

**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM**

ITA No.7871/Mum/2019
(Assessment Year: 2008-09)

ITO-6(2)(2) 5 th Floor, Room No.510 Aaykar Bhawan, M.K.Road Mumbai-400 020	Vs.	M/s. Kleem Consultancy Pvt.Ltd. (Formerly known as crystal Acqua Bottling Pvt.Ltd.) G-7, Unique House, Unique Industrial Estate Andheri(E) Mumbai-400 099
PAN/GIR No. AABCC2102K		
(Revenue)	:	(Assessee)

&

Cross Objection No.113/Mum/2021
ITA No.7871/Mum/2009
(Assessment Year: 2008-09)

M/s. Kleem Consultancy Pvt.Ltd. (Formerly known as crystal Acqua Bottling Pvt.Ltd.) G-7, Unique House, Unique Industrial Estate Andheri(E) Mumbai-400 099	Vs.	ITO-6(2)(2) 5 th Floor, Room No.510 Aaykar Bhawan, M.K.Road Mumbai-400 020
PAN/GIR No. AABCC2102K		
(Revenue)	:	(Assessee)

Assessee by	:	Shri Rakesh Joshi
Revenue by	:	Shri T.Shankar,DR

Date of Hearing	:	24.01.2022
Date of Pronouncement	:	17 .02.2022

ORDER

Per Shamim Yahya, A. M.:

This appeal by the revenue and cross objection by the assessee are arising out order of the learned Commissioner of Income Tax (Appeals)-12, Mumbai ('ld.CIT(A) for short) dated 09.09.2019 and pertain to the assessment year (A.Y.) 2008-09.

2. The grounds of appeal raised in the revenue's appeal read as under:

1. On the facts and circumstances of the case and in law, the Ld. CTT(A) has erred in deleting the addition made by the Assessing Officer on account of unexplained cash credit u/s 68 of the IT Act of Rs. 1,50,00,000/- received by the assessee by way of share capital and share premium from M/s Great Eastern Infrastructure Corporation. As the assessee could not submit the details regarding creditworthiness and genuineness of the party from where share premium was received."

2. The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored.

3. Brief facts of the case are that M/s Kleem Consultancy Pvt. Ltd., formerly known as Crystal Acqua Bottling Pvt. Ltd. (hereafter referred to as the assessee or appellant) is a private limited company engaged in the business of bottling, distribution and selling aerated drinks and other allied items. The assessee filed its return of income for A.Y. 2008-09 on 30.09.2008 declaring total income of Rs. NIL. The return was processed u/s.143(1). Case was reopened by issuing notice u/s 148 of the Act after recording reasons. The reassessment was completed u/s. 143(3) r.w.s. 147 on 30.03.2016 assessing total income at Rs.1,50,00,000 after making additions of Rs.1,50,00,000 u/s. 68 of the IT Act.

4. During course of assessment proceedings, the AO noticed that the appellant had allotted the share capital of Rs 10 per share at a premium of Rs.90 per share to the investing entity. AO asked the assessee to justify the charging of premium and also show cause as to why said amounts of investments should not be added u/s 68 of the Act.

5. The AO noted the details submitted. However, AO was not satisfied. He observed as under:-

"In response, the assessee company submitted the following;

- (i) Acknowledgment of Return of Income of M/s. Great Eastern Infrastructure Corporation Pvt. Ltd.
- (ii) P&L, Balance sheet, ledger confirmation in respect of M/s. Great Eastern Infrastructure Corporation Pvt. Ltd.
- (iii) Valuation Report
- (iv) Copy of bank statement for the period from 01.03.2007 to 30.03.2007 of M/s. Great Eastern Infrastructure Corporation Pvt. Ltd. the details of which are reproduced as under.

The assessee failed to furnish share application form and justification for the premium charged vis-a-vis the intrinsic value of the shares. The assessee also failed to prove capacity and creditworthiness of investors

Notice u/s 133(6) of the Act Is issued vide letter dated 07.03.2016 to the investor M/s. Great Eastern Infrastructure Corporation Pvt. Ltd. but no response has been received.

From the above, it was evident that the assessee company has miserably failed to establish the genuineness of the transaction and its true nature. Considering the parameters as discussed supra, it is established beyond doubts that the assessee company could not substantiate its claim of having received the said sums of money from the stated persons towards share application/share capital and share premium.

The primary onus is on the assessee to prove that the sums found credited in its books are truly in the nature of share application/share capital and share premium and it was indeed received from the stated persons. The onus to prove the identity, capacity and credit worthiness of the persons was also primarily on the assessee company only and it has failed to discharge the onus on both counts.

On being asked to explain as to why the sum of Rs 1,50,00,000/- received during the year in the form of share application be not treated as unexplained cash credit u/s.68 of the Act, it was submitted by the assessee as under:

"As regards to your show cause to make addition u/s 68 of the share premium received, we would like to submit that all the details required by you have been submitted by the assessee. As all the details have been filed your goofself is requested not to make addition of share premium amount u/s 68 of IT. Act. the IT Act, 1961."

6. Thereafter, AO observed that assessee has not discharged primary onus satisfactorily and observed that the bank statement of the investor, justification and share premium etc, was not provided with, hence the assessee has also failed to prove capacity and creditworthiness of creditors. The AO was also not satisfied with the working of share premium amount. He also referred to the surrounding circumstances and ITAT Kolkata decision in the case of Bisakha Sales Pvt.Ltd vs CIT in ITA No. 1493/Kol/2013. He also referred to other case laws and concluded as under:-

“ In view of the discussion as above, the gist of the facts that emerge are recapitulated hereunder for the sake of ready reference and ease of understanding: -

- (i) The Identity, capacity and creditworthiness of the share subscribers could not be established by the assessee.
- (ii) Funds not utilized in assessee's business as mentioned in the MOA- Funds diverted for investment in shares.
- (iii) It has been observed the major sales and purchase has been shown from the same party. The business transactions shown by the assessee apparently seem to be real. However, it needs to be emphasized that apparent has to be distinguished from real, in a situation like the one described above in assessee's case, being clearly a contrived one. Hence, the turnover shown in the books seems unreliable. The basis for arriving at the valuation of share of the assessee company as per DCF method submitted during the assessment proceedings is the turnover and its subsequent increase in projected turnover. When the basis of valuation itself is doubtful then how can a reliance be placed on the valuation report.
- (iv) The actual user of the funds so raised is other companies. The fund raised by the assessee company did not remain in circulation of assessee's business and it has been merely routed through its books to the beneficial enjoyment of persons other than the assessee company.

In view of the above, it is held that the sum of Rs.1,50,00,000/- introduced in the books of the assessee company as share application money; share capital and share premium is hereby held as unexplained and unsubstantiated as to the genuineness/nature thereof and is brought to tax accordingly u/s. 68 of the Act.

7. Against the above order , assessee appealed before the Id.CIT(A) challenging both the reopening as well as merits of the addition. The Id.CIT(A) dismissed the challenge to reopening by concluding as under:-

“The action u/s.147 is possible despite complete disclosure of material facts if there is any escapement of assessment proceedings vide Praful chunilal Patel, Vasan tChunilal Patel vs. ACIT (1999) 236 ITR 832, 840 (Guj), Stock Exchange vs. ACIT (1997) 227 ITR 906 (Guj) and ITO vs. Labjmani Mewal Das (1976) 103 ITR 437 (SC). When an income liable to tax has escaped assessment in the original assessment proceedings due to oversight and inadvertence or a mistake committed by the original Assessing Officer, subsequently, while verifying the records Assessing Officer can start escapement assessment proceedings. Further, there is a legal proposition accepted by various Courts that reassessment proceeding is permissible even if the information is obtained after proper investigation from the materials on record or from any enquiry or research into facts or law. There is a plethora of judgment that such information need not be from external source. CIT and anr. vs. Rinku Chakraborty 56 DTK 227 (Kar) and Kalyanji Mavji and Company vs. CIT 102 ITR 287 (SC). It is also pertinent to mention that for reopening of completed assessment u/s.148, tangible material need not be from outside the return of income. It can be obtained from the return of income or evidences on record itself. The reference may

be had of ACIT vs Kanga & Company (2010) - TIOL 464 ITAT Mumbai. It is also relevant to mention that information obtained in assessment proceedings of subsequent year, can also be utilized for reopening of the completing assessment refer Raymond Woolens Mills Ltd. vs. ITO and Other 236 ITR 34 (SC) and Revathy C.P. Equipment Ltd. vs. DCIT AND ors. 241 ITR 856 (Mad). In the light of these facts and discussions earlier, I do not find merits in the contention of the appellant and the reopening of the assessment is upheld. This ground of appeal is dismissed.”

8. On the merits, ld.CIT(A) noted that submission of the assessee and various case laws relied upon by the assessee. The ld.CIT(A) observed that AO reopened the case and also discussed that shares of face value of Rs. 10 were issued at a premium of Rs. 90, however, the addition is made u/s. 68 of the Act and not u/s. 56(2)(viib) of the Act. That addition on account of excess premium received by a private limited company can be made from AY 2013-14 as the provisions of section 56(2)(viib) are applicable from AY 2013-14 only. That further the appellant filed a valuation report of shares as per DCF method. That the AO has not pointed out any defects in the claim of the appellant regarding the share value. That as correctly pointed out by the AR the proviso placed u/s. 68 requiring to prove the source of source is applicable from AY 2013-14.

9. Thereafter, ld.CIT(A) referred to various case laws including that from Hon’ble Bombay High Court in the case of CIT vs Green Infra Ltd. [2013] 145 ITD 240/38 taxmann.com 23 and quoted there from. Referring to the case laws, he held as under:-

“Therefore respectfully following the above decisions of jurisdictional High Court and the Hon’ble ITAT Mumbai, it is held that the legislature does not envisage any sort of valuation for the purpose of section 68 of the Act and the addition made because of premium received for instant AY 2008-09 is incorrect under the law and liable to be deleted.”

10. Thereafter, he also held that share capital transactions are transactions of capital account and he referred to Hon’ble Bombay High Court in the case of Vodafone India Pvt.Ltd. vs UOI 368 ITR 1. Thereafter, he referred to ITAT decision in the case of

ITO vs Anant Shelters Pvt.Ltd. (2012) 20 taxmann.com 153 Thereafter, he observed as under:-

“ It is seen that during the course of assessment proceedings, the following documents were filed by the assessee before the AO as well as before this office

- i. ITR Acknowledgement of M/s Great Eastern Infrastructure Corp Pvt Ltd
- ii. P&L and Balance Sheet of M/s Great Eastern Infrastructure Corp Pvt Ltd for AY 2008-09 along with Ledger Confirmation
- iii. Form 2 filed before the ROC
- iv. Valuation Report
- v. Copy of Bank statement of M/s Great Eastern Infrastructure Corp Pvt Ltd for the period 01.03.2007 to 31.03.2007 showing the investments made in share capital.

If the above referred principles 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. In these circumstances, it can be said that the appellant had discharged the onus cast upon it to establish the identity and creditworthiness of the creditors as well as genuineness of the transactions. Therefore, the onus shifted to the AO to prove the contrary. However, the A.O. has not brought any evidence on record in order to controvert the claim of the appellant, other than relying on case laws-without reference to the facts of the case. 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 attempt to discharge his burden of proof to rebut the evidences produced 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. It is seen that the Assessing Officer did not bring specific incriminating evidence to show that appellant had given its cash to the investors in lieu of alleged entry for share capital and share premium. The AO himself mentioned that the company did not make much business. If that is so, then where is the scope for generating any unaccounted income or cash which is sought to be taxed u/s. 68 of the Act. Per contra, when the investor company is filing regular Income tax returns of income and there are transactions through banking channel, no addition can be made by making surmises without having any contrary or cogent evidences in possession.”

11. Thereafter, he referred to Hon’ble Supreme Court in the case of CIT vs Lovely Exports 6 DTR 308 and Hon’ble Bombay High court in the case of CIT vs Creative World Telefilms Ltd. 333 ITR 100 and Hon’ble Bombay High court in the case of CIT vs. Gangandee Infrastructure Pvt.Ltd.394 ITR 680. Referring to the case laws he has held as under:-

“ In view the above factual and legal position when details with supporting documents for the share application money and the investor are provide during the course of assessment proceedings and the same have been brought on record, the amount received as share capital and share premium cannot be treated as unexplained cash credit in the hands of receiver of such share application money. Respectfully following the order of the jurisdictional ITAT and High Court which are squarely applicable to the facts of the appellant’s case, the addition of Rs. 1,50,00,000 made by the AO u/s. 68 is directed to be deleted. Ground No.2 is accordingly allowed.”

12. Against the above order, revenue has filed appeal on merits of the case and assessee has filed cross objection challenging the Id.CIT(A) decision on the validity of reopening.

13. We have heard both the parties and perused the records. It is noted that in this case, the issue is addition u/s. 68 of the Act, a sum of Rs. 1.50 crores received from M/s Great Eastern Infrastructure Corporation. The shares of Rs 10 per has been allotted at a premium of Rs.90 per share. AO has found the evidence submitted not satisfactory and has added the same u/s. 68 of the Act. We note that assessee has submitted following details of the share applicant.

- (i) IT return Acknowledgment
- (ii) P&L account, Balance sheet, ledger confirmation
- (iii) Share Valuation Report
- (iv) Copy of bank statement

14. AO has also noted that notice u/s. 133(6) has not been respond. We note that it is not the case that AO has issued any summons to the said party and that the company has been found to be defunct as per the Registrar of the company website. It is also not the case that income tax department in the duly acknowledged return of income filed by the said company has found anything suspicious in that company’s account. Despite noting that sales and purchases of the said company was to the tune of Rs. 15 crores . The AO found the same to be suspicious. He also noted from the balance sheet that investing company has sufficient funds. But he found the same also to be

suspicious as it comprised of share application money received and loans. We note that the assessment year was involved is 2008-09. The extant provisions of section 68 did not provide for the assessee to satisfy the AO regarding the source of source. The amendment was brought into the statute by Finance Act, 2012 w.e.f. 1.04.2013, which provided that in case of share capital and share premium receipt, it will be necessary for the assessee to satisfy the AO about the nature and source of credit of the person from whom, such sum is received. Since, the present assessment year is 2008-09, there is no onus on the assessee to prove the source of source in this case. Hence, the AO's act of drawing adverse inference in this regard is not at all sustainable. Furthermore, the adverse inference on account of share premium is also not sustainable as necessary amendment by way of insertion of section 56(2)(viib) of the Act was also brought into statute books from AY 2013-14 and the same is not at all applicable for the current assessment year.

15. Hon'ble Bombay High court in the case of CIT vs Orchid Industries Pvt.Ltd. in ITA No. 1433 of 2014 has held as under:

“5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case

of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case.”

16. Furthermore, Hon’ble Bombay High Court in the case of PCIT vs Veedhata Tower Pvt.Ltd vide order dated 21.04.2018 has held as under:-

“8. This Court in Commissioner of Income Tax V/s. Gangadeep Infrastructure Pvt. Ltd, 394 ITR 680 has held that the proviso to Section 68 of the Act has been introduced by the Finance Act, 2012 w.e.f. 1st April, 2013 and therefore it would be effective only from Assessment Year 2013-14 onwards and not for the earlier assessment years. In the above decision, reliance was placed upon the decision of the Apex Court in Lovely Exports (supra) in the context of the pre-amended Section 68 of the Act. In the above case, the Apex Court while dismissing the Revenue’s Appeal from the Delhi High Court had observed that, where the Revenue urges that the money has been received from bogus shareholders then it is for the Revenue to proceed against them in accordance with law. This would not entitle the Revenue to invoke Section 68 of the Act while assessing the respondent for not explaining the source of its source. In any event, the impugned order of the Tribunal has raised a finding of fact that the respondent had discharged the onus which is cast upon it in terms of the pre-amended Section 68 of the Act by filing the necessary confirmation letters of the creditors, their Affidavits, their full address and their pan.

9. Thus, the Tribunal has rendered a finding of fact which is not shown to be perverse. In any event, the question as proposed in law of the obligation to explain the source of the source prior to 1st April, 2013, Assessment Year 2013-14, stands concluded against the Revenue by the decision of this Court in Gangadeep Infrastructure (supra).

10. Therefore, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

17. Accordingly, on the touchstone of aforesaid discussions and precedents, in our considered opinion, the assessee has discharged its onus. There was no requirement of proving the source of source in the impugned assessment year. Also the necessary mandate of the Act for addition of share premium was also not there in the said assessment year. In this view of the matter on the touchstone of Hon’ble Jurisdictional

High Court decisions referred hereinabove, we do not find any infirmity in the well reasoned order of Id.CIT(A) on the merits of the case. Hence, we uphold his order in this regard and revenue's appeal stands dismissed.

CO.No.113/Mum/2021

18. In the cross objection, assessee has challenged the dismissal by the Id.CIT(A) of assessee's appeal on validity of the reopening. Since we have already decided the issue in favour of assessee on merits, the issue of validity of reopening is only on academic interest, we are not engaging on the same. Hence, Assessee's cross objection is treated as infructuous.

19. In the result, appeal by the revenue is dismissed and cross objection by the assessee is treated as infructuous.

Order pronounced in the open court on 17.02.2022

Sd/-
(Amarjit Singh)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 17.02.2022

Thirumalesh, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Assstt. Registrar)
ITAT, Mumbai