

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 6976/Mum/2019 (Assessment Year 2008-09)

ITO-6(1)(2) Room No. 508 Aayakar Bhavan 5 th Floor M.K. Road Mumbai-400 020.	Vs.	M/s. Anita Dyes & Intermediates Pvt. Ltd. A-404, Bhavani Complex B.S. Road, Dadar-West Mumbai-400 028. PAN : AAACA4506A
(Appellant)		(Respondent)

Assessee by	Dr. P. Daniel
Department by	Shri Brijendra Kumar
Date of Hearing	08.07.2021
Date of Pronouncement	30.08.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A) dated 31.7.2019 pertaining to assessment year 2008-09.

2. The issue raised is that learned CIT(A) erred in deleting the addition of Rs. 5.5 crores under section 68 of the I.T. Act.

3. Brief facts are that during the course of assessment proceedings of the assessee company for AY 2009-10, it was seen by the Assessing Officer that the assessee is in receipt of huge share premium amounting to Rs. 5.50 crores during the F.Y. 2007-08 relevant to A.Y. 2008-09. The Assessing Officer observed that as there was no scrutiny assessment done for this year, the amount received towards share premium was not examined. That the following are the parties from whom the assessee company has received share premium:-

Sr. No.	Name of the party	No. of shares applied	Amount
1.	Aastha Suppliers Pvt Ltd	2000	2000000
2.	Abhinandan Suppliers Pvt Ltd	2000	2000000
3.	Arant Communication India (P) Ltd	2000	2000000
4.	Bhagyalaxmi Developers (P) Ltd	2400	2400000
5.	Chetna Vinmay (P) Ltd	2500	2500000
6.	Devpriya Tie-up Pvt Ltd	2500	2500000
7.	Dewdrops Agencies (P) Ltd	2500	2500000
8.	Jagaran "Securities (P) Ltd	3000	3000000
9.	Jagdamba Tie up (P) Ltd	3000	3000000
10.	Kanyu Commercial Pvt Ltd	2000	2000000
11.	Nilima Distributors Pvt Ltd	2000	2000000
12.	Panchdev Consultant Pvt Ltd	2600	2600000
13.	Pushpdant Vyapaar (P) Ltd	2000	2000000
14.	Rahul Viniyog Pvt Ltd	2500	2500000
15.	Rajneesh Goods Pvt Ltd	2000	2000000
16.	Riddhi Siddhi Tie Up Pvt Ltd	3500	3500000
17.	Saraogi Commercial (P) Ltd	2000	2000000
18.	Statefield Merchants Pvt Ltd	3000	3000000
19.	Third wave Suppliers (P) Ltd	2500	2500000
20.	Valley Viniwag (P) Ltd	2500	2500000
21.	Vikhyat Vyapaar Pvt Ltd	2000	2000000
22.	VKJ Traxirn Pvt Ltd	2000	2000000
23.	Zexy Trade & Commerce (P) Ltd	2500	2500000
		Total	55000000

4. The Assessing Officer opined that since the assessee had received share premium from the above mentioned parties and the amount received towards share premium was not examined as no scrutiny assessment was done for the year under question, the AO formed belief that income for A.Y 2008-09 chargeable to tax has escaped and accordingly issued a notice u/s. 148 of the I.T Act on 26.03.2015 to the assessee company.

5. Assessing Officer noted that the assessee was asked for documents in this regard. That the assessee has supplied certain documents which are kept on record. Later, the assessee vide notice u/s 142(1) dated 16/02/2016 was asked to prove the identity, genuineness and creditworthiness of the parties from which it had received share premium. That the assessee was also asked to produce the parties for verification of transactions in the form of share

premium. That further notices u/s. 133(6) dated 18.03.2016 were issued to the parties from which the assessee had received share premium. That some of the notices issued to the parties were returned unserved and remaining parties have not filed any details in response to notice under section 133(6) till the passing of the assessment order.

6. Thereafter from the above the Assessing Officer noted that the assessee has not proved the identity, creditworthiness and genuineness of the transaction. He also referred to Hon'ble Supreme Court decision in P. CIT Vs. Mohankala (291 ITR 278). He concluded as under :-

“Further in this case, during the course of assessment proceedings for the A.Y 2009-10, the inspector of this charge and of the office of the O.T U&CII. Kolkata were directed to verify the parties in their respective premise. None of the parties could be located in the given address. At the same time, the assessee company has also failed to produce the parties for the verification of the parties.

In the view of above legal judgments and facts of the case, it is held that the identity, creditworthiness and genuineness of the aforesaid parties is not established. For the reasons being, explanation offered by the assessee about the nature and source of the sum so credited is not satisfactory in the opinion of the AO, hence sum of Rs. 5,50,00,000/- received as share capital and share premium thereon is held as 'unexplained cash credit' within the meaning of sec. 68 of the Act and is added to the total income of the assessee.”

7. Against the above order assessee appealed before learned CIT(A).

8. Learned CIT(A) held that the assessee has furnished the necessary documents and has discharged the onus cast upon him. That the Assessing Officer has not brought on record any material to contravert the same. The learned CIT(A) has held as under :

“It is seen that during the course of assessment proceedings, the following details were filed before the AO.

1. PAN and addresses of all the share applicants.
2. Copy of Boara Resolution for allotment of shares
3. Copies of the share applications received.
4. Copies of Form 2 filed with ROC.
5. Balance sheets of all the share applicants, which are also filed during the appeal at pages 22 to 190 of the Paper book.

6. Copy of bank statement of the company for FY 2007-08 showing the receipt of the share application money through banking channels.
7. Company master data at ROC of all the share applicants, which gives complete details of registered office, authorized and paid up capital, company status as 'active' etc.

4.6 If the principles mentioned in para 10 are applied to the facts of the case under consideration it can be seen that the identity of the creditors, creditworthiness of the investors and genuineness of the transactions are established as under :-

- a. Identity of the Creditor - The appellant submitted party-wise details of share application money received during the FY 2007-08 along with PAN, GIN and address.
- b. Capacity of the creditor to lend money - Financial statements of the Companies which invested money and also the net worth of the Company. The investment is also reflecting in the respective Balance Sheets of the investor Company.
- c. Genuineness of the transaction- All the transactions is routed through banking channels and it has been recorded in the books of the appellant and also the person who invested the same. The transactions have been reported with the ROC. To substantiate the claim, the Appellant also enclosed Form No. 2 filed with ROC for allotment of shares in the subsequent years along with the Board resolution and list of allotment. The Appellant also enclosed the share application forms received. The Appellant also submitted its bank statement highlighting the amounts received /credited towards, share application money

4.7 In these circumstances, it can be said that the appellant had discharged the initial onus cast upon to establish the identity and creditworthiness of the creditors as well as genuineness of the transactions. Therefore, the onus shifted to the AO. It is also seen that AO only issued notices u/s. 133(6) on 18.03.2016 to the share applicants, just 13 days before the completion of the assessment. Further, it is important to note that 18.03.2016 was Friday and being closed holiday on Saturday and Sunday, the notices could have been posted only on 21-03-2016 and which could have received to the shares applicants only on 26th or 28th March 2016 as 23rd, 24th & 25th were holidays due to Holi Festival and Good Friday. Accordingly, it was almost impossible for investors to reply till 31-03-2016. It is also seen that in the assessment order the Assessing Officer has not identified the parties where the notices were returned un-served and where the replies in response to notice u/s 133(6) were not filed. It appears from the date of issue of notices u/s'133(6) by the Assessing Officer, the enquiry was not a genuine enquiry. He should have started enquiry much in advance, if the AO was not satisfied, he had the option of -summoning the lenders. No independent and genuine verification was carried out by the AO with the investor companies, no summons u/s 131 were issued to the share applicants and no statements were recorded with regard to the genuineness of specific transactions with

the appellant. No evidence was brought on record in order to controvert the claims of the appellant. There is no finding by the AO that the evidences produced by the appellant were untrustworthy or lacked credibility. In other words, the AO did not make any genuine attempt to discharge his burden-of proof to rebut the evidences filed by the appellant or to bring any contrary material on record. Thus, the appellant's contention that it had discharged onus of establishing the identity and creditworthiness of the investor companies and genuineness of the transactions with the help of relevant supporting evidences which could not be disproved by the AO appears to be correct.

4.8 Further, in a typical bogus share investment case, the money is routed through different layers and after the allotment of shares, in short possible time the shares are transferred to the original owner of the money. The appellant filed the list of share holders of the appellant company for the years 2008, 2009, 2010, 2011 and 2019. It is seen that there is no change in the share holding of the company since allotment, which means the same investors are still enjoying the benefits of the assets of the Company. This aspect supports the argument that the investors are genuine and the money does not belong to the appellant company or any other dummy investor.

4.9 AO has mentioned that during the assessment proceedings for a later assessment year 2009-10, the inspector of the Kolkata DIT(I&CI) office could not locate the offices of the investors. AO has not mentioned the detailed findings of the enquiry done prior to the reopening of the assessment. The finding in each of the investor not quoted in the assessment order. A vague statement without anything concrete worth quoting in the assessment order cannot be taken cognizance to make any adverse view. It is also seen that the AO did not supply copy of such report, if any to the appellant during the assessment proceedings, so that the appellant can counter it. Hon. Supreme Court in the case of *Andaman Timber Industries vs. Commissioner of Central Excise* (2015) 281 CTR 241 (SC) has reaffirmed the principles of natural justice and held that the opportunity of cross examination of witness is must in a case where some adverse inference is to be drawn against the assessee. The AO failed to bring any corroborative evidence and also failed to give opportunity to rebut the report which is used as one of the basis of addition. It is an established law that without corroborative evidence and without giving opportunity to the assessee, the addition cannot be made based on some report or the statement of a third party. Reliance is placed on *Asst. CIT Vs. Katrina Rosemary Turcotte* 87 Taxmann.com 116 (ITAT Mum) Addl. CIT Vs. *Miss Lata Mangeshkar* 97 ITR 696 (Bom). In this case, the AO brushed aside the evidence produced by the appellant in a casual manner only by discussing the case laws only. On the other hand, the appellant was able to establish the identity and the creditworthiness of the creditors as well as the genuineness of transaction. When the investor company is filing regular Income tax returns of income and there is a transaction through banking channel, no addition can be made,.-without having any contrary or cogent evidences in possession.

4.10 The Hon'ble Supreme Court in the case of *CIT V/s Lovely Exports* 6 DTK 308 has held "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". The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held "If the share application money is received by the assessee company from alleged bogus shareholders who's name are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.

4.11 Hon'ble ITAT, Mumbai in the case of Arceli Realty Ltd. ITA No. 6492/Mum/2016 dated 21.04.2017 has decided a similar issue.

"If the totality of facts and the judicial pronouncements, discussed hereinabove, are analyzed, we are of the considered opinion that the onus caste upon the assessee, as provided u/s. 68 of the Act, has been duly discharged by the assessee as the identity of the share subscribers, creditworthiness and genuineness of the transaction is not in doubt or it can be. Accordingly, the addition is deleted. The ground of appeal No. 2 & 3 are allowed."

9. Against the above order the Revenue is in appeal before us.
10. We have heard both the parties and perused the records.
11. Learned Departmental Representative relied upon the order of the Assessing Officer. He further relied upon the following case laws :
 - Hon'ble Supreme Court in the case of Pr. Commissioner of Income Tax (Central)-1 Vs. NRA Iron & Steel (P) Ltd. reported in (2019) 110 Taxmann.com 491 (SC)
 - Hon'ble High Court Of Bombay in the case of Royal Rich Developers (P) Ltd Vs. Pr. CIT, reported in (2019) 108 taxmann.com 382 (Bombay)
 - Hon'ble High Court of Delhi in the case of Commissioner of Income Tax Vs. Navodaya Castles (P) Ltd. reported in (2014) 50 taxmann.com 110 (Delhi)
 - Hon'ble ITAT Ahmedabad in the case of Ayana Comlradc (P) Ltd. Vs ITO. W-1(1)(4). Ahd reported in (2019) 104 taxmann.com 66 (Ahmedabad-Tribunal)
 - Hon'ble ITAT Delhi in the case of ITO (Exemption) W-7(4) Vs. Synergy Finlease (P) Ltd reported in (2019) 105 taxmann.com 208 (Delhi-Tribunal)
12. Per contra learned Counsel of the assessee relied upon the order of learned CIT(A). He relied upon the following case laws from Hon'ble Bombay High Court :-

- CIT Vs. Gagandeep Infrastructure Pvt. Ltd. (394 ITR 680)
- CIT Vs. Orchid Industries Pvt. Ltd. (397 ITR 136)
- Principal CIT Vs. Apeak Infotech (397 ITR 148)

13. As regards learned Departmental Representative reliance of NRA Iron & Steel (P) Ltd. (supra), the same was an ex-parte order by Hon'ble Apex Court, where Hon'ble Apex Court had given a finding on the bogus nature on the facts and circumstances of that case. The reliance upon Hon'ble Bombay High Court in the case of Royal Rich Developers (P) Ltd.(supra) is also not applicable here. In that case there was a finding that no business was carried on by the assessee and that deposits were made in the investors bank account and immediately investment in purchase of assessee share were made. In the present case we find that issue is squarely covered by Hon'ble Bombay High Court decision in Gagandeep Infrastrure Pvt. Ltd. (supra), wherein it has held that necessary statute for taxing unjustified share premium was brought into statute books from assessment year 2012-13. We may refer to the decision as under:-

“During the previous relevant to the subject Assessment Year the assessee had increased its share capital from Rs.2,50,000/to Rs.83.75 lakhs. During the assessment proceedings, the Assessing Officer noticed that the respondent had collected share premium to the extent of Rs.6.69 crores. Consequently he called upon the respondent to justify the charging of share premium at Rs.190/per share. The respondent furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form no.2 filed with the Registrar of Companies. The justification for charging share premium was on the basis of the future prospects of the business of the assessee. The Assessing Officer did not accept the explanation/justification of the respondent and invoked Section 68 of the Act to treat the amount of Rs.7.53 crores i.e. the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of Section 68 of the Act. This addition was deleted by the CIT(A) and the Tribunal. Before the High Court, the department contended that the proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of the present case even for A.Y. 2008-09. The basis of the above submission was that the de hors the proviso also the requirements as set out therein would have to be satisfied. HELD by the High Court dismissing the appeal:

- (i) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14

onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied.

(ii) Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in CIT v/s. Lovely Exports (P)Ltd. 317 ITR 218 in the context to the preamended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

14. Furthermore, we note that Hon'ble jurisdictional High Court in Veedhata Tower Pvt.Ltd. vide order dated 17.04.2018 has also held that when all documentary evidences has been submitted by the assessee, and adverse inference is drawn only for non response by the concerned party, such adverse inference against the assessee is not sustainable. We find that the aforesaid case laws duly applies on the facts of the case. No adverse inference has been noted from the bank statement, balance sheet and other document of the parties from whom share capital & share premium has been received, which were duly filed before AO. Hence, the addition on merits is not sustainable. Accordingly, on the touchstone of above Hon'ble jurisdictional High Court decision, we set aside the order of the authorities below and decide the issue in favour of the assessee.

15. In the result, this appeal by the Revenue is dismissed.

Pronounced in the open court on 30.8.2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 30/08/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS