

आयकर अपीलिय अधिकरण, इंदौर अहमदाबाद न्यायपीठ, - इंदौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE, INDORE BENCH**

**BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER
AND
MS.MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./ ITA No.70/Ind/2018

निर्धारण वर्ष/Asstt. Year: 2013-14

M/s.OREF Securities P.Ltd. 69, Agrasen Nagar B/h. MID India Mandsaur.	Vs.	ITO, Mandsaur.
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अपीलार्थी (Appellant)	प्रत्यर्थी (Respondent)
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Revenue by :	Shri Rajib Jain, CIT-DR
Assessee by :	Shri S. S. Solanki, CA

सुनवाई की तारीख/Date of Hearing : 19/08/2021

घोषणा की तारीख/Date of Pronouncement: 17/11/2021

आदेश/ORDER

PER Ms. MADHUMITA ROY, JUDICIAL MEMEBR:

Present appeal by the assessee is directed against order dated 01-11-2017 passed by the Ld. Commissioner of Income-tax (Appeals), Ujjain (M.P.) arising out of order dated 22.3.2016 passed by the ITO, Mandsaur under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2013-14 whereby and whereunder addition to the tune of Rs.11,77,50,000/- made under section 68 of the Act, has been confirmed by the Id.CIT(A).

2. Brief facts of the case is this that during the year under consideration, the assessee-company issued total 3,80,375 shares of face value of Rs.10/- each. Out of which, on 86,000 shares, share premium has been charged at Rs.490/- per share, and on 2,94,375,

share premium was charged at Rs.390/- each. Out of total share premium amount of Rs.15,69,46,250/-, the premium of Rs.4,21,40,000/- was received during the financial year 2010-11 and the balance of Rs.11,48,06,250 has been received during the year under consideration. Notices under section 133(6) dated 11.8.2015 were issued by the Id.AO to all seven companies who had applied for shares. Out of seven companies, six have replied in response to the said notices and confirmed their investment. While doing so, they have further filed certain documents in order to substantiate the genuineness of their investment. However, upon perusal of the details provided by these parties, the Id.AO came to the conclusion that share premium charged by the company was excessive considering financial performance of those company. The company, providing share premium, existed only on paper. The Company relieved huge amount as loan and gave the same to other concerns without apparent motive of conducting any actual business. As per the opinion of the Id.AO, the appellant company had accepted share premium from the companies which were engaged in providing bogus entries in the form of loan and share application money. The Id.AO ultimately was not satisfied with the credit-worthiness of the creditors and genuineness of the transaction. The directors of shareholding companies, since not appeared though directed the duty cast upon the appellant to prove genuineness of the share allotment was not discharged, and therefore, share premium to the tune of Rs.11,77,50,000/- has been added to the total income of the assessee, treating the same as bogus by invoking provisions of section 68 of the Act. The Id.AO, as we find from these order, discussed at length about the high premium and accepted Rs.28,31,888/- towards share capital (at Rs.9.62 per equity share), but treated Rs.11,49,18,112/- being the excessive share premium. However, no addition under section 56(2)(viib) of the Act was made while doing so. The relevant observation of the Id.AO is reproduced hereinbelow:

"5.21 In view of the above, computation ii is clear that the fair market value of the allotted equity shares amounts to Rs.9.62/- per equity shares. The assessee company has allotted 2,94,375/- equity shares during the period and fair market value of these shares amount to Rs. 28,31,888/-. The assessee company has received a sum of Rs. 11,77,50,000/- against these shares. Thus, excessive share premium received by the company amounts to Rs.11,49,18,112/- which is liable to be added to the income of the assessee in view of the provisions of section 56(2)(viib) of the Income Tax Act, 1961.

5.22 As per above discussion, the addition u/s 68 is coming to Rs. 11,77,50,000/- and addition u/s. 56(2)(viib) is coming to Rs. 11,49,18,112/- only. As double addition cannot be made, therefore addition u/s 68 as discussed above of Rs. 11,77,50,000/- is being made in this case and as the assessee has furnished inaccurate particulars of its income penalty proceedings u/s 271(1)9c are also initiated."

3. Before the Id.CIT(A), the appellant filed following written submissions:

With regard to the Income Tax Appeal in the case of our above named client company for the Assessment Year 2013-14, we have to submit as under:-

Ground No. 1

1.1 This ground relate to deemed addition of Rs. 14918112/- u/s 56(2)(viib) of the Income Tax Act. That the AO in his order has discussed about two sections, section 56(2)(viib) and section 68. However, be opted to go for addition U/s 68 and not u/s 56(2)(viib).

1.2 The AO has not made addition u/s 56(2)(vii)(b) but. has discussed the section in detail We have raised ground no. 1 to keep this matter alive. If any adjudication is to be given on this issue, We may be given some time to give separate submission on this issue.

Ground No.2

2.1 This ground relates to addition of Rs. 17750000/- by alleging that credit worthiness and genuineness of the share transaction cannot be proved.

2.2 That the appellant has produced following before the AO:-

- i) Computation of Income along with acknowledgement.
- ii) Balance Sheet along with Audit Report,
- iii) Confirmation letters.
- iv) Relevant bank statements.

2.3 The AO in para 5.2 also confirmed that the assessee has submitted the desired details.

2.4 Notices u/s 133(6) were issued to all seven companies from whom share application money was received.

2.5 All the seven notices issued u/s 133(6) were served and replies were received by the AO from six companies directly and from one company by the assessee on the instructions of the AO.

2.6 The AO commented that though the identity of shareholder is proved yet the genuineness and credit worthiness is not proved.

2.7 That when the assessee has proved the identity and also the transaction is through banking channels for which the bank statements are also furnished, the summons issued have also been served and replied, the ingredients of proving share capital is proved. For this proposition reliance is placed on following decisions:-

i) Honorable Rajasthan High Court in the case of *Barkha Synthetics Ltd. Vs. ACIT* reported in 283 ITR 0377 held that the principle relating to burden of proof concerning the assessee is that where the matter concerns the money receipt by way of share application from investors through banking channel the assessee has to prove existence of person in whose name share application is received. Once the existence of investor is proved, it is no further burden of assessee to prove whether that person himself has invested said money or some other person had made investment in the name of that person. The burden then shifts on revenue to establish that such investment has come from assessee-company itself. -*CIT vs. Shree Barkha Synthetics Ltd.* (2003) 182.CTR (Raj) **175 followed**

ii) Honorable Delhi High Court in the case of *CIT vs. Dwarkadhish Investment Pvt Ltd.* Reported in 45 DTK 0281, 330 ITR 029, held that Tribunal having confirmed the order of the CIT(A) deleting the impugned addition under s. 68 holding that the assessee has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques, no question of law arises.

iii) Honorable Madhya Pradesh High Court in the case of *CIT vs. Metachem Industries* reported in 245 ITR 0160 held that once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee -firm is over. The assessee-firm can not ask that person who makes investment

whether the money invested is properly taxed or not The assessee is only to explain that individual to account for the investment made by him. If that person own that entry, then, the burden of the assessee - firm is discharged. It is open for the AO to undertake further investigation with regard to that individual who has deposited this amount. So far as the responsibility of the assessee concerned, it is satisfactorily discharged. Whether that person is income tax payer or not or from where he has brought this money is not the responsibility of the firm.

iv) Honorable Supreme Court of India in the case of CIT vs. Lovely Exports Pvt Ltd. Reported in 216 CTR 0195 held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of assessee company.

iv) Honorable Supreme Court of India in the case of CIT vs. Lovely Exports Pvt. Ltd. Reported in 229 CTR 86 held that can the amount of share money be regarded as undisclosed income u/s 68 of-IT Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law, Hence, we find no infirmity with the impugned judgment.

vi. Honorable Madhya Pradesh High Court in the case of Sumerchand Jain vs. CIT Reported in 292 ITR 0241 held that the source of CR was not essential to be proved inasmuch as the assessee had been able to prove the identity, entry and source of the third party and it should be regarded that the assessee has been able to discharge the onus. In view of the aforesaid, as far as the transaction relating to purchase of silver made by the assessee firm from CR on credit basis which finds mention in the books of accounts it could not have been added on the basis of suppression.

vii) Honorable Delhi High court in the case of CIT vs. Divine Leasing & Finance Ltd. Reported in 207 CTR 0038 held that there cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee is should not be harassed by the

revenue's insistence that it should prove the negative. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain make available to the AO for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of ss. 68 and 69. The burden of proof can seldom be discharged to the hilt by the assesses; if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound, carryout thorough investigations. But if the AO fails to unearth any wrong or illegal dealings, he can not obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the assesses.

viii) Honorable Allahabad High Court in the case of CIT vs. Nav Bharat Duplex Ltd. Reported in 35 taxmann. Com 289 Section 68 of the income-tax Act, 1961 - cash credits [Share application money]- Assessment year 2004-05- During assessment proceedings, assessee -company submitted information relating to share application, who had invested in its share capital -Assessing Officer held that assessee could not discharged its onus in proving that share applicants of amount of Rs.25 lakhs had enough money in their bank accounts on date of purchase of share - He , therefore, added said amount to income of assessee as unexplained cash credit under section 68- Commissioner (Appeals) held that five companies subscribing equity share amounting to Rs.25 lakhs were identified _ and they had submitted their bank statements, cash extracts and returns-filling receipt - He , therefore, deleted impugned addition made by assessing officer -Tribunal upheld order of commissioner (Appeals) - supreme court while dealing with similar issue in various cases held that identity of shareholder alone is required to be proved in case of capital contributed by shareholders -Whether since five companies subscribing equity share amounting to Rs.25 lakhs were identified and they had submitted their bank statement, cash extracts and returns filling receipt, identity of share applicant companies and purchase of share had been proved-by assessee - Held, yes - Whether, therefore, appellate authorities had rightly deleted impugned addition made by Assessing Officer - Held, yes [para6] [In favour of assessee]

ix) Honorable Delhi High court in the case of CIT vs. Kansal Fincap Ltd. Reported in 221 Taxman 151 Section 68: Cash credits -Share application money - No addition shall be made in the hands of the assessee where transaction related to the receipt of share application money are genuine and are fully recorded by the share applicants.

x) *HONORABLE AHMEDABAD, IT AT TRIBUNAL (A) In The Case of ITO vs. APEX THERM PACKAGING PVT. LTD. When full particulars, inclusive of confirmation with name, address and PAN Numbers, copy of Income Tax Returns, balance sheet, profits and loss accounts and computation of total income in respect of all creditors were furnished and when it had been found that loan received through cheques and loan account were duly reflected in balance sheet, AO was not justified in making addition u/s 68.*

xi) *Honorable Delhi High court in the case of CIT vs. Expo Globe India Ltd. 82 CCH 0477 Income - Cash credits Share application money - AO held assessee/ respondents to have received share application money to extent of Rs. X and disallowed same on ground that assessee had not provided satisfactorily explanation - CIT (A) delete disallowance and ITA T upheld same - held, AO had initially concluded on basis of materials made available at that stage that service of entry providers had been utilized to bring in capital -After remand CIT (A) elaborately took into account considerable materials furnished by assessee-These included Income tax returns, CIT(A) held that share application money or source of share application money had been satisfactorily explained - ITAT was of opinion that no interference was warranted having regard to facts of case- Only sentence in paragraph-6 of impugned order that amounts were refunded t application itself should not be ground to conclude that findings recorded by lower authorities are not on basis of evidence*

xii) *Honorable ALLAHABAD HIGH COURT OF IN THE OF CIT vs. VACMET PACKAGING (INDIA) PVT. LTD. In this regard, both the CIT(A) and the tribunal had noted that the assessee had established all the three aspects by producing, during the courses of the assessment necessary documentary material such as the share application forms, copies of bank accounts, income tax returns and balance sheet. .*

xiii) *Honorable Calcutta High Court in the case of CIT vs. Nishan Indo Commerce Ltd. Reported is 101 DTK (Cal) 0413 Once identity and other relevant particulars of shareholders are disclosed, it is for these shareholders to explain source of their funds and not for assessee company to show wherefrom these shareholders obtained funds.*

xiv) *Honourable ITAT Indore in the case of Agrawal coal corporation Pvt. Ltd. Vs. Additional CIT reported in 135 ITD 270 S. 68 : Cash Credits - share application money - identity - identity of share applicants were not established hence addition was up held The assessee is a Pvt. Ltd. Company engaged in the trading business in coal. It was found that Hindustan Continental Ltd. (HCL) had applied for 40000 share application on face value of Rs.10 each and premium of Rs.90 per share. Similarly the Optimates Textile Industries Ltd, (OTL) also applied for*

10000 shares. Both the parties are from Indore. The Assessing Officer referred the matter to Assistant Commissioner Indore to verify the genuineness or parties. The investigation carried out by the officials of Indore; it was found that the parties were not in existence. The assessing officer held that as the assessee has failed to establish identity of share applicants the addition was made under section 68. On appeal the commissioner (Appeals), upheld the addition. On appeal to the Tribunal, the Tribunal held that since the identity of share applicants had not been established, the initial onus laid down under section 68 had not been discharged and thus addition made to be upheld.

In view of the facts of the case and case laws cited above, the addition of Rs.117750000/- made by the AO u/s.68 is illegal and wrong. The same therefore requires to be deleted.”

4. However, relying upon certain judgments as mentioned in the impugned order, the Id.CIT(A) confirmed the addition with the following observations:

".... .."

*The appellant company was obliged to prove:-
 (a)The identity of the alleged share holders.
 (b) The credit worthiness of the share holders.
 (c)The genuineness of the transactions.*

But it is clear from the facts as discussed above that the appellant could not prove the same, therefore, in the light of above facts and case laws as discussed above, I am of the considered view that the AO was justified to make addition u/s 68 of the IT Act. Therefore, the addition made by the AO amounting to Rs.11,77,50,000/- is confirmed. Therefore, the appeal on these grounds is dismissed.”

5. We have heard parties and perused the materials available on record. It appears from the record available with us that, before the Id.AO, following documents were duly submitted by the assessee, as asked for:

- i) Copy of ITR
- ii) Copy of Bank Statement
- iii) Copy of Memorandum & Article of the Company
- iv) PAN of the Company
- v) Copy of Audited Accounts
- vi) Copy of Affidavit
- vii) Copy of confirmation of Investing parties.

6. It is also fact that notices under section 133(6) were issued by the Id.AO to all seven parties; out of which six submitted requisite documents before the Id.AO. However, the AO came to the conclusion that company providing share premium existed only on paper and the company did not have any physical set up at the given address. During the course of assessment proceedings, neither assessee nor creditor-companies provided ITR of the creditor-company. The Id.AO concluded that directors of the said companies were not even aware of the huge transactions made by the company. Ultimately, Id.AO concluded by observing that the assessee-company accepting share premium from the companies engaged in providing bogus entries in the form of loan of share application money. But it is also relevant to note that the revenue before us failed to canvass the fact of any inquiry made by the Id.AO in order to identifying the creditor companies as paper companies and the transaction thereof as bogus while making addition under section 68 of the Act against share premium received by the assessee-company. Needless to mention that the Id.AO only on the basis of surmises, conjectures and presumption held that the companies providing premium are bogus and paper company.

7. The Id.CIT(A) has also confirmed addition on the wrong presumption that the alleged shareholder were not found to be in existence. However, he failed to show that while observing the same, whether the Id.AO has conducted any inquiry whatsoever about the identity, creditworthiness of the companies and genuineness of the transactions. It also appears from the order passed by the Id.CIT(A) that he has relied upon certain judgments including the judgment passed by the Co-ordinate Bench in the case of Vaibhav Cotton P.Ltd. Vs. ITO, (2012) 20 ITJ 422 (Trib-Indore) wherein the facts of the instant case is completely different from the facts available in the case mentioned above.

It is also a trite law that an addition made without making any investigation and/or inquiry and only on surmise and conjectures is required to be deleted. The AO under statutory provisions has to carry out his own investigation by exercising powers conferred under section 131 of the Act, which is absent in the instant case before us. On this issue, the following judgments as relied upon by the Id.AO has been considered by us carefully:

- i) PCIT Vs. M/s.Chain House (MP High Court, 408 ITR 561 (SLIP of Revenue dismissed)
- ii) CIT Vs. M/s.Ami Industries (India) P.Ltd., (Bom-HC)
- iii) PCIT Vs. NRA Iron & Steel P.Ltd.(SC)
- iv) PCIT Vs. Parth Enterprises (Bombay HC), 103 CCH 0398
- v) CIT Vs. Divind Leasing, 299 ITR 268 (Del)
- vi) PCIT Vs. Himachal Fibres Ltd., 259 Taxman 4 (Del) (SLP of Revenue dismissed)
- vii) Nishant Finance P.Ltd. (ITAT Indore)
- viii) M/s.Janani Infrastructure P.Ltd. Vs. ACIT (ITAT, Bangalore)
- ix) ITO Vs. M/s.Baba Bhootnath Trade & Commerce Ltd. (ITAT-Kolkata)
- x) Hariom Concast & Steel P.Ltd., (ITAT Hyd)
- xi) DCIT, Mumbai Vs. ACRO Exports Trading P.Ltd. (ITAT-Mum)

8. We also note that there must be more than the bare suspicion to support the assessment. Mere suspicion cannot take place of evidence, neither on the basis of procedural lapse on addition of share capital is sought to be justified. In this regard, we have considered judgment passed by the Hon'ble Supreme Court in the case of Dhakeshwar Cotton Mills Ltd. Vs. CIT, Janani Infra P.Ltd. Vs. ACIT passed by the ITAT, Bangalore Bench. The relevant portion of the judgment passed in the matter of Janani Infra Pft. Ltd. vs. ACIT this judgment reads as under:

"42. The Ld. Senior Advocate, Shri Percy Pardiwala advanced his arguments on merits of the additions. The case of Carmel Asia

Holdings P Ltd for assessment year 2007-08 was taken up first. The Ld AR submitted that the AO has assessed the share application money and share premium only as income of the assessee in this year. He further submitted that the AO has not referred to any of the sections of the Income-tax Act for assessing the 'share application money and share premium amount' as income of the assessee. At this point of time, the Ld D.R was asked to clarify this point, to which the Ld D.R submitted that the assessing officer has stated in page 7 of the assessment order that the sum of Rs.6059.52 lakhs is brought to tax as "unexplained credits". Accordingly he submitted that the AO has invoked the provisions of sec.68 only for making the above said addition. Hence, both the parties agreed to proceed on the basis that the addition was made by the AO u/s 68 of the Act as "unexplained credits". The Ld A.R submitted that the AO has accepted the genuineness of share capital to the extent of its par value and hence it can be concluded that the AO was satisfied with the three main ingredients required to be proved u/s 68 of the Act viz. identity of the shareholder, credit worthiness of the shareholder and genuineness of the transactions. Accordingly, the Ld A.R submitted that there is no scope for making addition u/s 68 of the Act."

9. We further appreciate that when the basic evidences are on record, as provided by the assessee to the Revenue mere failure of the creditor to appear cannot be the basis for making addition. In fact, the assessee has discharged its onus to prove credit-worthiness of the share holders and genuineness of the transaction by providing the documents and/or information to the AO. The documents filed in support of identity and credit-worthiness of the share holders and genuineness of the transactions being the balance sheet, bank statement, audited accounts, and the affidavit of the companies provided share premium were not doubted as non-genuine. The Ld. AO accepted genuineness of the share capital to the extent of its par value, it can be concluded that the Ld. AO was satisfied with three ingredients required to be proved under Section 68 of the Act. In fact, the addition even thereafter is not sustainable in the absence of any adequate enquiry made by the Revenue. On this aspect, we have relied upon the judgment passed by the Coordinate Bench in the case of Nishant

Finance P.Ltd. in ITA No.181 and 472/Indi/2017. Relevant portion of this order reads as follows:

"In the light of above judgments and given facts and circumstances of the case are of the considered view that the appellant i.e. the assessee has been successful to prove the genuineness, creditworthiness and identity of the alleged cash creditors on account of the fact that all the relevant details and supporting-documents are placed on record.

The documents filed in support of identity, creditworthiness and genuineness i.e. Profit & loss accounts, income tax returns, audit reports, affidavit of the cash creditors and identity proof have not been disputed by the revenue authorities at any stage. Ld. A.O seems to have made the addition without making any investigation after the loan was taken. The finding given in the impugned assessment order about the investment is during the period prior to taking the loan. We therefore in the given facts- and circumstances of the case and respectfully following the judgments in the preceding paragraphs are of the considered view that the addition for unexplained cash credit of Rs. 1,80,00,000/- needs to be deleted. We therefore set aside the finding of both the .lower authorities and allow this issue of unexplained cash credit raised by the assessee in Ground No. 3 to 9."

10. We have further relied on decision of the ITAT, Kolkata Bench in the case of ITO Vs. Savera Towers P.Ltd., passed in ITA No.2275/Kol/2016 wherein it was observed that all the share subscribers are duly assessed to income tax and the transaction with the assessee company are duly routed through banking channels and are duly reflected in their respective audited balance sheets, as were placed on record. Once the receipt of share capital has been accepted as genuine within the purview of section 68 of the Act, there is no reason for the Id.AO to doubt the share premium component received from the very same shareholders as bogus. This fact is identical to that of the fact available with us. At the cost of repetition, we would like to mention that addition under section 68 cannot be justified in the absence of any inquiry done by the Id.AO by exercising powers

conferred under the statutory provisions as already observed by us hereinabove. Thus, in the absence of proper inquiry made by the Id.AO, impugned addition cannot be sustained and the same is hereby deleted. The ground of appeal filed by the assessee is allowed.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on _17th _November, 2021 at Ahmedabad.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(Ms.MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 17/11/2021

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार(Dys./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad

1. Date of dictation : **11-11-2021**
2. Date on which the typed draft is placed before the Dictating Member. :
3. Date on which the approved draft comes to the Sr.P.S./P.S. :
4. Date on which the fair order is placed before the Dictating Member for pronouncement. :
5. Date on which fair order placed before Other Member :
6. Date on which the fair order comes back to the Sr.P.S./P.S. :
7. Date on which the file goes to the Bench Clerk. :
8. Date on which the file goes to the Head Clerk. :
9. The date on which the file goes to the Assistant Registrar for signature on the order. :
10. Date of Despatch of the Order :

