

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.2271/Kol/2019
Assessment Year: 2012-13

Nikhar Commodities (P) Ltd.....Appellant
C/o Subash Agarwal &
Associates, Advocates
Siddha Gibson,
1, Gibson Lane, Suite 213,
2nd Floor, Kolkata-700069.
[PAN: AABCN1178N]

vs.

ITO, Ward-1(4), Kolkata.....Respondent

Appearances by:

Shri Sunil Surana, CA, appeared on behalf of the appellant.
Smt. Ranu Biswas, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : September 22, 2022

Date of pronouncing the order : September 29, 2022

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 23.07.2019 of the Commissioner of Income Tax (Appeals)-17, Kolkata [hereinafter as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

The assessee in this appeal has taken the following grounds of appeal:

"1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in confirming the addition of Rs.1,86,50,000/- made by the A.O being fresh raising of share capital including share premium by wrongly invoking the provisions of section 68 of the Act.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.56,752/- u/s 14A r.w. Rule 8D.

3. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing."

2. The brief facts of the case are that the assessing officer during the assessment proceedings noted from the accounts of the assessee that the assessee during the year has shown receipt of share capital including share premium of Rs. 1,86,50,000/- from four different private limited companies. To verify the identity and creditworthiness of the shareholders and also about the genuineness of the transaction, the assessing Officer issued summons u/s 131 of the Act to the directors of the share subscriber companies. Since the said summons were not complied with. The AO held that the assessee had failed to discharge the burden of proof to substantiate the identity and creditworthiness of the share subscribers and genuineness of the transaction. He therefore made the impugned addition of share capital and share premium as unexplained income of the assessee u/s 68 of the Income Tax Act. The Ld. CIT(A) confirmed the additions so made by the AO.

3. We have heard the rival contentions of the ld. Representatives of the parties.

The ld. Counsel for the assessee in support of his case has made the following submissions :

1. Share Capital of 1.86 Crores raised from 4 companies. Details are annexed in paper book page 19. Complete details of identity and creditworthiness of the shareholders and genuineness of the transactions were filed before the AO as annexed in paper book page 20-49 in the case of Abhay Commerce Pvt Ltd, paper book page 50-77 in the case of Madhuvan Dealers Pvt Ltd, paper book page 78-103 in the case of R.R.Coal Agencies Pvt Ltd, paper book page 104-125 in the case of Rosemary Dealcom Pvt Ltd.

2. All 4 share applicants issued notices u/s 133(6) and in response, compliances made by all of them vide paper book page 20-39 in the case of Abhay Commerce Pvt Ltd whereby their financials, bank statement, source of "source of funds", ITR etc. Similar compliance was made by Madhuvan Dealers Pvt Ltd vide paper book page 50-67, R.R.Coal Agencies Pvt Ltd vide paper book page 78-95 and by Rosemary Dealcom Pvt Ltd vide paper book page 104-117. However the assessment order is silent and does not narrate the fact on this point. The AO added the same in the assessment made u/s 143(3) only on the ground that the shareholders did not appear personally in response to notice u/s 131 nor assessee could produce the shareholders. However the shareholders duly complied with the summons by filing their reply- Abhay Commerce Pvt Ltd vide paper book page 40-41, Madhuvan Dealers Pvt Ltd vide paper book page 68-69, R.R.Coal Agencies Pvt Ltd vide paper book page 96-97 and Rosemary Dealcom Pvt Ltd vide paper book page 118-119.

3. Shareholders had substantial "Net worth" in comparison to investment made by way of share subscription in appellant company as depicted in their balance sheet - Abhay Commerce Pvt. Ltd having net worth of more than 14 crores vide paper book page 29, Madhuvan Dealers Pvt Ltd having net worth of more than 8 crores vide paper book page 58, R.R. Coal Agencies Pvt. Ltd having net worth of more than 11 crores vide paper book page 86 and Rosemary Dealcom Pvt Ltd having networth of more than 1.87 crores vide paper book page 110.

4. The share applicants assessed u/s 143(3) on substantive basis. Copies of their assessment orders annexed in paper book. Abhay Commerce Pvt. Ltd vide paper book page 43-49, Madhuvan Dealers Pvt Ltd vide paper book page 71-77, R.R.Coal Agencies Pvt Ltd vide paper book page 99-103 and Rosemary Dealcom Pvt Ltd u/s 143(1). In case of Abhay Commerce Pvt Ltd vide paper book page 43-49, Madhuvan Dealers Pvt Ltd the share capital being the source of funds invested in assessee company were already taxed u/s 68. Hence once any addition made in hands of share subscribers, there cannot be double addition in hands of Appellant company. Judgement of Coordinate bench of Kolkata Tribunal in the case of Happy Structure in ITA No. 1977/Kol/2016 enclosed which has relied on another Kolkata ITAT in the case of MaaAmba and CP Rerollers. Recently ITAT Kolkata Bench in the case of Steelex India Pvt Ltd pronounced on 9 September, 2022 copy enclosed has also taken the same view.

5 All the shareholder companies are 'Active' compliant under MCA records not only at the time of allotment but even till today as per MCA database annexed in paper book. Abhay Commerce Pvt Ltd vide paper book page 42, Madhuvan Dealers Pvt Ltd vide paper book page 70, R.R.Coal Agencies Pvt Ltd vide paper book page 98 and Rosemary Dealcom Pvt Ltd vide paper book page 120.

6. Moreover although the assessee has explained the source of share capital but the same is not required to be explained for the Asst. Year 2012-13 prior to the amendment which was prospective and applicable from Asst Year 2013-14 as held by Bombay High Court in the case of Gagandeep Infrastructure, copy enclosed.

7. Even otherwise plethora of judgments that non-appearance of directors cannot be ground to make the additions once all documentary evidences w.r.t genuineness, creditworthiness etc filed on record. Pls refer Calcutta High Court in the case of Crystal Networks, copy enclosed. Kolkata ITAT in the case of Cygnus Developers copy enclosed.

4. The Ld. Counsel reiterating his above submissions has contended that in this case, the assessee had filed all evidences to prove the identity and creditworthiness of the subscribers and genuineness of the transaction including the address, PAN & Form 2 &

Form 5 filed with Registrar of Companies of the share subscriber companies, their audited financial statements, acknowledgement of filing their Income Tax Return, copy of bank statement of the allottee company highlighting the payment of the entire amount of share capital and share premium. That all the transactions were done through banking channel which were duly confirmed by the share subscribers. That even the notices u/s 133(6) of the Act were issued by the AO which were duly complied with by the share applicant companies and requisite documents were furnished evidencing their identity, and creditworthiness and that even source of investment was also provided. He has further submitted that the subscribing companies were having adequate reserves and surpluses to invest in the assessee company. Further, that all these subscribers were income tax assesseees and further that all the investor companies were duly incorporated with the Registrar of Companies. That there were no paper companies involved in the transactions. The Ld. Counsel has also invited our attention to the assessment orders passed u/s 143(3) of the share subscriber companies. That, however, the AO instead of examining the relevant documents, insisted for the personal presence of the directors of the subscribers which was not in the hands of the assessee. He therefore, has submitted that the identity and creditworthiness of these companies was duly established. He has further submitted that the AO could not point out any defect or discrepancy in the evidences/documents submitted by the assessee to prove the identity and creditworthiness of the subscribers and genuineness of the transaction. He has further submitted that instead of pointing out any defect or discrepancy in the evidences and the details furnished by the assessee, the AO proceeded to take adverse inference only on the ground that the directors of the subscriber companies did not appear personally before the AO. The ld. Counsel for the assessee in this respect has relied upon the decision of the Jurisdictional Calcutta High Court in the case of Crystal networks (P) Ltd. vs CIT (supra). The ld. Counsel has also relied upon the decision of the co-ordinate Kolkata Bench of the tribunal in the case of 'M/s Satyam Smertexpvt. ltd. vs. DCIT', ITA No.2445/kol/2019 vide order dated 29.05.2020 wherein the coordinate bench of the tribunal, while further relying upon the decision of the Hon'ble Allahabad High Court in

the case of CIT vs Raj Kumar Agarwal vide ITA No.179/2008 dated 17.11.2009 has held that non production of the director of the company, which is regularly assessed to income Tax having PAN, on ground that the identity of the subscriber is not proved, cannot be sustained.

5. The Id. D/R on the other hand, has relied upon the observations made by the AO. He has further relied upon the impugned order of the Id. CIT(A).

6. We have considered the rival submissions of the Id. representatives of the parties and also gone through the record. In this case a perusal of the Assessment Order would reveal that the AO has duly acknowledged the receipt of the relevant documents/evidences not only from the assessee, but also from the subscriber companies. However, he insisted for personal appearance of the directors of the subscriber companies without even going through and discussing about the discrepancies, if any, in the documents furnished by the assessee as well as by the share subscriber companies to prove the identity and creditworthiness of the subscribers and the genuineness of the transaction. The AO has not pointed out in the Assessment Order as to what further enquiries he wanted to make from the directors of the subscribers to insist for their personal presence. The Assessee in this case, as reproduced above, as explained about the identity, creditworthiness and financials etc. of each of the share subscriber company individually. However, we note that in the assessment order that the AO has not even mentioned the names of the share subscriber companies and even has not mentioned a word as to which of the share subscriber company or the corresponding transaction thereof was not genuine and on what grounds. The AO, in our view, could have taken an adverse inference, only if, he would have pointed out the discrepancies or insufficiency in the evidences and details received in his office and pointed out as to on what account further investigation was needed by way of recording of statement of the directors of the subscriber companies. Even if the directors of the subscriber companies have not come personally in response to the summons issued by the AO, in our view, adverse inference cannot be taken against the assessee solely on this ground as it is not under control of the assessee to compel the personal presence of the directors of the

shareholders before the AO. The Ld. Counsel for the assessee has rightly placed reliance upon the decision of the Hon'ble Bombay High Court in the case of PCIT, Panji vs. Paradise Inland Shipping Pvt. Ltd. reported in (2017) 84 taxman.com 58 (Bom) wherein the Hon'ble High Court has held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish their case. Further the jurisdictional Calcutta High Court in the case of "Crystal networks (P) Ltd. vs CIT" (supra) has held as under:

"We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter creditworthiness. As rightly pointed out by the learned counsel that the CIT(Appeals) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued in our view is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the produce of the assessee or not. When it was found by the CIT(Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

6.1 Even, as pointed out by the Id. Counsel for the assessee, the share subscribers have been assessed u/s 143(3) on substantive basis. Copies of their assessment orders have been placed on the file. Even in case of the two share subscribers namely Abhay Commerce Pvt. Ltd and Madhuvan Dealers Pvt. Ltd the share capital being the source of funds invested in assessee company has already been taxed u/s 68. Hence once any addition made in hands of share subscribers, there cannot be double addition in hand's of Appellant company. Reliance has been placed in this respect on the decision of the Coordinate Kolkata bench of the Tribunal in the case in the case of DCIT vs. M/s Maa Amba Towers Ltd. in ITA No.1381/Kol/2015 vide order dated 12.10.2018 wherein, the Coordinate bench under similar circumstances has made the following submissions:

"We find no merit in the Revenue's instant grievance in the light of relevant facts on record. There is no dispute about the assessee's having declared its share subscription premium from M/s Agrani Credit & Finvest Pvt. Ltd., Crown Mansion Pvt. Ltd., Liberal

Infrastructure Pvt Ltd., Darshan Enclave Pvt. Ltd., Snow Fall Impex Pvt. Ltd. involving corresponding sums of ₹27,60,000/-, ₹55,20,000/-, ₹82,80,000/- in case of third and fourth and ₹48,30,000/- in last entity's case; respectively totalling to ₹3,01,00,000/-. Case file suggests that the assessee has placed on record their income tax acknowledgement of the impugned assessment year 2012- 13, directors' report alongwith audited financial statements, explanation regarding source of investments, bank statements, share application forms and board's resolution(s) followed by their respective regular assessment orders pertaining to very assessment year u/s. 143(3) of the Act. Their Assessing Officer(s) made u/s 68 unexplained cash credits additions of share premium amounting to ₹67,03,00,000, ₹44,85,00,000/-, ₹24,42,00,000/- & ₹21,70,00,000/- in case of first four entities and accepted similar credits of ₹20,45,00,000/- to be genuine satisfying all parameters of identity, genuineness and creditworthiness. It can therefore be safely assumed that all these additions sums forming subject-matter of the impugned additions to be accepted as genuine in respective investors entities' end as the source of the amount(s) in issue totalling to ₹3,01,00,000/-. Learned Departmental Representative fails to dispute that the same very amount cannot be added twice in payees and recipients' hands u/s 68 of the Act. We therefore see no reason to accept Revenue's instant former substantive ground. We affirm CIT(A)'s findings under challenge qua the instant former issue.”

6.2. The aforesaid decision has been further relied upon by the coordinate Kolkata bench of the Tribunal in the case of “Steelex India (P) Ltd vs. ITO, Ward-3(2), Kolkata” I.T.A. No.2666/Kol/2019 decided vide order dated 09.09. 2022.

7. The Ld. DR before us could not dispute the proposition that since the addition has been made in the hands of the subscriber company, then the same amount cannot be added twice in recipient’s hands u/s 68 of the Act.

8. It has to be further noted that though powers of the ld. CIT(A) are co-terminus with the AO and the ld. CIT(A) had all the plenary powers as that of the AO. The Hon’ble Delhi High Court in the case of *Commissioner of Income-tax vs. Manish Build Well (P.) Ltd.* reported in [2011] 16 taxmann.com 27 (Delhi) has held that the CIT(A) is statutory first appellate authority and has independent power of calling for information and examination of evidences and possesses co-terminus power of assessment apart from appellate powers. However, a perusal of the impugned order of the ld. CIT(A) shows that the ld. CIT(A) has not discussed anything about the material facts of the case. He has not pointed out any defect and discrepancy in the evidences and details furnished by the

assessee but simply cited certain case laws even without pointing out as to how these case laws were applicable to the facts and circumstances of this case. The order of the ld. CIT(A) is a non-speaking order. By simply reproducing the contents of the case laws without discussing about their application on the facts of the case, in our view, would not make the order of the ld. CIT(A) justifiable speaking order and hence, the same is not sustainable as per law.

9. In view of the above discussion we do not find justification on the part of the lower authorities in making the impugned additions and the same are accordingly ordered to be deleted.

10. The appeal of the assessee stands allowed.

Kolkata, the 29th September, 2022.

Sd/-

[गिरीश अग्रवाल /Girish Agrawal]
लेखा सदस्य /Accountant Member

Sd/-

[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य /Judicial Member

Dated: 29.09.2022.

RS

Copy of the order forwarded to:

1. Nikhar Commodities (P) Ltd
2. ITO, Ward-1(4), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches