

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
RAJKOT BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,  
And  
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 235/Rjt/2017

निर्धारण वर्ष/Asstt. Years: 2009-2010

D.C.I.T., Circle-1(1), Rajkot.	Vs.	M/s Tirth Agro Technology Pvt. Ltd., Survey No.108/1, Plot No.B, Nr.Bharudi Toll Plaza, Tal. Gondal, Dist. Rajkot, Rajkot.  <b>PAN: AABCT6282F</b>
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Revenue by	:	Shri Aarsi Prasad, CIT. D.R
Assessee by	:	Shri Deepak Rindani, A.R

सुनवाई की तारीख/**Date of Hearing** : **05/07/2022**  
घोषणा की तारीख /**Date of Pronouncement**: **03/10/2022**

**आदेश/ORDER**

**PER BENCH:**

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income tax (Appeals)-1, Rajkot, dated 18/05/2017 arising in the matter of assessment order passed under s. 143 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2009-10.

2. The Revenue has raised following grounds of appeal:

1. *The Hon'ble CIT(A)-1, Rajkot has erred in law and on fact of the case in deleting the addition made by the AO of unexplained cash credit u/s.68 of the Income Tax Act, 1961 of Rs.3,00,00,000/-.*

2. *The Hon'ble CIT(A)-1, Rajkot has erred in law and on fact of the case in deleting the additions made by the AO of alleged commission paid to the middleman of Rs.15,00,000/-*

3. *It is therefore, prayed that the order of the Ld.CIT(A) be set aside and that of the Assessing Officer be restored.*

3. The inter-connected issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 3 crore being accommodation entry in the guise of share capital & premium and Rs. 1,50,000/- being commission expenses for such entry.

4. The facts in brief are that the assessee is a private limited company and engaged in the business of manufacturing & trading of agricultural implements (Rolling tiller system). The assessee in the year under consideration issued 3 lakh share at Rs. 100 per share comprising premium of Rs. 90 per share to certain companies detailed as under:

Sr. No.	Name, address, PAN and Corporate Identification no. of shareholders	Amount of share capital (nominal value)	Amount of premium	Total consideration on allotment
01.	<i>Bhumidev Credit Corporation Ltd B/9, Sahjanand Towe, Opp. Jivraj Bus Stand, Vejapur Road, Jivraj Park. Ahmedabad CIN: U45400GJ1995PLC027412 PAN:AADCB1361P</i>	<i>5,00,000</i>	<i>45,00,000</i>	<i>50,00,000</i>
02.	<i>Supreme Communications Pvt. Ltd 202, Samedh Building, Nr. Associate Petrol Pump, Ahmedabad PAN : AAICS0078D</i>	<i>10,00,000</i>	<i>90,00,000</i>	<i>100,00,000</i>

03.	<i>Ideal Fertilizers Pvt. Ltd 171/1 Prince Anwar Shah Road, Kolkatta West Bengal CIN: U24122GJ1998PTC061997 PAN : AABCI03S4H</i>	<i>5,00,000</i>	<i>45,00,000</i>	<i>50,00,000</i>
04.	<i>Highland Industries Ltd J-1Q3, SumerNagar, S.V. Road, Korakendra, Borivall Mumbai CIN : U99999MH1985PLC036897 PAN: AABCH4352G</i>	<i>5,00,000</i>	<i>45,00,000</i>	<i>50,00,000</i>
05.	<i>Jai Adhyashakti Marketing Pvt. Ltd. 704, Hare Krishan Complex, Pritam Nagar, Ellisbridge, Ahmedabad CIN : U51909GJ2006PTC04848A5 PAN : ABCJ6882H</i>	<i>5,00,000</i>	<i>45,00,000</i>	<i>50,00,000</i>

4.1 The AO during the assessment proceedings found that the share were allotted on "firm allotment" basis without inviting share application. The assessee was not declaring dividend right from inception, therefore in absence of dividend and any other basis charging premium at Rs. 90 per share is unusual. One of the share subscriber namely M/s Bhumidev Credit Corporation Ltd to which 50000 share were allotted found to be a Paper Company engaged in the business of accommodation entry in lieu of commission by the ADIT (Inv.) Rajkot. Similarly, the notices under section 133(6) of the Act were issued to all the subscriber for verification but the same were returned with the remark not known/ not found. The AO also found that the share subscribed by the above investors were transferred to the directors of the assessee company within a very short period of time at Rs. 10 per share only. Thus, the AO proposed to treat the receipt of share capital money and premium thereon as unexplained cash credit under section 68 of the Act and also proposed to make an addition of Rs. 1.5 lakh being commission expenses for taking accommodation entry in form of share capital and premium.

4.2 The assessee during the assessment/reassessment proceeding furnished certain primary document in order to establish the identity & credit worthiness of

the investor and genuineness of the transaction. The documentary evidences furnished by the assessee are detailed as under:

1. *Name and address of all shareholders to whom shares were allotted during the year under consideration with details of no. of shares allotted.*
2. *Contra ledger account of the Assessee Company from the books of all parties to whom shares were allotted in respect of shares issued.*
3. *Bank statement of the shareholders showing payment in respect of equity shares issued made to the Assessee Company.*
4. *Copy of Income Tax Return of all the Shareholders.*
5. *Copy of Audit report of the shareholders entity for the relevant ear wherein the investment made by them in the Assessee Company is reflected.*
6. *Form no.2 filed with Registrar of Companies (Return of allotment of shares)*
7. *Affidavit of the shareholders confirming of having made investment in shares of the Assessee Company.*

4.3 On the strength of the documentary evidences the assessee submitted that the three ingredient of section 68 of the Act i.e. identity and credit worthiness of the investors and genuineness of the transaction have been duly established. The assessee also contended that all these details were also furnished during regular assessment proceeding under section 143(3) of the Act and after due verification genuineness of the share capital and premium, it was accepted. The assessee with regard to the notice under section 133(6) of the Act which were returned as unserved submitted that it has provided address of the share subscribers as per the address mentioned on MCA platform and income tax, but quite possible that the address might have changed as the notices under section 133(6) of the Act were issued after a period of 6-7 years. With regard to premium it was contended that the premium was charged on the basis of future growth. It was also contended that, subsequently share were also issued to the directors at the same price. The assessee also submitted that the above share subscribers wanted to opt out, therefore, they sold the shares to the directors. The reasons for sale of the shares to the directors is that as per AOA shares cannot be transferred to a person other the member of the assessee company, therefore its director only provided exit route to the above share subscribers. The rate at which share were transferred by the

subscriber to the director cannot be made basis for adverse inference as it is the prerogatives of the above subscribers of the share to sale their holding.

5. However, the AO was dissatisfied with the submission and contention of the assessee and held that merely furnishing primary documentary evidences and showing transaction were carried out through banking channel cannot be foolproof of the genuineness of the transaction. The other surrounding evidences such as ADIT (Inv.) Rajkot, the returned of notices issued under section 133(6) being unserved and transfer of share to the director at face value only after incurring loss of Rs. 90 by the subscriber is vital. Thus the AO in view of the above after placing reliance on the judgment of Hon'ble Supreme court in case Sumati Dayal V. CIT 214 ITR 801, CIT vs. Durga Prasad More 82 ITR 540 and other case laws held that the assessee failed to explain the credit of share capital and premium of Rs. 3 crore. Thus the AO made addition of Rs. 3 crore to the total income of the Assessee. The AO also made addition of Rs. 1.5 lakh on account of estimated commission expenditure incurred in the process of getting accommodation entry.

6. The aggrieved carried the issue before the learned CIT (A) and reiterated its submission. The learned CIT(A) after considering the fact deleted the addition made by the AO by observing as under:

*6.13 To sum up, the undisputed facts that are emanating from the above discussion, when summarized, are as follows;-*

*1) Money from the share holder companies to the Appellant company has flowed through banking channels.*

*2) There is no cash deposited in the bank account of the share holder entities which subscribed to the share issued by the Appellant company*

*3) All the share holders have confirmed having made investments and filed notarized affidavit,*

*4) Both the Appellant and shareholders have reflected the impugned amount in their audited accounts along with the returns of income filed.*

*5) The returns and audited accounts of these shareholders companies are much prior in point of time to the assessment proceedings concluded in the case of Appellant.*

6) Hitherto, there is no evidence on record to show that the returns and audited accounts of the share holder companies were ever disputed / investigated by their respective assessing officers, as the same were accepted.

7) The procedures under the companies Act have been fulfilled.

8) The evidence put forth by the Appellant was not disproved.

9) The AO has not been able to bring on report any contradicting evidence.

10) There are no definite guidelines for issue of shares at premium but it depends on the promoter's background future of the company's working.

11) There is no corroborative material to take the suspicious of the AO to the next logical level to support the addition made u/s 68 of the Act.

6.14 There is series of Judicial pronouncements wherein High courts including jurisdictional high court and Tribunals has followed the judgment of the Apex court in the case of CIT vs Lovely exports (supra) as binding precedent and therefore the same is also required to be followed in the present appeal.

6.15 In view of the above discussion and circumstances of the Appellant's **case**, documentary evidences, the relevant case laws on the subject, the jurisdictional pronouncements of Gujarat High Court and on the basis of decision of Apex Court in the case of Commissioner of Income Tax vs M/s Lovely Export (Pvt) Limited (supra), I find substance in the submissions of the A.R. of the Appellant Company, I am therefore, convinced that there is no justification for the addition of Rs. 3,00,00,000/- made by the Assessing officer u/s 68 of the Act. Therefore the addition made by the Assessing officer is hereby deleted.

7. The second ground of appeal relates to addition of Rs. 15,00,000/- being alleged commission paid to middleman for raising share capital and share premium. During the course of Appellate proceedings AR of the Appellant Company filed a written submission as under:

"The Appellant Company has submitted sufficient document as enumerated above, to substantiate the transaction and from the elaborate rebuttal of all presumptions/surmises as mentioned in Assessment order, it is conclusively proved that Rs. 3,00,00,000 being Rs. 30,00,000 towards share capital + Rs. 2,70,00,000 towards share premium raised during the year under consideration should not be treated as income u/s 68 of the Income Tax and therefore question of estimated alleged commission for arranging such transaction does not arise. Further no such entry of alleged commission has been found to be recorded in the books of the Appellant Company nor the investor company or any third party assumed to be middleman for arranging the transaction. In absence of any evidence merely based on presumption assuming commission is paid as alleged is unwarranted for."

7.1 The Assessing officer has made addition of Rs. 15,00,000/- as alleged commission paid to middleman for raising share capital and share premium. This Addition was made consequential to the addition of Rs. 3,00,00,000/- u/s 68 of the Income Tax Act in respect of share capital and share premium raised during the year under consideration by the Appellant Company.

As directed above the addition made on account of unexplained cash credit u/s 68 of the Income Tax Act, 1961 is to be deleted, therefore, consequential addition of Rs. 15,00,000/- is also hereby deleted.

7. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

**8. The learned DR before** us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

9. On the contrary, the learned AR before us filed a paper book running from pages 1 to 93 and contended that the assessee has furnished all the necessary documentary evidence in support of the share capital received by it in the year under consideration. As such the assessee has discharged the onus imposed upon it under the provisions of section 68 of the Act. The learned AR before us vehemently supported the order of the learned CIT-A.

10. We have heard the rival contention of both the parties and perused the material available on record. The facts of the case have been elaborated in the previous paragraphs. Therefore, for the sake of brevity, we are not inclined to repeat the same. The provision of Section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under Section 68 of the Act by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance (P) Ltd. reported in 208 ITR 465 wherein it was held as under:

*"It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. "*

10.1 Now first we proceed to understand the identity of the party. The identity of the party refers existence of such party which can be proven based on evidences.

As such the identity of a party can be established by furnishing the name, address and PAN detail, bank details, ITR etc.

10.2 The next stage comes to verify the genuineness of the transaction. Genuineness of transaction refers what has been asserted is true and authentic. A genuine transaction must be proved to be genuine in all respect not merely on a piece of a paper. The documentary evidences should not be a mask to cover the actual transaction or designed in way to present the transaction as true but same is not. Genuineness of transaction can be proved by submitting confirmation of the parties along the details of mode of transaction but merely showing transaction carried out through banking channel is not sufficient to prove the genuineness. As such the same should also be proved by circumstantial surrounding evidences as held by the Hon'ble Supreme court in the case of Shri Durga Prasad More reported in 82 ITR 540 and in case of Smt. Sumati Dayal reported in 214 ITR 801.

10.3 The last stage comes to verify the creditworthiness of the parties. The term creditworthiness as per Black Law Dictionary refers as:

*"creditworthy, adj. (1924) (Of a borrower) financially sound enough that a lender will extend credit in the belief default is unlikely; fiscally healthy-creditworthiness."*

10.4 Similarly in The New Lexicon Webster's Dictionary, the word "creditworthy" has been defined as under:-

*"creditworthy, adj. of one who is a good risk as a borrower."*

10.5 It the duty of the assessee to establish that creditor/investor party has capacity to subscribe share and having requisite fund in its books of account and banks. The capacity to invest can be established by showing sufficient income, capital and reserve or other fund in the hands of creditor. It is required by the AO to find out the financial strength of the investor with judicious approach and in accordance with materials available on record but not in arbitrary and mechanical manner.

10.6 In the light of the above discussion, we proceed to adjudicate the issue on hand. We find that during the proceedings under section 147 of the Act, the details such copy PAN, income tax return, ledger account and confirmation from investors and other details such as bank statement, audited books were available before the AO. However, the AO without considering and pointing any deficiency in the above primary document held that the assessee failed to explain the genuineness of the credit of share capital and premium thereon.

10.7 Moving further we find that in the regular assessment proceeding the genuineness of the credit of share capital and premium was accepted by the AO. Further, there was no finding of the AO that the cash were deposited in the bank of the share subscriber company. Also, there is no evidence on record that the cash exchanged hands. Thus, we are of the view that the assessee discharged the primary onus cast under section 68 of the Act.

10.8 Before parting, we note that the object of section 68 of the Act was to prevent the circulation of black money. There were instances where the assessee was bringing his own unaccounted money in the form of capital, loan, gift which was not suffered to tax. To curb the practice of black money the provisions of section 68 were introduced. There is no dispute to the fact that the assessee has issued shares premium aggregating to ₹ 100 per share to the parties as discussed above. However, these share subscribers in a short span of time have transferred the shares to the directors of the company at ₹10 per share. This action of the share subscribers is very strange. It is for the reason that no prudent person will acquire the shares at a higher value and shall transfer the same in the period of short time to the directors of the company at the face value being ₹10 per share. Thus, the impugned transaction is not free from the doubts that the assessee has used these companies to convert its black money into accounting form.

10.9 It is also significant to note that the assessee to justify the share premium has submitted that the shares were issued at premium after considering the future

growth of the company. The growth in the future in the company was also felt by the share subscribers. Therefore, the share subscribers acquired the shares at a premium. But soon after, the share subscribers realized that there would not be any growth in the company and therefore they have decided to exit from the company at loss. In this regard, we note that the stand of the assessee is contradictory. It is because the assessee has been showing growth consistently in its business. Once the growth in the business is evident there was no reason for the share subscribers to sale the shares at loss and that too in a short span of time.

10.10 Further one of the share subscriber namely M/s Bhumidev Credit Corporation Ltd to which 50000 share were allotted found to be a Paper Company engaged in the business of accommodation entry in lieu of commission by the ADIT (Inv.) Rajkot. There were notices under section 133(6) of the Act issued by the AO to the share subscribers for the independent inquiry but notices were return as unserved. In this regard no plausible explanation was furnished by the assessee. Considering the all these fact in aggregate being one of the subscriber engaged accommodation entry, notice return unserved and shares were transferred in short period at loss lead to conclusion that the circumstantial and surrounding evidences are against the assessee.

10.11 The Hon'ble Supreme Court, in *CIT v. P. Mohanakala*, [2007] 161 Taxman 169, held that the opinion of the assessing officer is required to be formed with reference to the material available on record. In the present case, the AO has formed the opinion based on the materials available on record, as discussed above, suggesting that the transaction for showing the shares at premium was not genuine transaction though it was duly supported on the documentary evidence.

10.12 We also find that the Hon'ble Supreme Court in case of *CIT vs. Durga Prasad More* reported in 82 ITR 540 has held that the assessing authority is entitled to look into circumstantial surrounding evidences. The relevant observation of the Hon'ble bench extracted as under:

*8. Now we shall proceed to examine the validity of those grounds that appealed to the learned judges, (it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, other wise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.*

10.13 In view of the above and after considering the facts in totality, we are of the view that the assessee has not discharged the onus imposed under section 68 of the Act. Thus, we are not inclined to uphold the finding of the learned CIT-A. Hence, we confirm the order of the AO. Thus, the ground of appeal of the Revenue is hereby allowed.

11. In the result, the appeal of the revenue is **allowed**.

**Order pronounced in the Court on 03/10/2022 at Ahmedabad.**

**Sd/-  
(SIDDHARTHA NAUTIYAL)  
JUDICIAL MEMBER**

**Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**

**(True Copy)**

Ahmedabad; Dated 03/10/2022  
*Manish*