

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

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.2269/Kol/2019
Assessment year: 2012-13

Mahacol Tie Up (P) Ltd.....Appellant
C/o Subash Agarwal &
Associates, Advocates
Siddha Gibson,
1, Gibson Lane, Suite 213,
2nd Floor, Kolkata-700069.
[PAN: AABCM7356H]

vs.

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

Appearances by:

Shri Sunil Surana, FCA, appeared on behalf of the appellant.

Shri Vijay Kumar, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : September 27, 2022

Date of pronouncing the order : October 12, 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 20.08.2019 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.2,15,00,000/- 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.72,224/- 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. 2.15 crores from seven 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 LdCIT(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 2.15 Crores raised from 7 companies at premium of 2490 per share. Details are annexed in paper book page 22- 22A. 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 37-107.

2. All share applicants issued notices u/s 133(6) and in response, compliances made by all of them vide paper book page 23- 29 whereby their financials, bank statement, source of "source of funds", ITR etc. were submitted. 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- vide paper book page 148-160.

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- OyesterCommotrade Pvt Ltd having net worth of more than 1.42 crores Vide paper book page 38, Skyhigh Minerals Pvt Ltd having net worth of more than 2.47 crores vide paper book page 47, Mahalaxmi Promotion Pvt. Ltd having networth of more than 7.98 crores vide paper book page 56, Niknar Commodities Pvt Ltd having networth of more than 5.09 crores Vide paper book page 68, R.R.Coal Agencies Pvt Ltd having networth of

more than 12 crores vide paper book page 80, Rosemary Dealcom Pvt Ltd having networth of more than 1.87 crores vide paper book page 91 and Newtown Mercantile Pvt Ltd having networth of more than 12.79 crores vide paper book page 100.

4. Three share applicants assessed u/s 143(3) on substantive basis. Copies of their assessment orders annexed in paper book page 131-147. In case of Mahalaxmi Promotion and Nikhar Commodities 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 hand's 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 9th September, 2022 copy enclosed has also taken 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 page 124-130.

6. Moreover although the assessee has explained the source of 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 and 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 assessees 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 Smertex Pvt. 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 ld. 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 ld. CIT(A). The Ld. DR has further relied upon the decision of the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron & Steel (P) Ltd. reported in [2019] 103 taxmann.com 48(SC).

6. We have considered the rival submissions of the ld. 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, has 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 Mahalaxmi Promotion and Nikhar Commodities 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. So far as the reliance of the Ld. DR on the decision of the hon'ble Supreme Court in the case of "PCIT v/s NRA Iron & Steel (P) Ltd." (supra) is concerned, we find that the Hon'ble Supreme Court in para 8.2 of the said decision has made the following observations:

"8.2 As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer CIT v. Precision Finance (P.) Ltd. [1995] 82 Taxman 31/[1994] 208 ITR 465 (Cal.):

Proof of Identity of the creditors;

Capacity of creditors to advance money; and

Genuineness of transaction

This Court in the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able

to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.”

Further, in para 9 of the said decision, the hon’ble Supreme Court has observed as under:

“9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness. “

There after the Hon’ble Supreme Court summed up the principles which emerged after deliberating upon various case laws as under:

“11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*
- iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.*

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.”

The Hon’ble Supreme court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound conduct to conduct an independent enquiry to verify the same. However, as noted above, the Assessing Officer in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee

having furnished all the details and documents before the Assessing Officer and the Assessing Officer has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifted upon the Assessing Officer to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, the aforesaid decision of the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron and Steel Pvt. Ltd., in our humble view, is not applicable to the facts and circumstances of the case in hand.

9. 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.

10. 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.

11. The appeal of the assessee stands allowed.

Kolkata, the 12th October, 2022.

Sd/-

[डॉक्टर मनीष बोरड /Dr. Manish Borad]

लेखा सदस्य /Accountant Member

Sd/-

[संजय गर्ग /Sanjay Garg]

न्यायिक सदस्य /Judicial Member

Dated: 12.10.2022.

RS

Copy of the order forwarded to:

1. Mahacol Tie Up (P) Ltd
2. ITO, Ward-1(4), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches