

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER
AND SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.5820/MUM/2016
Assessment Year: 2009-10**

ITO-13(3)(3), Mumbai	Vs.	Varad Vinayak Estates P. Ltd. H-3/57, Trilok CHS Ltd., New MHB Colony Gorai Rd, Borivali(W), Mumbai, Pin- 400092. PAN: AADCV0629G
(Appellant)		(Respondent)

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**ITA No.5133/MUM/2017
Assessment Year: 2010-11**

ITO-13(3)(3), Mumbai	Vs.	Varad Vinayak Estates P. Ltd. H-3/57, Trilok CHS Ltd., New MHB Colony Gorai Rd, Borivali(W), Mumbai, Pin- 400092. PAN: AADCV0629G
(Appellant)		(Respondent)

&

**CO No.166 & 167/Mum/2019
(A/o. ITA No.5820/Mum/2016 & ITA No.5133/Mum/2018)
Assessment Year: 2009-10 & 2010-11**

Varad Vinayak Estates P. Ltd. H-3/57, Trilok CHS Ltd., New MHB Colony Gorai Rd, Borivali(W), Mumbai, Pin-400092. PAN: AADCV0629G	Vs.	ITO-13(3)(3), Mumbai
(Cross-Objector)		(Respondent)

Varad Vinayak Estates P. Ltd.
 ITA No.5820/MUM/2016 &
 ITA No.5133/MUM/2017 &
 CO No.166 & 167/Mum/2019 &
 Assessment Year: 2009-10 & 2010-11

Present for:

Appellant by : Surabhi Sharma, Sr. DR
 Respondent by : Hariom Tulsian, Advocate

Date of Hearing : 10.12.2019

Date of Pronouncement : 28.01.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The present two appeals has been preferred by the Revenue and two cross-objections filed by the assessee against the orders dated 27.07.2016 & 19.05.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to AY 2009-10 & 2010-11 respectively.

2. We will first adjudicate ITA No.5820/Mum/2016 wherein the grounds of appeal raised by the Revenue are as under:

“1. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) is right in deleting the addition made by the AO on account of bogus share premium even though it is very clear from the facts of the case that the share premium has been brought in by share holders which are bogus entry providers as established by the Investigation Wing, Mumbai.

2. Whether on the facts and in circumstances of the case and in law, the ld. CIT(A) is right in deleting the addition by disregarding the fact that despite his directions and the best efforts of the AO to afford an opportunity of cross examination to the assessee no compliance was made either by the assessee of Shri Pravin Kumar Jain, the controller of these bogus entry providers.

3. Whether on the facts and in circumstances of the case and in law, the ld. CIT(A) is right in agreeing with the assessee who stated that its name did not appear in the statement of Shri Pravin Kr. Jain, whereas the said statement clearly mentioned that wherever the companies controlled by the said entry provider had made investment/provided share capital these were bogus transaction.

4. The appellant prays that the order of the CIT(A) on the grounds be set aside and that of the AO be restored.

5. *The appellant craves leave to add, amend or alter all or any of the grounds of appeal which may be necessary.”*

3. The only issue raised by the Revenue in the various grounds of appeal is that the Id. CIT(A) has erred in deleting the addition made by the AO on account of bogus share application money.

4. The facts in brief are that the assessee filed his return of income on 30.09.2009 declaring income at Nil which was processed u/s 143(1) of the Act. The assessee is a private limited company and engaged in the business of development of properties. The assessee company was incorporated on 19th September 2008 and this was the first year of operation. The company was having authorized share capital of 6,00,000 equity shares out of which the assessee issued 5,60,000 equity shares at face value of Rs.10/- at a premium of Rs.40/- per share. These shares were allotted to 20 persons/parties/entities out of which two were the directors of the assessee company and the remaining 18 were other parties/entities. The case of the assessee was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act on 30.03.2014. The assessee complied with the said notice by submitting that the return filed u/s 139(1) of the Act on 30.09.2009 may be considered as return filed in response to the notice u/s 148 of the Act. Thereafter notices u/s 133(6) were issued and served on the investors during the assessment proceedings which were issued by the AO in order to verify the identity and creditworthiness of the investors and genuineness of the transactions. Notices were accepted and necessary documents were submitted by all the shareholders before the AO. The AO also noted that out of 18 shareholders, 6 shareholders were the companies which were controlled by Shri Praveen Kumar Jain. The details of

shares issued are given on page 3 of the assessment order. The assessee has issued 300000 equity shares to these six companies at face value of each share @ Rs.10/- and total amount realized was Rs.1,50,00,000/- from these six shareholders. The assessee also filed during the course of assessment proceedings various documents / evidences in support of its claim such as PAN cards, confirmation letters, Income Tax Returns, bank statements, application for shares, balance sheets of investors showing investment made by the subscribers with the assessee company, memorandum of Association of the investor companies, etc. However, the AO by not accepting these evidences proceeded on the belief that the said six companies provided accommodation entries as have been brought out during the search on Shri Praveen Kumar Jain/related entities and accordingly rejected the explanation of the assessee by making an addition u/s 68 of Rs.1,50,00,000/- by framing assessment u/s 143(3) r.w.s 147 of the Act dated 04.03.2015.

5. In the appellate proceedings, the ld. CIT(A) after considering the reply of the assessee deleted the addition made by the AO by observing and holding as under:

“10. I have considered the facts and submissions carefully. The investor had complied with the notices issued u/s 133(6) by the assessing officer. The assessing officer did not examine the investors nor carried out any further investigations. The six investor companies are assessed to tax and their identity is not in doubt. They have confirmed the transactions and the amounts are paid by way of cheques through banking channels, Copy of their bank statements have been filed. The shares have been issued at premium to these six companies as well as to promoter and his friends and family. By restricting the additions to the six companies, the assessing officer has accepted the issue of shares at premium.

11. The investment and the corresponding source of funds of investors as seen from the copy of their audited accounts for FY 2008-09 is tabulated below.

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Sr.No.	Name of the share holder	Total amount invested in (Rs.)	Share capital and reserves	Profit as per P & L account (Rs.)
1.	JPK Trading (1) Pvt. Ltd.	25,00,000	177,55,319	17,42,474
2.	Sanjivani Enviro Protection Ltd.	25,00,000	191,09,169	5,47,150
3.	Ostwal Trading (I) Pvt. Ltd.	25,00,000	161,29,100	15,52,854
4.	Faststone Trading Co Pvt. Ltd.	25,00,000	134,63,322	15,45,769
5.	Raghunandan Reyons Ltd.	25,00,000	4,88,40,631	132,577
6.	Hema Trading Co Pvt. Ltd.	25,00,000	257,26,942	17,39,588

12. It can be seen from the observation of the Assessing Officer that he has only referred the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such evidence that the appellant has in reality obtained any accommodation entries. When these companies are filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possessions. Over such issue there are plethora of judgements to support the appellant. Some of them are discussed here below:-

“(i) The Hon'ble Supreme Court in the case of CIT V/s Lovely Exports 6 DTR 308 has held as under:

"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".

(ii) The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held as under:

"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.

Held, dismissing the appeal, that there was no dispute that the assessee had given the details of names and addresses of the shareholders, their PAN/ GIR

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numbers and had also given the cheque numbers, name of the bankers. The Assessing Officer ought to have found out their details through PAN cards, bank reholders. Thus, the view taken by the Tribunal could not be faulted.

(iii) The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under:

"That in this case the respondent had given the names and addresses of the alleged creditors, It was in the knowledge of the Revenue that the said creditors were income-tax assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence".

Reliance is also placed on the following decisions:

- i. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Value Capital Services P. Ltd. (2008) 307 ITR 334 (Delhi).*
- ii. Hon'ble Punjab and Haryana High Court in the case of Commissioner of Income Tax v/s. GP International Ltd. (2010) 325 ITR 25 (P&H).*
- iii. Hon'ble Madras High Court in the case of Commissioner of Income Tax v/s. Electro Polychem Ltd (2007) 294 ITR 661 (Mad).*
- iv. Hon'ble Rajasthan High Court in the case of Commissioner of Income Tax v/s. AKJ Granites P.Ltd. (2008) 301 ITR 298 (Raj.)*
- v. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Oasis Hospitalities (Pvt.) Ltd. (2011) 51 DTR 74 (Dellhi).*

Sec.69 places the burden of proof on the tax payer to explain the nature and source of any credit found in the books. But, when assessee proves or submit the basic information like identification, genuineness of transactions and creditworthiness of the creditors, onus is discharged by him and if Assessing Officer disbelieve the genuineness of the same, he has to prove otherwise, merely, doubting or pointing out some discrepancy is not the foundation for discarding the genuineness of the deposit or share money or substance of the matter, held by the Hon'ble Supreme Court in the case of CIT v. Gujarat Heavy Chemicals Ltd. (2002) 256 ITR 795 (SC).

In view of the above the question of making any addition u/s. 68 of the Act does not arise."

13. Further, Hon 'ble jurisdictional ITAT in the case of ITO-10(2)(3) vs. M/s J.J. Multitrade Pvt.Ltd. ITA No.2158 & 2159/Mum/2014 order dated 11.03.2015

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has deleted additions on similar facts. Further, the Hon'ble jurisdictional ITAT in the case of M/s S.D.B. Estate Pvt. Ltd. vs ITO-5(3)(2) ITA No.584/M/2015 has deleted similar addition made u/s 68 of the I.T. Act. The Hon'ble ITAT (Jaipur Bench) In the case of Bharti Syntex Ltd. vs. DCIT ITA Nos. 172 &173/Jp/2010 has held in para 24.4 as under:-

"24.4 In this case also no cross examination was allowed to the assessee. Therefore, adverse inference cannot be drawn only on the statement of Shri Mukesh Choksi. We further noted that all other necessary details have been filed before AG. Amounts were received through account payee cheque. Both the companies are assessed to tax in Mumbai. Confirmation along with copies of share certificate, bank statement, memorandum of articles, copy of share application money, audited balance sheet and P&L a/c of these parties were filed. These are similar details as were filed in case of three other companies for asst. yr. 2005-06. We have already disposed of the appeal for asst. yr. 2005-06 whereby we have held that the assessee has discharged its onus by filing necessary details and further have relied on the decisions of Hon'ble Supreme Court and Hon'ble Delhi High Court along with various other decisions of Tribunal and have held that addition cannot be made under S.68 in the hands of the assessee company. Therefore, in view of the same reasoning, we cancel the entire addition made and confirmed by the lower authorities here also.

The above decision of ITAT also related to Mr.Mukesh Choksi's case of investment in share application money. On perusal of above case it is clear that if a bogus shareholder has invested the money and if appellant receives such money as share application money and appellant during assessment proceedings provides the details like name & address of the corporate entity, PAN No., ROC No., then ITAT held that this may be referred to the concerned A.O. for proceeding against such bogus shareholders instead of adding the amount u/s. 68 of the I.T. Act in the name of the company.

14. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received is unexplained as covered u/s 68 even after opportunity was given in the remand proceedings. The statement of Shri Praveen Jain is not shown to name the appellant specifically. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross-examination. This has not been provided. In this fact matrix, and the judicial decisions covering the scope of section 68, the addition made of Rs 150 lakhs u/s 68 in the case of the appellant is deleted. The ground of appeal no1 is allowed.

6. The ld. DR, by relying heavily on the order of AO, argued before the Bench that the assessee, being in the first year of operation when it was not doing business, issued shares capital to 20 parties/entities out of which these six parties were belonging to Shri Praveen Kumar

Jain and associates. The said fact was duly brought to light by the search operation on Shri Praveen Kumar Jain and his associates. It was admitted during the course of recording of statement u/s 132(4) of the Act by Shri Praveen Kumar Jain that he and his entities were engaged in providing accommodation entries only without doing any real business. The ld. DR also submitted that the ld. CIT(A) without appreciating the fact that all these transactions were of hawala nature intended to brought back to the mainstream the assessee's own funds by issuing these shares. The ld. DR stated that the ld. CIT(A) has deleted the addition on the ground that the AO has acted only on the statement of Shri Praveen Kumar Jain without doing any enquiry in the matter to dig out the truth whereas the facts on record are contrary to this as the AO had issued notices u/s 133(6) of the Act to all the shareholders and only thereafter a conclusion was drawn by the AO that the share capital issued to these parties were of bogus nature as the ingredients of section 68 of the Act namely identity, creditworthiness and genuineness of the transactions were proved by the assessee. Therefore, the ld. DR prayed before the Bench that the order of ld. CIT(A) may kindly be quashed. In defence of his arguments, the ld. DR relied on a series of decisions namely PCIT vs. NRA Iron & Steel Pvt. Ltd. Civil Appeal No of 2019(arising out of SLP (Civil No.29855 of 2018) Supreme Court dated 05.03.2019, PCIT vs. NDR Prompters Pvt. Ltd. ITA 49/2018 of Hon'ble Delhi High Court dated 17.01.2019 and CIT vs. Navodaya Castle Pvt. Ltd. [2014] 367 ITR 306(Del) .

7. The ld. AR on the other hand relied on the order of ld. CIT(A) and submitted that the ld. CIT(A) has passed a speaking and

reasoned order after taking into account all the aspects of the issue and by relying on the various decisions of the Hon'ble Supreme Court and High Courts. The ld. AR submitted that the assessee filed all the necessary details which were called for by the AO during the course of assessment proceedings namely PAN cards, confirmation letters, Income Tax Returns, bank statements, applications for shares, balance sheets of investors showing investment made by the subscribers with the assessee, memorandum of Association of the investor companies, etc. The ld. AR submitted that notices were issued and were duly served upon the shareholders by the AO. The ld. AR submitted that instead of carrying out further investigation, the AO only based his conclusion on the fact that these six entities were belonging to Shri Praveen Kumar Jain and treated the investments by these entities as bogus by ignoring the facts that the said companies have sufficient funds to invest in assessee company. The ld. AR placed before the Bench the evidences of sources of the said alleged six investor companies. The ld. AR submitted that the assessee has filed all the necessary evidences before the AO, however the AO has relied on the statement of Shri Praveen Kumar Jain. Further the ld. AR drew attention to the Bench to the fact that the proviso has been added to section 68 of the Act by Finance Act 2012 w.e.f. 01.04.2013 which is effective from A.Y 2013-14 and therefore not applicable to the assessee company as the year involved is A.Y 2009-10. The ld. AR in defence of his arguments, relied heavily on the order of CIT vs. Lovely Exports Pvt. Ltd. (2208) 216 CTR 195(SC), CIT vs. Gagandeep Infrastructure Pvt. Ltd. ITA No.1613 of 2014 (Bom-HC), CIT vs. Haresh D Mehta 407 ITR 492, CIT vs. Dwarkadhish Capital Market Pvt. Ltd. 330 ITR 298(Delhi HC).

8. After hearing both the parties and perused the materials on record, we observe that the undisputed facts are that the assessee was incorporated on 19th September 2008 and this was the first year of operation. The company was having authorized share capital of 6,00,000 equity shares out of which the assessee issued 5,60,000 equity shares at face value of Rs.10/- at a premium of Rs.40/- per share. These shares were allowed to 20 persons/parties out of which two are the directors of the company and the remaining 18 are other parties. The case of the assessee was reopened u/s 147 of the Act after receiving information from the Investigation wing of Income Tax Department, Mumbai that the assessee is one of the beneficiaries hawala rockets of providing accommodation entries by entities belonging to Shri Praveen Kumar Jain and associates. The assessee has filed various evidences such as PAN cards, confirmation letters, Income Tax Returns, bank statements, applications for allotment of shares, balance sheets of investors showing investments made by the subscribers with the assessee, memorandum of Association of the investor companies, etc. Thereafter, the AO issued notices u/s 133(6) of the Act to verify the identity, creditworthiness of the investors and genuineness of the transactions of the investors which were duly served and were duly complied with by filing details/evidences as called for by the AO. We note that instead carrying out further investigation, the AO has relied primarily on the statement of Shri Pravin Kumar Jain which has been retracted since then. Finally, the AO made addition u/s 68 of the Act on account of bogus share premium and share application money. The ld. CIT(A) deleted the addition after taking into account the various facts and ratio laid by the various judicial forums as reproduced above in CIT(A)'s order. In

the present case, the AO has not made any further investigations to find out the truth but relied on the statement of Shri Praveen Kumar Jain and therefore has no basis. In our opinion, the assessee has sufficiently discharged its onus by filing the necessary evidences and the onus shifted to the AO to make further investigation as has held in the case of Haresh D Mehta (supra). The Hon'ble Apex Court in the case of Lovely Export (supra) has held that whereas the assessee has received application money from alleged bogus shareholders whose names are given to the AO, then the Revenue is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of the assessee. Similarly, in the recent case of Gagandeep Infrastructure Pvt. Ltd. (supra) the Hon'ble Bombay High Court has adjudicated the identical issue by upholding the order of the Tribunal wherein the Hon'ble Tribunal had deleted the addition made u/s 68 of the Act on account of share capital and share premium which was made by AO as unexplained cash credit. In this case, the assessee has filed list of shareholders, copy of share application form, copy of share certificates and form no.2 filed with the Registrar of Companies and also the justification for charging the premium on the basis of the future prospect of the respondent company. But by not accepting the explanation, the AO made addition u/s 68 of the Act. The Hon'ble Bombay High Court by relying the decision of Lovely Exports (P) Ltd. upheld the findings of the ITAT that respondent assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to the shares. Similarly in the case of CIT vs. Dwarkadhish Capital Market Pvt. Ltd. (supra) it was held that once the identity of the share applicant has been established by either furnishing PAN or income

tax assessment number and proved the genuineness of transactions by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue which has all the powers to trace any person. Moreover the addition made by the AO u/s 68 was wrong on the ground that the proviso to section 68 was added by Finance Act 2012 w.e.f. 01.04.2013 which comes in operation from A.Y 2013-14 and on this account also, the addition cannot be sustained. We have also perused the decisions relied upon by the Revenue and found the same as distinguishable on facts. We note that the ld. CIT(A) has taken all the aspects and issues into account while passing his order and, thus we do not find any infirmity or illegality in the order of ld. CIT(A). Accordingly, we uphold the same by dismissing the appeal of the Revenue.

9. Now, we come to ITA No.5133/Mum/2017. The issue involved in this appeal is identical as decided by us above in ITA No.5820/mum/2016 wherein we have upheld the order of ld. CIT(A) by dismissing the appeal of the Revenue. The assessee has issued share premium and capital of Rs.2,50,00,000/- which were treated by the AO as bogus and made addition u/s 68 of the Act. Therefore, our finding in ITA No.5820/Mum2016 will, mutatis mutandis, apply to this appeal as well. Accordingly, we affirm the order of CIT(A) by dismissing the appeal of the Revenue.

10. Now we come to C.O Nos.166&167/Mum/2019. In both these cross objections, the assessee has challenged the order of CIT(A) dismissing the appeals of the assessee on jurisdiction under section 147 r.w.s. 148 of the Act.

11. At the outset, we find that the COs of the assessee have been late. There is a delay of 490 days in A.Y 2009-10 and 211 days in A.Y 2010-11 in filing. After hearing both the parties, we find that the explanation offered by the counsel of the assessee for condonation of delay, is not tenable as the only plea put forth before us is that since the ld. CIT(A) has allowed the appeal of the assessee on merits, the assessee was not aware of whether there lies any appeal against the order of CIT(A) on dismissal of jurisdictional issue. However when the case came up for hearing, the assessee approached the advocate and only after the advice of the ld. Counsel, these two cross objections were filed. In these cross-objections, the assessee has challenged the reopening of the assessment in both the years. The ld. DR opposed the condonation of delay as the reasons stated for condonation are not germane and sufficient reasons. Therefore, we are of the view that the cross-objections filed by the assessee are not maintainable as the same are barred by limitation and the assessee has failed to explain the reasons for the delay. The said cross-objections of the assessee are accordingly dismissed.

11. In the result, the appeals of the Revenue and cross-objections of the assessee are dismissed.

Order pronounced in the open court on 28.01.2020.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 28.01.2020.
RS, Sr. P.S.

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Copy to: The Appellant
 The Respondent
 The CIT, Concerned, Mumbai
 The CIT (A) Concerned, Mumbai
 The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

		Date	Initial	
WHETHER DICTATION PAD ENCLOSED WITH THE FILE : Yes/No (as the order has been typed with the help of manuscript)				
1.	Draft dictated on			Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS
6.	Date of pronouncement			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			