

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. Nos. 625 & 626/Mum/2019

(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

M/s. Moongipa Development and Infrastructure Ltd. 203/204 Raigad Darshan, Opp. Indian Oil Colony, JP Road, Andheri West, Mumbai-400053.	बनाम/ Vs.	DCIT Central Range-7(3) Room No.655, 6 th Floor, Aayakar Bhavan, Churchgate, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFCM1616E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Vimal Punamiya
Revenue by:	Shri A. H. Ansari (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 13/10/2020

घोषणा की तारीख /Date of Pronouncement: 04/12/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals) -49, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Ys. 2009-10 & 2010-11.

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2. The assessee has filed the present appeal against the order dated 05.12.2018 passed by the Commissioner of Income Tax (Appeals) -49, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2009-10.



3. The assessee has raised the following grounds: -

“1. On the facts and circumstances of the case and in law the IA. CIT(A) erred in confirming the reopening the case u/s 148 which is bad in law.

2. On the facts and circumstances of the case and in law, the IA. CIT(A) erred in confirming the assessment order passed u/s. 143(3) of the Income Act 1961 by the Ixi. Assessing Officer is against the principal of natural justice, hence bad-in-law.

3. On the facts and circumstances of the case and in law, the IA. CIT(A) erred in deleting addition in respect of the Share Capital and Share Premium of Rs.50,00,000/- as unexplained cash credit u/s. 68 of the Income Tax Act, 1961 without corroborative evidences.

4. On the facts and circumstances of the case and in law, the IA. CIT(A) erred in not permitting of partly business loss of Rs. 2,00,000/- as against the total loss of Rs. 3,14,419/-

5. On the facts and circumstances of case and in law, Ld. CIT(A) erred in confirming initiation of penalty proceeding u/ s.274 r.w.s. 271 (1) (c) of Income Tax Act 1961.

6. On the facts and circumstances of the case and law the Ld. CIT (A) erred in set a siding for fresh calculations of interest under section 234A, 2343 and 234C of the Income Tax Act, 1961.

7. The Assessee craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing.”

4. Brief facts of the case are that the assessee filed its return of income on 30.09.2009 declaring total income to the tune of Rs. Nil and Current Year loss in sum of Rs.3,14,419/-. Thereafter, the case of the assessee was reopened u/s 147 of the I. T. Act, 1961. Notice u/s 148 of the Act dated 28.03.2016 was given. The case of the assessee was reopened on the following grounds:-

“2. During the course of a search conducted in the Loutus/Kamdhenu/Greenvalley group of cases. During the course of search it was not:ced that the assessee, during the year under



consideration, had received sum of Rs. 45,00,000/- from various Kolkata based companies. One Shri Rajesh Agarwal, an associate of the group, was found to have received sum of Rs. 30 Crores in 4 corporate entities including the assessee across FYs. 2008-09 to 2011-12. Out of this sum, Shri Rajesh Agarwal admitted that sum of Ps. 11,13,30,000/- was the undisclosed ir..omc of the group in a statement recorded under the provisions of section 131 of the Income Tax Act, 1961 (herein after, 'the Act') which had been recorded on 09.10.2014. Further analysis of the documents seized / impounded documents indicates that the assessee company.

3. The Pr. CIT 2, Kolkata, on 11.12.2015 passed an order under section 127 of the Act centralizing the case with this office. In view of the above facts, reasons were recorded and the Principal Commissioner of Income Tax (Central) - 4, Mumbai accorded the approval for reopening of the assessment of the assessee vide letter dated 28.03.2015 bearing No. Pr.CIT(C)-4/MUM u/s. 147/2015-16. Notice under section 148 of the Act was issued on 28.03.2016. This notice was served on the assessee on 31.03.2016. Vide this notice, the assessee was requested to furnish a return within 30 days from the date of the service of the notice.

4. The assessee responded vide letter filed in this office on 06.04.2016 requested that the returned tiled on 30.09.2009 (under section 139(1) of the Act) be treated as return in response to the notice dated 78.03.2016. In the same letter the assessee requested that the reasons recorded prior to the issue of the notice be available. The reasons were conveyed to the assessee vide letter dated 22.08.2016. This letter was served on the assessee on 23.08.2016.

5. Notice under section 143(2) of the Act was issued on 1.05.2016 and the same was served on the assessee. In response the assessee, vide letter dated 06.06.2016, of Mis Vasudeo Agarwal, Advocate requested for an adjournment. Notice under section 142(1) of the Act, calling for details was issued on 21.09.2016 and was served on the assessee on 23.09.2016. In response to the notices Shri Basudev Agarwal CA and the authorized representative of the assessee attended from time to time along with Shri Yogesh Dave, Accountant of the assessee, filed details called for and discussed the case. The details filed by the assessee vide letter filed in this office on 17.10.2016 are placed on record.”



5. Thereafter, the notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. It was observed that the issued share capital of the assessee stood at Rs.43,00,000/- comprising of 430,000 equity shares of Rs.10/- each. The assessee during the year issued 50,000/- equity shares of Rs.10/- each. These shares were issued at a premium of Rs.90 per share. Accordingly, the assessee issued share capital as on 31.03.2009 stood at 480,000/- equity shares at Rs.10/- each. The assessee has also obtained share premium of Rs.45,00,000/- during the year under consideration. There was no business receipt in the year under consideration. The complete details u/s 133(6) of the Act were asked and after the reply of the assessee and examining all the necessary documents, it was observed that the assessee had introduced 50,00,000/- its share capital and 45,00,000/- was found as share premium. Accordingly 50,00,000/- amount was added to the income of the assessee and taxed. The total income of the assessee was assessed to the tune of Rs.46,85,580/-. Feeling aggrieved, the assessee has filed an appeal before the CIT(A) who partly allowed the claim of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NOs.1 & 2

6. These issues have not been pressed by the Ld. Representative of the assessee, therefore, these issues are being decided in favour of the revenue against the assessee being not pressed.

ISSUE NO.3



7. At the very outset, the Ld. Representative of the assessee has argued that the case of the assessee has duly covered by assessee's sister concern unit namely M/s. Bini Builders Pvt. Ltd. ITA. No.631 & 632/M/2019, therefore, in the said circumstances, the issue is liable to be decided in favour of the assessee. It is specifically argued that the present case is on similar footing and having similar facts and circumstances, therefore, the issue is liable to be decided in favour of the assessee in accordance with law. However, on the other hand, the Ld. Representative of the revenue has refuted the said contentions. Under this issue the assessee has challenged the addition of share capital of Rs.50,00,000/- as unexplained cash credit u/s 68 of the Act. In the case of the assessee's sister concern i.e. M/s. Bini Builders Pvt. Ltd. ITA. No.631 & 632/M/2019, the issue has been decided by Hon'ble ITAT in favour of the assessee. The copy of order dated 12.03.2020 is on the file and the relevant finding is hereby reproduced as under.:-

“6.3 On merits, the assessee assailed the quantum addition by way of elaborate submissions which have been extracted in para 7.1 of the impugned order. The assessee drew attention to the documents submitted by the assessee with respect to investor entities to establish their identity, creditworthiness and genuineness of the transactions. It was submitted that each and every shareholder confirmed the stated transactions therefore, findings rendered by Ld.AO run contrary to the provisions of Sec. 68. The assessee maintained that by submitting these details, it had discharged the primary onus of proving the stated transactions. All the investor entities had enough funds to invest in the assessee company. Reliance was placed on catena of judicial pronouncements to support the said submissions. These have already been tabulated in assessee's submissions. Therefore, the assessee submitted that additions as made by Ld. AO were uncalled for in the light of documentary evidences furnished by the assessee. 6.4 The Ld. CIT(A), at para 7.3 of the impugned order, noted that the assessee had submitted share application form, copy of cheque, cheques deposit slips, copy of assessee's bank statement, copy of share certificates, copy of source of funds, copy of board resolution, certificate of incorporation, copy of Memorandum of Association (MOU) etc. with



respect to 11 investor entities. However, the same would not prove the genuineness of the transactions. It was observed that investor entities did not have any genuine business activity which was evident from the fact that main object of the investor entities contained all activity possible and would indicate the mala-fide intentions of the assessee. Any genuine company with a real motive of doing business would have a concrete object to be followed. Further, there was no justification for Kolkata based entities to make investment in Mumbai based entity and that too, at a premium of Rs.90/- per share. At para 7.6, it was noted that all the entities purchased the shares of the assessee at premium of Rs.90/-per share but they exited at face value of Rs.10/- per share. Further, the retraction would not have any relevance in the light of decision of Mumbai Tribunal in Hiralal Maganlal and Co V/s DCIT (97 TTJ 377). The case laws being relied upon by the assessee were held to be distinguishable rather reliance was placed on the decision of Hon'ble Delhi High Court in Nova Promoters & Finlease Pvt Ltd. 342 ITR 169 to confirm the additions. Finally, the additions were confirmed by observing as under: -

7.8 The Learned Counsel also alleged that the AO made the addition on the basis of suspicion and not evidences. This also is not correct as the AO had brought in enough evidences both direct and corroborative to come to the conclusion that the share capital and premium received by the assessee are not genuine. As could be seen from the assessment order and from the discussion made above, the Learned Counsel further alleged that the AO has no material in his possession to prove the same and that he made the addition on the basis of information from investigation wing and without any independent enquiry made by the AO. This also is incorrect as the AO had in-depth information not only about the 11 companies which have invested in the assessee company but also about the 67 companies which have invested in the said 11 companies. The AO had made exhaustive enquiry and analysis before reaching to this conclusion. The Learned Counsel has also alleged that the Third Party Unilateral Act cannot be the basis of addition but the addition, in this case, has been made not on the basis of Third Party Unilateral Act but on the basis of the assessee's own admission supported by other corroborative evidences. In the light of these facts and circumstances, the addition made by the AO is confirmed. The grounds of appeal are dismissed. Aggrieved the assessee is under further appeal before us.

7. We have carefully heard the arguments advanced by respective representatives and perused relevant material on record including documents placed in the paper-book. We have also deliberated on various judicial pronouncements as cited before us. We have already appreciated the settled legal position regarding addition u/s 68 as enumerated by us in



the opening paragraphs. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

8.1 Upon careful consideration, the facts that emerges are that the assessee has issued 20.70 Lacs shares to as many as 11 corporate entities during the year as tabulated in para 5.3 above. As evident from documents on record, these shares were issued at face value of Rs.10/- per share. The Share Capital of the assessee increased by Rs.207 Lacs during the year under consideration. In the light of settled legal position as enumerated by us in the opening paragraphs, it is quite evident that the primary onus was on assessee to prove the fulfilment of three ingredients of Sec. 68 viz. (i) identity of the investor; (ii) creditworthiness of the investors; & (iii) genuineness of the transactions. 8.2 To demonstrate fulfillment of these ingredients, the assessee had during the course of assessment proceedings as well as appellate proceedings, furnished following broad documentary evidences with respect to all the 11 entities: -

- (i) Share Application Form*
- (ii) Copy of Cheque*
- (iii) Copy of Cheque Deposit Slip*
- (iv) Copy of investor's Bank Statement*
- (v) Copy of Share Certificate Counterfoil*
- (vi) Copy of Audit Report along with financial statements of the investor entity*
- (vii) Copy of ITR acknowledgement of the investor entity*
- (viii) Copy of Certificate of incorporation of investor entity*
- (ix) Memorandum & Articles of Association of investor entity*
- (x) Company Master Data showing status as active (xi) Copy of Board Resolution*

The assessee's own bank statement was also placed on record which would show that all the transactions have taken through banking channels. Upon careful consideration of these documents, we find that so far as the identity of the investor entities are concerned, the same stand proved by certificate of incorporation which is held to be conclusive proof of registration of a corporate entity. The creditworthiness of the entities would stand satisfied by the financial statements of the investor entities, which are also placed



on record. The genuineness of the transactions would stand proved by the fact that the transactions were duly supported by share application form, share certificates, copy of board resolution and by the fact that ultimately the shares were allotted to all these entities. The assessee has tabulated the net worth of all these entities in the following manner: -

The perusal of net worth chart would reveal that all the investor entities had sufficient net worth to make stated investment in the assessee company. Upon perusal of all these documentary evidences, it could safely be concluded that the assessee had successfully discharged the onus casted upon him u/s 68 and the onus was on revenue to rebut assessee's evidences.

8.3 Proceeding further, we find that the sole basis of making impugned addition is the statement of one of the directors as recorded during the course of survey proceedings u/s 133A. However, this statement has been retracted within a span of 7 days. It is settled law that statements recorded during the course of survey proceedings would not have much evidentiary value unless the same are backed by credible evidences. This position has been settled by Hon'ble Supreme Court in the case of CIT V/s S.Khader Khan & Sons (25 Taxmann.com 413). The CBDT instructions No. F.No.286/98/2013-IT (Inv. II) dated 18/12/2014 also discourages confessional statements without any credible evidences. No incriminating material is shown to have been found during the course of survey proceedings.

8.4 We also find that learned CIT(A) has gone by irrelevant considerations to confirm the impugned additions. The object clause of the investor entities would have no relevance vis-à-vis proposed additions in the hands of the assessee u/s 68. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmises.

8.5 The Ld. DR has relied upon the case of Hon'ble Supreme Court in Sumati Dayal Vs CIT (80 Taxman 89) & Durga Prasad More (82 ITR 540 26/08/1971). No doubt that the revenue authorities were not required to put blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the documents produced before them. However, we find that no such inquiries have been made by the authorities except for the allegations that the share capital was bogus in nature. Nothing was brought on record that to substantiate the fact that the assessee's unaccounted money was routed in the books in the garb of share capital.

8.6 The entirety of facts and circumstances as enumerated hereinabove do not convince us to concur with the stand of Ld. CIT(A). The impugned



additions, in our considered opinion, could not be sustained under law in the light of binding judicial pronouncements as enumerated by us in the opening paragraphs. Therefore, we delete the same. Consequently, the set-off of losses, as allowable under law, would be available to the assessee. Ground Nos. 4 stand allowed. Ground No.5 stand allowed for statistical purposes. Ground Nos. 6 to 8, being consequential in nature, would not require any specific adjudication on our part. 8.7 So far as the legal grounds are concerned, we find that the original return was processed u/s 143(1) and the only requirement in law to trigger assessment was that Ld. AO certain reasons to believe that certain income escaped assessment in the hands of the assessee. We find that Ld. AO was clinched with tangible information from investigation wing which suggested possible escapement of income in the hands of the assessee. In our opinion, nothing more was required at this stage since Ld. AO had sufficient reasons to form such a belief. Therefore, we do not find much substance in assessee's legal grounds. Ground Nos. 1 to 3 stand dismissed.

8.8 The appeal stands partly allowed in terms of our above order."

8. It is legal proposition is that the assessee has to prove three ingredient to discredit the addition raised u/s 68 of the I. T. Act. (i) Identity of the Investor (ii) Creditworthiness of the investor (iii) Genuineness of the transactions. The assessee has furnished the address, PAN, Certificate of incorporation, MOA & AOA of the subscribers who subscribe the shares. To prove the credit-worthiness the assessee has given the certificate source of fund, Balance sheet, Profit & Loss Account and Return of income of share applicants. The assessee has submitted the following data for the assessment year 2009-10 and 2010-11.

No .	Name of investor's companies	No of shares	Share Capital @ Rs.10	Premium @ Rs.90	Total Amount	Share Capital of IC	Reserves of IC	Networth of IC	Investment/Networth %
1	M/s. Apar Finlease P. Ltd.	25000	250000	2250000	2500000	58766750	501024508	559791258	0.40
2	M/s. Kamakhya Goods P.	20000	200000	1800000	2000000	772000	32945132	33717132	5.34



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	Ltd.								
3	Nextgen Tradecom Pvt. Ltd.	30000	30000 0	270000 0	3000000	5765000	10763500 0	11340000 0	2.38
4		30000	30000 0	270000 0	3000000	1810350 0	26227998 6	28038348 6	0.96
5	M/s Rexas Trexim P Ltd	37000	37000 0	333000 0	3700000	8742100	10590660 8	11464870 8	2.90
6	M/s. SSA Motor Finvest p ltd.	30000	30000 0	270000 0	3000000	2960300 0	24129867 6	27090167 6	1.00
7	M/s. Priyamvada Finvest P ltd.	25000	25000 0	225000 0	2500000	2928800 0	21860013 2	24788813 2	0.91
8	M/s. Motocab Finance P Ltd.	25000	25000 0	225000 0	2500000	2123000 0	32802076 7	34925076 7	0.64
9	M/s. Balaji Dealcom P Ltd.	25000	25000 0	225000 0	2500000	9035000	80426195	89461195	2.52
10	M/s. Deepa Holding Pvt. Ltd.	25000	25000 0	225000 0	2500000	651800	27049015	27700815	8.12
11	M/s. Deepa Holding P. Ltd.	30000	30000 0	270000 0	3000000	2441800 0	19303531 0	21745331 0	1.24
12	M/s. Hill View Hire Purthase P Ltd.	30000	30000 0	270000 0	3000000	4737700 0	38420822 4	43158522 4	0.63
13	M/s. Limelight Commotra de Pvt. Ltd.	10000	10000 0	900000	1000000	1685000	30124341	31809341	2.83
14	M/s. Mandyati Dealcom Pvt. Ltd.	30000	30000 0	270000 0	3000000	4356920 0	35075874 9	39432794 9	0.68



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15	M/s. Sumangal Commotrade P. Ltd.	25000	250000	250000	2500000	10390000	92614563	103004563	2.18
	Total	397000	3970000	3573000	39700000	309396350	2955927206	3265323556	1.22

No.	Name of investor's companies	No of shares	Share Capital @ Rs.10	Premium @ Rs.90	Total Amount	Share Capital of IC	Reserves of IC	Networth of IC	Investment/Networth %
1	Cherry Tie Up Pvt. Ltd.	7000	70000	630000	700000	7048200	28645400	35693600	1.77
2	Crown Tie Up Pvt. Ltd.	6000	60000	540000	600000	5629600	10308644	15938244	3.39
3	Deepa Holding Pvt. Ltd.	10000	100000	900000	1000000	24418000	193030784	217448784	0.41
4	Mangalam Commercial P. Ltd.	5000	50000	450000	500000	1670000	0	1670000	26.94
5	Shivpujan Commodities Pvt. Ltd.	7000	70000	630000	700000	5241000	4538154	9779153.6	6.44
6	Simplex Merchants Pvt. Ltd.	5000	50000	450000	500000	980000	7922013	89022013	5.06
7	Wellplan Corporate M Pvt. Ltd.	10000	100000	900000	1000000	3223100	9321859	12544959	7.17
	Total	50000		4500000	5000000	4820990	253766854	301976754	1.65%

The investor companies have positive net worth and only invested 1.6% and 1.2% of their net worth. The assessee submitted Form of application of shares, Photocopy of the cheque receipt towards the share application, photo copy of the bank deposit slip reflecting the deposit of the above cheque, extract of Bank Statement of all subscribers duly highlighting the entries of share money and premium money given by them to the appellant company along with copy



of board resolution, resolving the decision of investment into appellant company. To prove the genuineness of the transaction the assessee produced the confirmation, bank statement, financial of the lender. Nothing came into noticed that the transaction were found bogus. Retracted statement of Shri Rajesh Agarwal was not liable to be relied upon the unless corroborated by the sufficient evidence on record. Moreover no opportunity of being heard was given to the assessee. However, in support of this contention, the Ld. Representative of the assessee has placed reliance upon the following law:-

1. CIT Vs. Lovely Exports Pvt. Ltd. (2008) 216 CTR 195 (SC)
2. PCIT Vs. Himachal Fibers Ltd. (2018) 98 taxmann.com 173 (SC)
3. PCIT Vs. Bharat Securities P. Ltd. (2020) 13 taxmann.com 32 (SC)
4. PCIT Vs. Rohtak Chain Co. P. Ltd. (2019) 110 taxmann.com 59 (SC)
5. PCIT Vs. Ami Industries Pvt. Ltd. 1231 of 2017
6. CIT Vs. Gagandeep Infrastructure Pvt. Ltd. ITA. No.1613 of 2014 (Bom)
7. CIT Vs. Orchid Industries Pvt. Ltd., I. T. Appeal No. 1433 of 2014
8. Jasamrit Constructions Pvt. Ltd. Vs. ITO, ITA. No. 1091/M/2016 ITAT Mum dated 8 Feb, 2018
9. Pr. CIT Vs. M/s. ApeakInfotech, Nagpur ITA. No. 26/2017 (Bom. HC) dated 8 June, 2017
10. Umbrella Projects Pvt. Ltd. Vs. ITO 18(1) ITA. No. 5955/Del/2014 dated 23 Feb, 2018.

Taking into account all the facts and circumstances mentioned above and also relying upon the decision of the Hon'ble ITAT in the sister concern case M/s. Binni Builder Pvt. Ltd. (supra) in which the issue has been decided on the basis of similar facts and circumstances, we set aside the finding of the



CIT(A) on this issue and decide this issue in favour of the assessee against the revenue.

ISSUE NO.4

8. This issue has not been pressed by the Ld. Representative of the assessee, therefore, this issue is being decided in favour of the revenue against the assessee being not pressed.

ISSUE NO. 5

9. This issue has not been pressed by the Ld. Representative of the assessee, therefore, this issue is being decided in favour of the revenue against the assessee being not pressed.

ISSUE NO. 6

10. Issue. No. 6 is consequential in nature and nowhere required any specific adjudication.

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11. The facts of the present case are quite similar to the fact of the case as narrated above while deciding the ITA. No.625/M/2019, therefore, there is no need to repeat the same. However, the figure is different. The matter of controversy is also the same. The finding given above in ITA. No.625/M/2019 is quite applicable to the facts of the present case as mutatis mutandis and accordingly we partly allowed the claim of the assessee.



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12. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 04/12/2020

Sd/-

Sd/-

(SHAMIM YAHYA)

(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 04/12/2020

Vijay Pal Singh/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 / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai