

आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 2061/Mum/2017

(निर्धारण वर्ष / Assessment Year 2009-10)

The Dy. Commissioner of Income Tax Officer, Circle-12(1)(2), Room No. 223, 2 nd Floor, Aayakar Bhavan, M.K. Rd, Mumbai-20	बनाम/ Vs.	M/s Blue Square Corporate Services Pvt. Ltd. 103, 10 th floor, Yugdharma, Off Link Road, Goregaon (West), Mumbai-400 062
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./ PAN No. AADCB4038M		

प्रत्याक्षेप सं./ CO No. 273/Mum/2018

(Arising in ITA No. 2061/Mum/2017 for AY 2009-10)

M/s Blue Square Corporate Services Pvt. Ltd. 103, 10 th floor, Yugdharma, Off Link Road, Goregaon (West), Mumbai-400 062	बनाम/ Vs.	The Dy. Commissioner of Income Tax Officer, Circle-12(1)(2), Room No. 223, 2 nd Floor, Aayakar Bhavan, M.K. Rd, Mumbai-20
(आपत्ति करनेवाला / Cross Objector)		(प्रत्यर्थी/ मूल अपीलार्थी / Respondent/Orig. Appellant)

अपीलार्थी की ओर से / Appellant by	:	Ms. Kavita P. Kaushik, DR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Rakesh Joshi, AR

सुनवाई की तारीख / Date of hearing:	28.11.19
घोषणा की तारीख / Date of pronouncement:	31.12.19



आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-20, Mumbai in Appeal Nos. CIT(A)-20/DCIT-12(1)(2)/IT-410/2014-15 dated 02.12.2016. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle 12(1)(2) Mumbai (in short DCIT/ITO/ AO) for AY 2009-10 vide dated 23.03.2015, under section 143(3) read with section 143(3) read with section 147 of the Income-tax Act, 1961 (hereinafter 'the Act').

2. First, we will take up the Cross Objection raised by the assessee on the issue of assessment of jurisdiction by the AO for reopening of assessment. For this, assessee has raised the following ground No. 1: -

"1. On the facts and circumstances of the case as well as in Law, the learned CIT(A) has erred in confirming the action of Learned Assessing in reopening the assessment under section 147 of the Income Tax Act, 1961, without considering the facts and circumstances of the case."

3. The learned Counsel for the assessee stated the facts that the assessee filed its return of income on 30.09.2009 declaring total income of ₹1,14,92,500/- and this return of income was

processed under section 143(1) of the Act. Subsequently, on perusal of information received from the office of CCIT (CCA), Mumbai, the AO noticed that the assessee has raised share premium of ₹2.88 crores and for that he issued notice under section 148 of the Act dated 30.03.2014. The assessee in response to this notice stated that the assessee filed its return of income on 30.09.2009 by treating as return filed in response to notice under section 148 of the Act vide letter dated 19.05.2014. The assessee required the AO to provide reasons for reopening of the assessment and AO provided copy of reasons recorded which are reproduced in the assessment order and read as under: -

"The assessee company has been incorporated on 03/04/2008. The assessee has filed its first return of income for A.Y.2009-10 on 30/09/2009 declaring total income at Rs. 1,14,92500/-. The return was processed u/s. 143(1) of the Act on 04/03/2011.

On perusal of information available on record and information received from the office of the CCIT(CCA), Mumbai, it is noticed that the assessee has issued 3,20,000 equity shares having face value of Rs. 10/- on a premium of Rs.90/-. Accordingly, on issue of 3,20,000 equity shares during the year, the assessee has received share premium of 2,88,00,000/-.

This is the first year of the business operation of the assessee company and therefore the intrinsic value of equity shares issued by the assessee company can only be considered at the face value of Rs. 10/-.

Accordingly, the nature of receipt of the entire share premium of Rs.2,88,00,000/- is unexplained. Therefore, the receipt of share premium to the extent of Rs.2,88,00,000/- in the nature of unexplained cash credit within the meaning of section 68 of the Act.

In view of the above, I have a reason to believe that income chargeable to tax to the extent of Rs.2,88,00,000/- has escaped assessment in the hand of the assessee."

4. This issue was raised before CIT(A). The CIT(A) upheld the reopening. Aggrieved, assessee has raised this issue in its cross objection.

5. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that no scrutiny assessment was framed under section 143(3) of the Act rather, return of income was processed under section 143(1) of the Act for the relevant AY 2009-10. Return of income was filed by the assessee on 30.09.2009. The notice under section 148 of the Act was issued dated 30.03.2014 i.e. within 4 years from end of the relevant assessment year. We noted that the reopening is done on information received from CCIT (CCA), Mumbai that the

assessee has equity share of ₹3.20 lacs having face value of ₹10 on a premium of ₹90. According to AO, the share premium received amounting to ₹2.88 crores is not genuine and the assessee has introduced unexplained cash credit equivalent to the amount of share premium under section 68 of the Act. We noted that the AO has received information on the basis of the same reopening was done. Even now before us, the learned Counsel for the assessee only made submissions that the AO cannot reopened the assessment on the above given reasons because the only dispute is regarding share premium received at the rate of ₹ 90 per share but he could not point out how the reasons recorded are not as per the provisions of section 147 of the Act. For this limited aspect, the assessee has made argument. Hence, we find no infirmity in the reopening made by AO and confirmed by CIT(A). Hence, this reopening is upheld and this issue of assessee's CO is dismissed.

6. Coming to Revenue's appeal, the only issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by the AO of amount of ₹3.68 lakhs on account of unexplained cash credit under section 68 of the Act being share capital and share premium. For this, Revenue has raised the following grounds: -

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that the assessee company failed to submit details of directors of the companies to which shares were issued even after specifically being asked

to do so by the AO and thus failed to discharge its onus to establish the identity and creditworthiness of the share applicants and the genuineness of transaction.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that the shares of face value of Rs. 10/- per share, allotted to various companies on premium of Rs. 90/- per share, have been subsequently transferred to the directors of the assessee company at the face value of Rs. 10/- without charging any premium.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 3,60,00,000/- made by the AO on account of unexplained cash credit u/s 68 of the Act without appreciating the facts of the case elaborately discussed by the AO in the Assessment order u/s 143(3) r.w.s 147 of the Act.”

7. Briefly stated facts are that the AO on perusal of information received from the office of CCIT (CCA), Mumbai, that the assessee has issued equity share of 3.20 lakhs having face value of ₹10 on a premium of ₹90/-. The AO noticed that this is the first year of business operation of the assessee and

therefore, the strength value of equity share issued by assessee company could only be considered at the face value of ₹10. According to AO, the nature of receipt of entire share premium of ₹2.88 lakhs was unexplained. According to AO, the assessee could not explain the genuineness of transaction and even creditworthiness or source of the entry being amount received in cash. The entire emphasis of the AO is that the entire share premium is received in cash and these entries received was from the bogus companies of Pravin Kumar Jain, who has admitted that he is involved in providing accommodation entries in a statement recorded under section 132(4) of the Act. The AO rejected the contention of the assessee vide Para 4.12 and 4.13 of his order as under: -

"4.12 Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders.

4.13 On the question of creditworthiness and genuineness, there is no doubt that the money

was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction."

8. Aggrieved assessee preferred the appeal before CIT(A), who deleted the addition after considering the submissions, case records and facts of the case by observing in Para 4.6 to 4.8 and 4.12 as under: -

"4.6 As regards ground no. 2.1 have gone through the assessment order and submissions made in this regard. It is noted that the Assessing Officer doubted the increase in the share capital and share premium of Rs. 3,60,00,000/- and treated the same as unexplained cash credit u/s. 68 of the Income Tax Act, 1961. The appellant has stated in its submissions that the action of the AO to treat these shareholders as non-existent is arbitrary and is based on surmises and conjectures and is contradictory to the facts on record. It is contended that the details of these shareholders clearly shows that all the

shareholders are active and maintained proper accounts which were duly audited. It is also submitted that the shareholders are having Income Tax Pan Number. It is further observed from the assessment order that the appellant company had filed confirmation, copy of ITR, and copy of bank statements of the share applicants. The appellant in its written submission has quoted and relied on the legal proposition enunciated by decisions of the Hon'ble Courts and ITAT on the issue as reproduced above.

4.7 It is noted that the A.O. has held that the appellant has introduced income from undisclosed sources brought under the garb of share capital and premium of 3,60,00,000/- from different shareholders and hence this amount of issue of the share application money and share premium was assessed as income of the appellant u/s 58 of the Act. In this case the appellant had received share capital and share premium from shareholders which are regularly assessed to tax, these shareholders had submitted the copies of the accounts, copy of PAN, copy of Bank account etc. The A.O. had concluded that based on the test of human probabilities it is clear that the entire transaction is a pre-structured transaction and

a colorable device used by the assessee company to introduce undisclosed income under the garb of share application money and share capital. The AR has contended that the A.O. had missed the crucial fact that the share applicants were regularly doing the business and had filed their tax returns on regular basis. The taxes were paid by them on the income so earned. In the light of observations of the Hon'ble Supreme Court in the case of CIT Vs. Lovely Exports (P) Ltd. reported in 216 CIR 295, the onus on the appellant has been duly discharged. The peculiar facts of the case may have caused suspicion in the mind of the A.O. but there is no evidence or other material to hold that the appellant had routed its own money.

4.8 On an analysis of the facts on records, it is seen that the share capital and premium of ₹ 3,60,00,000/- has come from different shareholders. It is noted that these shareholders are existing shareholders and had confirmed that they had contributed to the share capital of the assessee company. The next aspect is their Creditworthiness. The assessee has filed copy of PAN card, bank Statement, balance sheet and P&L account,

Share Application Form, etc. of shareholders. It emerges out from the record that the investing shareholders had recorded the investments in appellant company. In their books of accounts during the relevant financial year. Thus, the shareholders had demonstrated these balances in their balance sheets in the shape of investment as well as loan and advances. The next issue is about the genuineness of the transaction. The assessee has produced the details of bank account. The share application money and share premium had been issued through banking channel. There is no cash transaction which could compel oneself to assume that the transactions were not genuine. The AO has made the addition on the issue that the shares were issued to shareholders at high premium and the subscribing shareholders had meagre income during the year- hence the entire transaction was to be treated as unexplained cash credit U/s 68 of Income Tax Act. The onus cast upon the assessee under Section 68 of the Act is to satisfy the department about the true identity of an investor, its creditworthiness and genuineness of a transaction was explained by the Supreme Court in CIT Vs. Lovely Exports (P) Ltd., 216 CTR 295. Whilst, the A.O. acted legitimately in

enquiring into the matter, the inferences drawn by him were not justified at all in the circumstances of the case. Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry In the first instance. Instead, the issue here was whether the amount invested by the share applicants was from legitimate sources. The objective of Section 68 is to avoid inclusion of amounts which are suspect. Therefore, the emphasis is on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is peculiar in the present case is when the assessment was being completed the A.O. has not made much investigation except issuing of notices u/s 133(6) which were served on the share applicants and these investor shareholders were required to file confirmation, balance sheets and Bank details etc. which would have established that the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants. It has been submitted that these details called for by the AO were duly filled by the share applicants before the AO but the appellant failed to produce the share applicants before the Assessing Officer.”

Aggrieved, now Revenue is in appeal before Tribunal.

9. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the assessee has received share application money of ₹ 10 for each share and share premium at the rate of ₹ 90 per share. The following are the details of share issued: -

Name of subscriber of shares	No. of Shares	Face value of shares	Premium	Total amount received
Charu Rathi	10,000	10	-	1,00,000
Sharad Rathi	10,000	10	-	1,00,000
Charu Rathi	1,90,000	10	-	19,00,000
Sharad Rathi	1,90,000	10	-	19,00,000
Yashman Vyapar Pvt. Ltd.	1,00,000	10	90,00,000	1,00,00,000
Yashman Vyapar Pvt. Ltd.	1,00,000	10	90,00,000	1,00,00,000
Real Gold Trading co. Pvt. Ltd.	55,000	10	49,50,000	55,00,000
Stocknet Investment & Finance Ltd.	20,000	10	18,00,000	20,00,000
Doldrum Investment & Finance Ltd.	20,000	10	18,00,000	20,00,000
Artillegence bio Innovations Ltd.	25,000	10	22,50,000	25,00,000
Total	7,20,000		2,88,00,000	3,60,00,000

10. We noted that the assessee has submitted the names and address of the all the shareholders as per the latest information available with the assessee. Further, we noted that the assessee has submitted all the relevant information like copy of share application form (confirmation), their PAN numbers, bank statement of these share holders, audited balance sheet in the case of these share holders wherever these are companies. Further, the assessee also submitted information in the shape of income tax returns, memorandum of association and articles of associations of these companies before the AO and CIT(A).



11. From the above chart, it is clear that the list No. 1 to 4 Shri Sharad Rathi and Mrs. Charu Rathi, they are directors of the company and they have filed documentary evidences in the form of investing in shares. Further, the assessee has filed the bank statement of Mrs. Charu Rathi from where these investments were made at assessee's paper book page 4 and 5 and complete details of investment made amounting to ₹ 20 lakhs is explained. The ₹ 19 lakhs was invested by cheque no. 75673 on 06.10.2008. Further, a sum of ₹ 1 lakh was transferred vide cheque no. 309636 on 05.04.2008 from the bank account of corporation bank, Goregaon (West) Branch. The relevant evidence is enclosed at assessee's paper book at pages 4 and 5. Similarly, in the case of Shri Sharad Rathi a sum of ₹19 lakhs was invested from HDFC Bank account vide cheque No.232568 on 08.10.2008. Further, in the case of Yashman Vypar Pvt. Ltd. of ₹2 crores, these were transferred on 10.04.2008 vide cheque no. 536540 of ₹1 crores and another 1 crores was transferred on 15.04.2008 vide cheque No.536541. This amount was transferred from Tamilnad Mercantile Bank Ltd. Calcutta Branch. In the case of Real Gold Trading Co. Ltd a sum of ₹20 lakhs was received on 10.10.2008 vide cheque No.493905 and a sum of ₹35 lakhs was received on 10.10.2008 vide cheque No. 493906 from corporation bank. In the case of Stocknet Investment & Finance Ltd. as sum of ₹20 lakhs was transferred on 17.10.2008 by way of transfer from the bank account of Stocknet International to the assessee. Similarly, in the case of Doldrum Investment & Finance Ltd. the amount of ₹20 lakhs was transferred on 16.10.2008 of ₹10 lakhs and another 10 lakhs again on 16.10.2008. In the case of

Artillengence Bio Innovations Ltd. the amount of ₹25 lakhs was transferred to assessee vide cheque No. 826145 dated 17.10.2008. We have gone through the bank statements above mentioned and noted that all the parties have sufficient cash balance in their respective bank accounts for investing in share premium of the assessee.

12. In view of the above, we note that the CIT(A) had elaborately dealt with the entire issue by due appreciation of the various documentary evidences submitted in respect of investor companies duly proving the three necessary ingredients of Section 68 of the Act viz. identity of the investors, creditworthiness of the investors and genuineness of the transactions. We find that none of these documentary evidences were controverted by the AO by proceeding to make further enquiry in this regard. None of these facts were even denied by the AO or any deficiencies were found thereon by the AO and we also take note of the fact that all the investors, who had invested monies in the assessee company, have filed bank statements proving credit worthiness. We also take note of the fact that the CIT(A) had placed reliance on the co-ordinate bench decision of this Tribunal in the case of ACIT vs. Gagandeep Infrastructure Pvt. Ltd. in ITA No.5784/Mum/2011 dated 23/04/2014, wherein it was held that the amendment to Section 56(2)(viib) and proviso to Section 68 of the Act are only prospective in nature and applicable only from A.Y.2013-14 onwards and not earlier. We find that this judgment has been subsequently approved by the Hon'ble Jurisdictional High Court. We find that the Ld. DR vehemently relied upon the decision of



Hon'ble Delhi High Court in the case of Navodaya Castles (P) Ltd., reported in 50 taxmann.com 110. We hold that the decision of Hon'ble Jurisdictional High Court would bind this Tribunal. Hence, in view of the aforesaid observations and various decisions of Hon'ble Jurisdictional High Court relied upon by the CIT(A) while granting relief to the assessee, we do not deem it fit to interfere in the said order of the CIT(A). Accordingly, the appeal filed by the revenue is dismissed.

13. In the result, the CO of the assessee as well as appeal of Revenue, both are dismissed.

Order pronounced in the open court on 31.12.2019.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 31.12.2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai