee is at liberty to file any other documents before Ld. CIT(A) and Ld. CIT(A) is also at liberty to carry out any further investigation or verifications, if so required.

17. Before parting, we may make it clear that our decision to restore the matter back to the file of Ld. CIT(A) shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by the Ld. CIT(A) independently in accordance with law. With these directions, this ground of appeal raised by the revenue is **partly allowed for statistical purposes.**

18. In the net result, the appeal filed by the revenue stands **partly allowed for statistical purposes.**

C.O. No. 310/Mum/2017 for AY 2012-13

19. Now we take up **C.O. No. 310/Mum/2017 for AY 2012-13** filed by the assessee. Since we have already decided the similar ground of appeal in ITA No. 2926/Mum/2016 for AY 2012-13 on merits. Therefore, following our own decision in ITA No. 2926/Mum/16, we apply the same findings in the present appeal in order to maintain judicial consistency which is applicable *mutatis mutandis*.

20. Consequently, the CO filed by the assessee also stands **allowed for statistical purposes**.

21. In the net result, the appeal filed by the revenue and C.O. filed by the assessee stands **allowed for statistical purposes** with no order as to cost.

Order pronounced in the open court on 27th June, 2019

Sd/-
(G. Manjunatha)
लेखासदस्य / Accountant Member
मुंबई Mumbai; दिनांक Dated :
Sr.PS. *Dhananjay*

Sd/-
(Sandeep Gosain)
न्यायिकसदस्य / Judicial Member
27.06.2019

*I.T.A. No. 2926/Mum/2016
and C.O. No. 310/Mum/2017
M/s Ami Housing and Developers Pvt. Ltd.*

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT,
Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai