

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI**

(THROUGH VIDEO CONFERENCING)

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.4284 /Del/2017
Asstt. Year: 2012-13

ITO, Ward -6(3) New Delhi.	Vs.	Cozy Footwear Pvt. Ltd. F-605, Rashmi Apartments, Harsh Vihar, Pitampura, New Delhi – 110 034
(Appellant)		(Respondent)

Department by:	Dr. Rakesh Gupta, Advocate
Assessee by :	Shri Mahesh Thakur, Sr. DR
Date of Hearing	05.08.2021
Date of pronouncement	07-10-2021

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the Revenue against the impugned order dated 23.3.2017, passed by Ld. CIT(A)-2, New Delhi for the quantum of assessment passed u/s 143(3) for the assessment year 2012-13 on following grounds :-

1. *“The Ld. CIT(A) has erred in deleting the addition made u/s 68 of the Act amounting to Rs. 2,00,00,000/- received by the assessee company as unexplained cash credit in the garb of share application money / premium.*

2. *The Ld. CIT(A) has failed to proved the identity, genuineness and creditworthiness of the of the transactions as per judgement of Hon'ble Delhi High Court in case of M/s Nova Promoters and Finlease Pvt Ltd where it was held that mere filing of PAN No. acknowledgement of ITRs, Bank Account Statements of the applications was not sufficient to discharge the onus.*
3. *The Ld. CIT(A) has erred in accepting the creditworthiness and genuineness of transactions merely on the basis that transaction were through banking channel or by account payee instruments but it did not reflect their actual genuine business activities.*
4. *The Ld. CIT(A) did not notice that the share subscribers did not have its own profit making apparatus. It merely rotated money, which was coming through the bank accounts. The bank accounts did not reflect their creditworthiness of transaction.*
5. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”*

2. The facts, in brief, are that Assessee Company is engaged in the business of buying and selling of wide range of footwear and in the year under consideration assessee has not started its business operations. The AO noted that assessee has raised the share capital of Rs. 13,52,625/- by issuing fresh 240525 equity shares out of which 30000 equity shares at par @Rs.10/- each to Shri Surender Kumar Saraf and Sh. Girjesh Saraf and the balance 210525 shares @ Rs.5/- called up were issued to M/s. Omexpo Enterprises Pvt. Ltd at a premium of Rs.90/- per share.

3. The details filed reveal that the share premium/ share application money claimed to have received from the following 03 persons/entities.

Sl. No.	Name & Address of Subscriber	PAN	No. of shares purchase			Total amount of investment (Rs.)
				Face Premium Value		
1.	Shri Surender Kumar Saraf	ABJPS56531	15000	10/-	Nil	1,50,000/-
2.	Shri Girjesh Saraf	AVDPS9301E	15000	10/-	Nil	1,50,000/-
3.	Omexpo Enterprises Pvt. Ltd.	AAACO8604R	210525	10/- Rs.5/- Called Up)	90/-	2,00,00,000/-

4. Ld. AO issued notices u/s 133(6) to the above mentioned share subscribers and in case of two subscribers namely, Shri Girjesh Saraf and Shri Surender Kumar Saraf notices were received back undelivered with postal remark 'Left'. However, the assessee company in the case of above two persons had filed the confirmation of account, acknowledgement of Income Tax Return, balance sheet with annexures and the copy of bank statement. In the case of Omexpo Enterprises Pvt. Ltd. apart from the aforesaid documents, information was received from the said party directly to the AO in response to notice u/s 133(6) which includes, confirmation of account, Ack of ITR, balance sheet with annexures and portion of bank statement. The analysis of the information is as under:-

S No	Name & Address of the share capital / share premium subscriber - / applicant	Share application /share premium invested	Income as per ITR for AY 2012-13	Sources of income as per Profit & Loss Account

1.	Shri Surender Kumar Saraf 12, Dhudial Apartment, Madhuban Chowk Pitampura, Delhi	1,50,000	Rs.3075060/-	No revenue from business activities only nominal income from other of Rs. 2359/- declared
2.	Shri Girjesh Saraf 12,Dhudial Apartment, Madhuban Chowk Pitampura, Delhi	1,50,000	Rs.1515200/-	No business activities is being done.
3.	Omexpo Enterprises Pvt. Ltd. 1401, Bazar sita Ram,Opp. LaL Darwaza Delhi - 110006.	2,00,00,000/-	Rs.2,02,565/-	Sale of traded goods

5. It was further submitted by M/s Omexpo Enterprises Pvt. Ltd that they have applied for 2,00,000 equity shares of Rs.10/- each at a premium of Rs.90/- per share, whereas assessee company has submitted during the assessment proceedings that they have received and issued 210525 equity shares of Rs.5/- paid up and share premium @ 90/- per share was charged.

6. Ld. AO deduced that no actual transaction of share capital has taken place and only the accommodation entry has been taken by the assessee, as assessee is claiming issue of 210525 equity shares of Rs. 5/-whereas M/s. Omexpo Enterprises Pvt. Ltd. has claimed 2,00,000 equity shares of Rs. 10/-. However, a total amount in both the cases is Rs. 2,00,00,000/-. Ld. AO accepted the share capital of Rs. 3,00,000/- received from the Directors of Company on the ground that they had credit worthiness for making such an investment. On examination of bank statement of M/s. Omexpo Enterprises Pvt. Ltd. AO noted that

there are receipts of funds from some source and entries shows a pattern of continuous receipt of funds from different companies which is followed by transfer of same amount of funds to another set of companies. Therefore, he deduced that it can only be conduit to give entries to different companies. He has also issued summon u/s 131 for personal deposition of the Director of M/s. Omexpo Enterprise. However, in response none attended. The assessee also could not produce the said Director. Thereafter, after detail discussion AO came to the conclusion that sum of Rs. 2.00.00.000/- is not genuine transaction and he made the addition u/s 68 after referring to the various decisions incorporated in the impugned assessment order.

7. Before Ld. CIT(A), the assessee submitted that during the course of assessment proceedings all the requisite details and information was given with respect to each and every query raised by the AO. Brief summary of assessment proceedings was described by following sequence of events:-

<i>Sl. No.</i>	<i>Particulars</i>	<i>Notice Date</i>	<i>issue</i>	<i>Response Date</i>	<i>Submission of Information and Documents</i>
1.	<i>Notice Issued U/s 143(2) & 142(1) and hearing held on various dates</i>	<i>12.08.2013</i>		<i>Various dates as per record sheet</i>	<ul style="list-style-type: none"> • <i>Copy of Return for A.Y. 12-13 along with audited Balance Sheet, P & L account and computation of Income.</i> • <i>Address of Office/Principal Place of Business of Assessee. Complete Details of Directors during the year.</i> • <i>Name of the shareholders and their shareholding.</i> • <i>Details of Bank</i>

				<p><i>accounts maintained during the year.</i></p> <ul style="list-style-type: none"> • <i>The assessee company incorporated on 22.03.2010.</i> • <i>During the year under consideration the assessee company has not started its business operations hence no operational income has been declared except nominal receipt of interest on FDR.</i> • <i>Details of Unsecured Loan/ Deposits taken during the year including Squared up loans.</i> • <i>Details of various payments made to persons covered u/s 40A(2)(b) along with their ledger, PAN and other details.</i> • <i>Details of Expenses Payable shown in Balance Sheet.</i> • <i>Details of Shares Issued during the year.</i> • <i>Details of investment and source of investment.</i> • <i>Details of the shares allotted during the financial year under consideration along with Form 2.</i>
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				<ul style="list-style-type: none"> • Balance sheet, Profit/Loss account and bank statement of M/s Omexpo Enterprises Pvt. Ltd. having Pan: AAACO8604R. • Details of interest received on FDR
2.	Notice u/s 133(6)	08.01.2015	As per record	<ul style="list-style-type: none"> • Copy of Account Statement of the Company for the A.Y. 12-13 (By M/s Omexpo Enterprises Pvt. Ltd.) • Copy of Bank Statement from where funds have been given. (By M/s Omexpo Enterprises Pvt. Ltd.) • Copy of ITR, Audit Report with annexure, Balance Sheet, Profit & Loss and Computation of the income for A.Y. 12-13. (By M/s Omexpo Enterprises Pvt. Ltd.) • Copy of Share Certificate. (By M/s Omexpo Enterprises Pvt. Ltd.) • Authorized representative attended the office along with authorized board resolution.
3.	Notice U/s 131	18.02.2015	-	<ul style="list-style-type: none"> • Directors have not been presented. • Reasons submitted 1) Director was not available due to the reason that he was out of town authorized representative attended

				<i>and filed board resolution.</i>
4.	<i>Show Cause Notice</i>	<i>02.03.2015</i>	-	-
5.	<i>Final Show Cause Notice</i>	<i>16.03.2015</i>	-	<ul style="list-style-type: none"> • <i>AR of the Assessee Company and Sh. Surender Kumar Saraf one of the directors of the company attended and filed reply.</i>
6.	<i>Assessment Order</i>	<i>Passed dated 26.03.2015</i>	-	<ul style="list-style-type: none"> • <i>Ld. AO made the addition of Rs. 2,00,00,000 on account of unexplained credit u/s 68 of the Act by contending that:</i> <ul style="list-style-type: none"> <i>i. The Appellant has failed to prove the identity, genuineness and creditworthiness of the party.</i> <i>ii. The Appellant has furnished inaccurate particulars thereby concealing the particulars of its Income and rendering Itself liable for initiation of penalty proceedings u/s 271(1)© read with section 274 of the Act.</i>

Apart from that assessee made detailed submission which was incorporated in the impugned appellate order.

8. Ld. CIT (A) after considering the entire facts and material on record and the finding and observation of the AO, first of all discussed to various judgments and the principle laid down for discharge of onus in the case of share subscriber in the case of individuals as well as corporate entities and the principle laid down in the judgment of judicial pronouncements in para 4.2.1 at pages 8 to 9 of the appellate

order. Thereafter applying the said principles on the facts of the assessee's case, he made following observations:-

“4.2.2 Now applying the above judgement to the facts of the case, it is seen that the appellant has filed sufficient documents e.g. Permanent Account Number, bank statement copy, copy of IT Return of the company, statement from the MCA website showing that the company is live working company, etc. to establish the identity of the share applicant viz. M/s Omexpo Enterprises Pvt. Ltd. The share applicant had twice replied to notices issued by the Assessing Officer during the course of assessment proceedings. Copies of such replies dated 19.01.2015 and 05.03.2015 of M/s. Omexpo Enterprises Pvt. Ltd. before the Assessing Officer form part of the paperbook filed by the appellant before me. It is not understood that if the company had not existed, how it could file replies to notices issued by the A.O. The copies of the bank statements of the share subscriber and the appellant wherein the transactions are reflected (transfer of Rs.lcrore each two times from the bank account with Axis Bank of M/s. Omexpo Enterprises Pvt. Ltd. to the bank account of the appellant with Oriental Bank of Commerce on 10.08.2011) as well as the fact that it is assessed to income tax, establish the creditworthiness of the share subscriber. The income of M/s. Omexpo Enterprises Pvt. Ltd. for the year under appeal may have been in the negative, but creditworthiness of a party is not gauged merely from income/loss of a particular year. The balance sheet of M/s Omexpo Enterprises Pvt. Ltd. as on 31.03.2012 reveals that it had sufficient sources of funds to invest in the appellant company, as evident from the table below:-

S. No.	Name of the Share Applicant	Share Capital as per Balance Sheet (Rs.)	Reserves as per Balance Sheet (Rs.)	Total Investments (Rs.)	Investment in the appellat company (Rs.)
1.	M/s. Omexpo Enterprises Pvt. Ltd.	28,56,250	27,11,31,946	38,27,61,000	2 Crore

4.2.3 As regards the genuineness of the transactions, since the share capital/ share premium was paid for vide banking channel and there was no deposit of cash in the bank account of the share subscriber prior to issue of funds by it to the appellat company, this aspect also stands proved. As regards the mismatch between the number of shares of the appellat company subscribed to by M/s. Omexpo Enterprises Pvt. Ltd. - as mentioned by the appellat company and as mentioned by M/s. Omexpo Enterprises Pvt. Ltd. in its replies to the A.O., it has been submitted that there may have been typographical error in the reply of the share subscriber. The details of the shares are stated to be as under, in support of which the appellat has furnished copies of the share certificates before me [which were called for by me in exercise of my powers u/s 250(4)]:-

Date	Number of shares	Distinctive no. of shares	Nominal Value of shares	Called up amount of shares	Premium on shares	Amount of share
22.08.2011	30000	80001 to 110000	Rs. 10/- each	Rs. 5/- each	Rs. 90/- each	Rs.28,50,000/-
22.08.2011	100525	110001 to 210525	Rs. 10/- each	Rs. 5 / - each	Rs. 90/- each	Rs.95,49,875/-
22.08.2011	80000	210526 to 290525	Rs. 10/- each	Rs. 5 / - each	Rs. 90/- each	Rs.76,00,000/-

4.2.4 On going through the assessment order, it is seen that the assessing officer has not been able to rebut or find any

*discrepancy in the documents submitted by the appellant. The appellant company has been able to prove its case and in case the appellant has failed to produce the Director of the shareholder company, as held by the jurisdictional High Court in the case cited above, the assessing officer cannot shift the burden on the appellant company. If the assessing officer had any doubt about the shareholder, nothing stopped him from taking appropriate action or proceeding against the shareholder or informing its Assessing Officer. It is a case where the appellant has been able to meet the requirements to justify its case. If the notices issued by the A.O. to the share subscriber company/its directors were not complied with or came back unserved, this could not be held against the appellant, which had discharged the initial onus which lay upon it by proving the identity and capacity of the share applicant and the genuineness of the transaction. This principle has been laid down in the case of **CIT vs. Orissa Corporation Pvt. Ltd. [1986] 159 ITR 78 (SC)***

(.....)

4.2.5 Then, as held by the Hon'ble Delhi High Court in the case of CIT vs. Value Capital Services Pvt. Ltd. In ITA No. 348/2008, "there is an additional burden cast on the revenue to prove that the investment made by the share applicants actually emanated from the coffers of the assessee, so that the amount was to be treated as undisclosed income. As observed by the Ld. CIT (A), in the present case, the AO did not bring anything on record to the effect that the investment made by the share applicant had come actually from the coffers of the assessee company only."

4.2.6 The judgements relied upon by the Assessing Officer are not applicable to the facts of the appellant's case. For instance in the cases of M/s Nipun Builders and Developers Pvt. Ltd. (30

Taxmann.com 292) (Del.) as well as M/s N.R. Portfolio Pvt. Ltd. (42 Taxmann.com 339) (Del.), the Assessing Officer was in possession of adverse information from the Investigation Wing about the two companies being beneficiaries of accommodation entry providers and further in the case of Nipun Builders and Developers Pvt. Ltd. (supra) the assessee had merely furnished copies of the bank statements of the share subscribers and no positive evidence to show the nature and source of resources of the share subscribers. In the case of the appellant, there is no adverse information from the Investigation Wing regarding the appellant company being a beneficiary of entry providers and in order to prove the creditworthiness of the share subscriber, it not only produced copy of its bank statement but copy of its I.T. Return and final accounts as well, wherein, as per discussion in para 4.2.2 above, it was having huge share capital and reserves for investment in the appellant and other companies. Accordingly, I hereby direct the assessing officer to delete the addition of Rs.2 crores made by the AO on account of share capital and share premium. In my view, this addition was not warranted. These grounds of appeal are allowed.”

9. Before us, Ld. DR strongly relied upon the observation and the finding of the AO and submitted that though various documents may have been filed by the assessee however, the Director of the subscriber company could not be produced who could have been explained the entries in the bank statement and the source of funds. Thus, the share capital amount received from the said company remains unsubstantiated and has rightly been added u/s 68.

10. Ld. Counsel for the assessee strongly relied upon the order of the Ld. CITA() and further brought to our notice that after passing of

the CIT(A) order, proceeding u/s 148 was initiated and same addition of Rs. 2,00,00,000/- have been again made by the AO and order passed u/s 143(3) /147 vide order dated 18.12.2019. On one hand, the revenue is pursuing appeal before this Tribunal on the deletion made by the Ld. CIT (A); and on the other hand, has also added the same income twice in the proceedings u/s148. Apart from that, he submitted that there is neither any adverse material on record nor the AO was able to find any discrepancy in the documents filed by the assessee and also by the subscriber company M/s. Omexpo Enterprises Pvt. Ltd. in response to the notice u/s 133(6). Thus, apart from onus cast upon the assessee to be discharged, therefore, the order of the Ld. CIT(A) also should be confirmed.

11. We have heard the rival submissions and also perused the relevant material placed on record in the impugned order. Here in this case, the assessee company has received share application money from three parties. Two of them were Directors and one was a corporate entity M/s Omexpo Enterprises Pvt. Ltd. In so far as the share application money received from Directors, the AO has held the genuine transaction of the subscriber stood satisfactorily explained. In the case of share application money for sums aggregating to Rs. 2,00,00,000/- received from M/s. Omexpo Enterprises Pvt. Ltd., first of all the assessee discharged its onus by filing the copy of confirmation along with documents like, PAN, bank statement of the subscriber company, copy of income tax return alongwith audited accounts, etc., statement from the MCA website showing that the company is live working company. Thereafter, the AO himself carried out inquiry from the said parties and notice u/s 133(6) was sent asking for various details to corroborate the stand of the assessee. In response, the said company replied to the said notices and in fact two times reply was sent, i.e., vide letter dated 19.1.2015 and 5.3.2015.

The party not only confirmed the said transaction but also explained the source of investment alongwith the set of documents as mentioned in the assessment order itself as well as in the impugned appellate order. The bank statement furnished by the said company reflected a transfer of Rs. 1,00,00,000/- of each on two occasions from its bank account with the Axis Bank to the bank account of the assessee on 10.8.2011. The company also stated that it assessed to tax income tax and duly reflected the said investment in the balance sheet. Ld. CIT (A) has also noticed that this company had sufficient source of funds in the form of share capital and reserves as per balance sheet. The figure of which has been incorporated above. Out of the said funds the investment which has been made in the assessee company was Rs. 2,00,00,000/-. Apart from that, there is a categorical finding by the Ld. CIT(A) that there is no cash deposit in the bank account of share subscriber prior to issue of funds. Further, in so far as second discrepancy in the number of shares subscribed by M/s. Omexpo Enterprises Pvt. Ltd., the same was reconciled along with the share certificate filed before the Ld. CIT (A) which has been discussed in detail by him. Thus, in so far as assessee is concerned entire onus should discharge and even in the inquiry conducted by the AO, no adverse material has been found as the party has provided all the necessary details to prove the genuineness of the transaction. In these circumstances, we do not find any reason as to why the transaction has been doubted by the AO without any adverse material found during the course of inquiry conducted by the AO. Now simply because Director of the subscriber company did not appear personally that does not mean that all other documents sent by the said company which are mostly statutory records as well as the income tax records can make the transaction fictitious. Thus, we do not find any

infirmity in the finding and observation of the Ld. CIT(A) while deleting the said addition.

12. Apart from that, as brought on record by the Ld. Counsel, the AO subsequently based on certain information emanating from search in some other case on 29.3.2012, came to the conclusion that the amount of Rs. 2,00,00,000/- is an accommodation entry and again the same amount has been added. This has been added despite noting the fact that already Ld. CIT (A) has deleted the same addition vide order dated 23.3.2017. If the same addition has been made again, then we do not find any justification for challenging the said addition in the present appeal. On this count also the ground raised by the revenue cannot be sustained. In any case on merits we have already upheld the order of the Ld. CIT (A) in deleting the addition of Rs. 2,00,00,000/-. Accordingly the appeal of the revenue is dismissed.

13. In the result, the appeal of revenue is dismissed.

Order pronounced in the open court on 07/10/2021, immediately after conclusion of the hearing of the matter in virtual mode.

Sd/-
(B.R.R. KUMAR)
ACCOUNTANT MEMBER

sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 07 /10/2021

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

