

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 6014/Del/2017 : Asstt. Year : 2014-15

M/s Surya Manufacturing Pvt. Ltd. 2937/3, Chuna Mandi, 1 st Floor, Paharganj, New Delhi-110055	Vs	DCIT, Circle-24(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AACCS2412B		

Assessee by : None

Revenue by : Sh. Umesh Takyar, Sr. DR

Date of Hearing: 09.03.2022

Date of Pronouncement: 15.03.2022
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-28, New Delhi dated 30.08.2017.

2. Following grounds have been raised by the assessee:

"1. That on facts and circumstances of the case, the order passed by the Ld. CIT (Appeal) is bad both in the eyes of law and on facts.

2. That on facts and circumstances of the case, the CIT (A) has erred in holding that assessee has not raised any ground vis-a-vis issuance of notice under section 143(2), without the fulfillment of basic conditions stipulated therein.

3. *The CIT (A) has failed to appreciate that AR of the assessee has orally argued the validity of notice under section 143(2) read with 142(1) of the Act.*

4. *Without prejudice to the above, the CIT (A) has erred in confirming the addition of Rs.9,00,50,000/- made by AO u/s 68 of the Act, received by assessee against the allotment of shares.*

5. *On the facts and under the circumstances of the case the CIT(A) has erred in observing that the AO has directed the assessee to produce the directors of the companies who had subscribed for shares of the assessee Company.*

6. *The observation of the CIT(A) that the AO has directed the assessee Company to produce the directors of the subscribers companies is factually incorrect and also contradictory in as much as in first part of the impugned order the CIT(A) has not made any such observations.*

7. *The CIT(A) has erred in holding the companies who have subscribed for shares of the assessee Company were paper Company and not have any identity and does not have any creditworthiness.*

8. *On the facts and under the circumstances of the case the CIT(A), while holding the subscribers as paper companies, has erred in not appreciating that all the Companies were at the master roll of the ROC and possessing substantial reserve and surplus and were having substantial income during the under consideration and before that.*

9. *The Ld CIT(A) has further failed to appreciate that assessee has duly allotted shares to the subscriber even before the commencement of the assessment proceedings.*

10. *The CIT (A) has further failed to appreciate that assessee has successfully discharged his burden as envisaged under section 68 of the Act read with newly inserted proviso.*

11. On the facts and under the circumstances of the case both the AO as well as CIT(A) has failed to refute any of the documentary evidence filed by the assessee to prove the identify creditworthiness and genuineness of the transactions.

12. On the facts and under the circumstances of the case both the authorities have passed the orders in a whimsical manner without refuting the documentary evidence produced by the assessee in support of his claim."

3. The appeal has been filed in the Tribunal on 25.09.2017 and listed for the first time on 23.12.2017. The case has been posted on various dates till 06.11.2019.

4. On the date of hearings conducted on 09.01.2020, 13.02.2020, 20.01.2021, 30.03.2021, 08.06.2021, 25.08.2021, 15.12.2021. None appeared on behalf of the assessee nor any adjournment letter has been filed. On 09.03.2022 also, nobody represented the assessee hence a reasonable conclusion could be drawn that the assessee is not inclined to pursue the matter which could lead to the dismissal of the appeal. However, in the interest of justice, the matter is being adjudicated on merits of the case.

5. The return of income was filed on 28.11.2014 disclosing income at Rs. 1,37,62,044/-. During the assessment proceedings, it was observed by AO that the assessee company has received share capital and premium of Rs. 9,00,50,000/- from three entities namely,

1. V M Tie Up Pvt. Ltd. 9/12, Lal Bazar Street, 3rd Floor, Block-B, Room No. 16, Kolkata

2. Pearl Developers P. Ltd., 7, Lyons Range, Room No. 5B, 2nd Floor, Kolkata
3. Jainex Securities P. Ltd., 66, Ezra Street, 3rd Floor Kolkata

6. In order to examine the genuineness of share capital / share premium, AO asked the assessee to file confirmation of the creditors, supported by their bank statements, ITRs, Audit Accounts etc. Simultaneously, commission u/s 131(1)(d) of IT Act was also issued to DDIT (Inv), Kolkata to verify the genuineness of share capital / share premium. After getting reply from the assessee and perusal of details, financial statements, bank statements etc, it was observed by AO that the share applicant companies are not doing any real business and ITRs have been filed for income either at Nil or with some small values. The scan copies of ITRs and its annexures have been reproduced by AO in the assessment order in support of his contention. The AO has also reproduced the enquiry report of DDIT, (Inv), Unit-I(i), Kolkata at page no. 14 of assessment order wherein the DDIT (Inv) has reported that the summons were issued u/s 131 to the Principal Officers of the creditors companies, but in the cases of M/s V.M. Tie Up (P) Ltd. and M/s. Pearl Developers (P) Ltd, no documents were filed and in the case of M/s Jainex Security (P) Ltd., summons u/s 131 was returned by post. It is further mentioned by DDIT(Inv.) in his report that the departmental Inspector was deputed to enquire about the said creditor companies in order to verify identity/existence and creditworthiness and genuineness of the investments made by them in assessee company, but the Inspector reported that offices of all the said creditor companies were found to be non-existent. In view of the reply of the

assessee and report of DDIT (Inv.), AO issued show cause letter to assessee giving him final opportunity to treat the share capital / premium as unexplained cash credit within the meaning of section 68 of the Act. The reply given by assessee was not satisfactory in the eyes of AO and he observed about the creditor companies as under:-

"3.8 The Reply of the assessee and the report of DDIT (Inv) has been carefully considered and following conclusions has been drawn:-

3.8.1 The assessee has failed to either reply or replied unsatisfactorily which itself proves that the assessee is not able to substantiate the genuineness of the share capital/share premium transaction due to following observations:

- a. All the companies, which have provided share capital / share premium to the assessee companies are non-existent. It means these companies are only shell companies which has been incorporated just to accommodate the finance to the assessee company and share capital/premium in only a colorable device just to accommodate the finance to the assessee company.*
- b. Doubt on genuineness of the transaction in the absence of existence of share applicant companies.*
- c. There is no credit worthiness of any of the share applicant companies to advance such huge share capital/ share premium.*

3.9 Despite non existence of these share applicant companies, a close look at the balance sheet and the ITR reveals generally typical features of these companies.

- 1. Funds Source:- the funds of the companies are generated only through huge share premium.*
- 2. Reserves:- Other than paid up share capital there is no reserve in the form of accumulated profits.*
- 3. Application of funds:- Short Term Advances/ Investment:- The funds are invested in Pvt. Ltd. companies as Short Term Loans and advances or non current investment which if scrutinized are not big names in any industry. They hardly have any profits and hardly ever pay any return to such advance provider.*
- 4. Fixed Assets:- There is no investment in fixed assets.*
- 5. Liability:- The liability are shown in small numbers against the expenses claimed and the creditors are mostly, not verifiable for such expenses. However, if subject to scrutiny then the documentary evidences are produced because such payment is in cash as the amounts payable are small.*
- 6. Revenue:- Revenue is mostly Nil or nature of operation not disclosed.*
- 7. Expenses:- The kind of expenses shown are such on which there is little or no TDS. If there is TDS then such TDDS by the beneficiary is claimed as a refund in its income. The expenses are mostly very general and in small amounts under different heads which when are subjected to scrutiny are not verifiable.*

8. Bank Statements:- In the instant case the bank statement of the share applicant have been made available and it is seen that there are matching deposits with withdrawals. The deposits and withdrawals are almost on the same day or within a period of 2-3 days. The deposits of amounts are in whole numbers and so are withdrawals with last 2 to 4 digits as "Zeros".

7. After relying on the several judgments of different Courts, the AO concluded that identity and creditworthiness of share applicants and genuine of transactions are not established as per provisions of section 68 of the Act and he, therefore, treated the share application money and share premium, aggregating to Rs. 9,00,50,000/- as unexplained in the hands of assessee and added back to its income and completed the assessment proceedings.

8. Before the Id. CIT(A), the assessee submitted the financial position of V.M. Tie Up Pvt. Ltd. as having Rs.14.83 Crore of Reserve and Surplus, Pearl Developers Pvt. Ltd. as having Rs.71.64 Crore of Reserve and Surplus and revenue from operations is Rs.7.9 Crore and Jainex Securities as having Rs.43.13 Crore Reserve and Surplus and other income is Rs 8,53,669/-.

9. The submissions of the assessee before the revenue authorities is as under:

"15. In order to discharge its burden under section 68 of the Act has filed following documents with the AO:

- a. *Copies of Return of Income of all these companies*
- b. *Copies of their Balance Sheet and Profit and Loss accounts*
- c. *Copies of audited report of these companies*
- d. *Master Data of ROC proving the existence and identity of these Companies*
- e. *Copies of Bank Statement showing that payments for allotment of shares were received via banking channel.*

16. *It is submitted that all the above documents proves beyond doubt that assessee has duly proved the ingredients of section 68 of the Act and has successfully discharged his burden. However, the AO discarded these documentary evidences and master Data of ROC in a whimsical manner and has framed the assessment on the basis of report of DDIT investigation Kolkata.*

17. *It is submitted that perusal of the commission issued by the AO of the assessee, as reproduced at page No. 3 and 4 of the assessment order would prove beyond doubt that the DDIT Kolkata has not conducted proper enquiries from the concerned AO of the share subscribers companies. The AO of the assessee has asked for around 15 documents from the DDIT. However, not a single document was provided by the DDIT.*

18. *The DDIT has simply answered that inspector has conducted enquiries and found that no such companies are there. The DDIT has not even revealed the name of the inspector the date and time of inspection. The DDIT has also not annexed the so called report of the inspector with his reply to the AO the assessee.*

19. *It is submitted that AR of the assessee vide his reply dated 29.12.2016 has categorically asked for the report of inspector received from Kolkota so that the assessee can make its submissions. However the AO denied the existence of the same and has discarded the submissions and documentary evidences produced by the assessee.*

20. *It is submitted that perusal of the last Para of final show cause notice dated 27.12.2016 would prove beyond doubt that the AO has neither asked any further information nor has brought any material on record to rebut the documentary evidences produced by the assessee. The AO has simply concluded that in view of the report of DDIT Kolkota it is his view that share capital received by the assessee is taxable under section 68 of the Act.*

21. *It is submitted that it is settled position of law that an assessee cannot be punish on account of inaction of the revenue authorities. A reference can be made to the following decisions:*

- a. 203 CTR 601(P&H)*
- b. Orrisa Cement 159 ITR 79(SC)*

22. *Assessee further seeks to rely on the following judgments:*

23. *CIT Vs Gangeshwari Metals 361 ITR 0010- Delhi*

24. *The other decisions which the assessee seeks to rely are as under:-*

- a) ACIT Vs Divine Infracon 42 CCH 22(Del)*

b) CIT Vs Kamdhenu Steels 361 ITR 220(Del):- SLP against this decision has been dismissed by the Hon'ble Apex Court in SLP No. 15640 of 2012. In this case their lordships have observed as under:-

25. It is next submitted that it is once again reiterated that it is not a case wherein there is any investigation wing report or any material has been found in search or any other action under the income tax act. It is a case wherein the return of income has been picked up for scrutiny under the normal provisions of the income tax and hence balance of convenience lies in favour of assessee particularly the fact that the assessee has already allotted the shares to the subscribers before its case would have been picked up for scrutiny.

26. It is next submitted that it is also not a case where there is any material to show that there was immediate cash deposit in the banks of those companies who had subscribed for shares of the Company. Further the AO failed to bring any material on record to show that amounts received by assessee for allotment of shares is the assessee's own money. It is submitted that it is settled position of law that if share applicants are bogus then department is free to proceed in their cases as held by Hon'ble Apex Court in Lovely Export.

27. In view of the above it is most respectfully submitted that appeal of the assessee may be allowed."

10. The Id. CIT(A) held that the AO asked the assessee to produce the share applicants, along with relevant documentary evidence, in order to establish the identity, creditworthiness and genuineness of transactions in respect of these share applicants. However, the assessee failed to do so. Since the assessee failed to produce the creditors, AO issued commission u/s 131(1)(d) to DDIT(Inv), Kolkata to make enquiry about the identity, creditworthiness and genuineness of transactions about these creditors. The DDIT (Inv), Kolkata issued summons to these creditors but no fruitful result came out. Either the summonses were not complied with or returned back by postal authorities. The ITI deputed by DDIT (Inv), Kolkata also made field enquiry to know about these creditors and after making enquiries, he reported that these creditors are non-existent at the given addresses. Thus, the assessee failed to prove that even these creditors actually exist. In absence of any relevant details related to cash creditors about existence, AO was unable to go further for making any enquiry / investigation to examine the identity and credit worthiness of creditors and genuineness of transactions in this regard.

11. The Id. CIT(A) further held that the assessee company which has taken the entries of share application money from share applicants, is a private limited company different from the public limited companies wherein public are substantially interested and where the share application money comes out with an initial public offers and wherein shares are listed on stock exchange and are widely traded. In such cases, it is very difficult for the company to know the creditors closely and have no control / mechanism to verify their creditworthiness and the

burden of prove in such cases are different. But there is another class of companies which are closely held companies in which public are not substantially interested which are mostly family controlled closely held companies and they raise their share capital from their family members, relatives and friends and in these companies since share capital is received from the close knit circles who are mostly known to the companies / promoters, the onus as cast upon u/s 68 of the Act is very heavy to prove the capacity of the share holders and genuineness of the transactions. Since such companies are closely held companies, unlike of public limited companies wherein if the share application money is not found as explained, AO may proceed against the share holders u/s 68 instead of proceeding against the company, share capital are mostly raised from family, close relatives, friends and the assessee is expected to know the share subscribers and the burden is very heavy on the assessee to satisfy cumulatively the ingredients of section 68 of the Act as to identify and establish the creditworthiness and genuineness of the transactions to the satisfaction of the AO, otherwise he shall be free to proceed against the assessee company and make addition u/s 68 of the Act as unexplained. In the case of assessee also, being a private limited company, heavy onus is on it to establish the identity, credit worthiness and genuineness of transactions in the cases of its creditors.

12. The Id. CIT(A) further observed as under:

"6.2 The aforesaid onus has been made much heavier now in the cases of such companies as to check this pernicious practice of conversion of unaccounted money through masquerade of investment

in the share capital of companies, the provisions of section 68 have been further strengthened by inserting the Proviso w.e.f. 01.04.2013, applicable from A.Y. 2013-14, of casting a higher onus on such companies requiring them to prove the source of money in the hands of such share holders or persons making payments towards issue of shares before such sum is accepted as genuine credit and if the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income. However, in the case of appellant company, it failed to discharge the initial burden of establishing the identity, creditworthiness and genuineness of transaction in the case of its applicants / creditors, leave aside the source of funds of those creditor companies.

6.3 Incidentally, the discussion about such types of companies who provide accommodation entries in lieu of commission has found place at the national level when Hon'ble Prime Minister of India, while speaking on Foundation Day of Institute of CA in India, revealed that more than 37,000 such shell companies have already been detected and registrations of more than 1 lakh others have been cancelled. In his speech, Hon'ble Prime Minister indicated about such 'suitcase companies' who exists only on paper and all the documentary evidence about their existence and creditworthiness are available but on ground they actually do not exist. These companies are used as a tool for giving accommodation entries and have no real business of any kind except executing the transactions related to accommodation entries only. In subsequent discussions also at the national level, a concern has been raised about these shell companies. These concerns show that such shell companies actually exist on paper who provide accommodation entries in the form of share application / share capital / share premium to the beneficiaries and they do not exist on ground in real terms.

6.4 Now, in the light of above, it has to be seen that to what extent, appellant has been able to satisfy all three conditions, i.e., identity of creditor, creditworthiness and genuineness of transactions in its case. So far as the word 'identity' is concerned, Hon'ble jurisdictional High Court in the case N.R. Portfolio Pvt. Ltd., [2014] 2 ITR-OL 68, has defined that 'the identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN or assessment particulars did not establish the identity of the person. The actual and the true identity of the person or a company was the business undertaken by them.' In the case of appellant, it has failed to establish the identity of creditor companies. Despite of asking by AO to produce the directors of creditor companies, it failed to do so. The summons issued by DDIT(Inv), Kolkata and field enquiry made by ITI proved that the creditor companies do not actually exist. The aforesaid view is supported in the other decisions also of Hon'ble jurisdictional High Court. In the case CIT vs. Nova Promoters and Finlease (P) Ltd. 342 ITR 169, on the similar facts regarding information from Investigation Wing about accommodation entry providers and their modus- operandi, it was held that identity of the creditors was not proved as the summons issued to such creditors were not responded to. It was further held that once the conditions as per section 68 are not proved or not satisfied, one could reasonably come to the conclusion that monies emanated from the coffers of the assessee company. Similar view has been taken by Hon'ble jurisdictional High Court in the case CIT vs. Youth Construction Pvt. Ltd., 357 ITR 197 and CIT vs. Nipun Builders and Developers Pvt. Ltd., 350 ITR 407, wherein, it has been held that onus is on assessee to prove the identity of share applicants, failing which it has to be concluded that the assessee company has introduced its own money through non-existing companies using the banking channels in the shape of share application money. In view of above, it is clear that the appellant

has failed to establish the identity of creditors in its case. The other evidence given by appellant to establish the identity have no relevance here as the physical presence of the creditor companies is not proved. Thus, the first condition as stipulated in section 68 of the Act is not satisfied.

6.5 As regards the other conditions, i.e., creditworthiness and genuineness, Hon'ble jurisdictional High Court in the case N.R. Portfolio Pvt. Ltd. (supra) has held that 'The bank accounts do not reflect the creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent- assessee, did not give any share dividend or interest to the said entry operators/subscribers. The profit motive is normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan, would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining the creditworthiness and the genuineness of the transactions.' It is further held by Hon'ble Court that 'mere production of incorporation details, PANs or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, are deeper and obtrusive. Companies no doubt are artificial or juristic person but they are soulless and are dependent upon the individuals behind them to run them and manage them. It is the persons behind the company who take the decision, control and manage them.' In the case of appellant company, though the soulless juristic entity is existent on paper but the individuals, running and managing them are found non-existing as the director of the appellant company could not give a single detail about the

existence of the share applicant companies. Since the creditors are non-existing, its creditworthiness is also not established. Moreover, the report from Investigation Wing and discussion by AO that the creditor companies are merely a tool of providing accommodation entry to appellant also support the fact that the appellant company has taken accommodation entries and rotated its own unexplained money through these creditor entities. Similarly, the genuineness of transactions in the case of appellant has also not been proved for the reason that these were accommodation entries as established during the inquiry made by Investigation Wing and subsequently during assessment proceedings. The mere submissions of PAN, ITRs, balance sheet, bank statement etc of the share subscriber is not sufficient as the AO is not satisfied as to their creditworthiness as well as genuineness of the creditors in the instant case, even the identity and creditworthiness of the creditors is not proved as the appellant has failed to produce the director/ persons from creditors companies and DDIT (Inv), Kolkata found such these creditors. Thus, the onus cast upon by the provisions of the 68 of the Act has not been discharged by appellant to treat the cash credit as genuine.

7. In view of above discussion, I hold that the share application money / share premium of Rs. 9,00,50,000/- credited to the books of account of appellant are unexplained cash credits as per provisions of section 68 of the Act."

13. We have gone through the entire gamut of the issue and the rationale of the Id. CIT(A). The returned income of the V.M. Tie Up Pvt. Ltd. for the relevant A.Y. was Rs.609/- only. The total revenue from operations was Rs.12,000/- for the year ending March 2013 and Rs.17,530/- for the year ending March 2014. The profit for the year ending March 2013 was Rs.430/- only. Further, the returned income of Pearl Dealers Pvt. Ltd. was Rs.2,01,570/-. Similarly, in the case of Jainex Securities P.

Ltd., the returned income was Rs.51,160/- and the revenue's from operation for the year ending 2014 was Nil whereas for the year ending 2013 was Rs.12,24,294/- and the returned income for that year was Rs.21,195/-. Further, we find that the assessee could not discharge the primary onus of establishing the genuineness and creditworthiness of the parties.

14. The Hon'ble Apex Court in the case PCIT Vs. NRA Iron & Steel Pvt. Ltd. in SLP(Civil) No. 29855 of 2018 dated 05.03.2019 held that,

"13. The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company - Assessee had filed all the primary evidence, the onus on the Assessee stood discharged. The lower appellate authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the Assessee Company - Respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility. The Court/Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.

14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal

knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee.

15. On the facts of the present case, clearly the Assessee Company - Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income".....

15. Hence, keeping in view, the facts elucidated above, the judgments of various Courts, especially of the Hon'ble jurisdictional High Court in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169, NR Portfolio Pvt. Ltd. in ITA No. 1018/2011 dated 22.11.2013 and the judgment of Hon'ble Apex Court in the case PCIT Vs. NRA Iron & Steel Pvt. Ltd. (supra), we affirm the order of the Id. CIT(A) in confirming the addition made by the AO u/s 68 of the Act.

16. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 15/03/2022.

Sd/-

(Saktijit Dey)
Judicial Member

Dated: 15/03/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR