

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No. 4447/MUM/2019

(Assessment Year 2011-12)

ITO 13(3)(1)
Room No. 227, 2nd Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020

vs.

M/s. Trusted Trading Pvt
Ltd
102nd Junction of 11th
Road, Near Ghanteshwar
Mandir, Khar, Mumbai-400
052

(Appellant)

(Respondent)

PAN No. AADCT5152A

Assessee by : None
Revenue by : Shri. Sanjeev Kashyap, CIT DR.

Date of hearing: 10.10.2022
Date of pronouncement : 30.12.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the ITO-13(3) (1) Mumbai (the Id. AO) for A.Y. 2011-12 against the order of the Id. CIT(A)-21 Mumbai (the Id. CIT-A) dated 29/03/2019 wherein the appeal filed by the assessee against the assessment order passed u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 by the Id. AO was partly allowed. The Id. AO is aggrieved with the deletion of the addition made u/s. 68 of the Income Tax Act of ₹10 Crores on account of unexplained share capital and premium.
02. The Id. AO has raised the following grounds of appeal:



"On the facts and the circumstances of the case and in law, the Id. CIT (A) erred in deleting the disallowance made by the AO on account of Unexplained share/capital at premium u/s 68 of ₹ 10,00,00,000/- without appreciating the fact that the assessee could not produce its own witness for cross examination and hence failed to discharged its onus to prove the genuineness of the transaction and creditworthiness of the Investor parties.

2. On the facts and circumstances of the case and in law, the Id.CIT(A) erred in deleting the disallowance made by the AO on account of Unexplained share/capital at premium u/s. 68 of ₹10,00,00,00/- by ignoring the decision of the APEX Court in the case of PCIT vs NRA Iron & Steel Pvt. Ltd. [2019] 103 taxmann.com 48 (SC) wherein it is held that "practice of conversion of unaccounted 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 know of the assessee. The assessee is under legal obligation to prove receipt of share capital/ premium to the satisfaction of the A.O. failure of which would justify addition.

3.The appellant prays that the order of CIT(A) on the above ground be set aside and that of Assessing Officer be restored."



03. The brief facts of the case shows that, assessee is a company engaged in the business of construction and real estate development. It filed its return of income on 28.07.2011 declaring total income at ₹Nil. Subsequently, the return was processed u/s. 143(1) of the Act. As per the survey report in case of the assessee sent by the DDIT investigation, the case of the assessee was reopened by recording the reasons u/s. 148 of the Income Tax Act.
04. The reason shows that as per survey u/s. 133A on 27.08.2014 on Shri Dilip Mehta and his statement recorded u/s. 131 of the Act that he is managing companies and providing accommodation entries to various companies. He has also provided accommodation entries to Mr. Amar Natvarlal Shah of the assessee company in the form of share premium through 8 companies of ₹10 Crores.
05. In response to notice u/s. 148 of the Act, Assessee filed the original return of income on 30.08.2016. The necessary notices were issued and the assessee was asked to explain the above share capital of ₹10 Crores. AO further issued notices u/s. 133(6) of the Act to all shareholders but all returned un-served. Further, the assessee was directed to provide new address of the shareholders. The assessee company did not give new address, but confirmation of shareholder companies were sent by the post. Further, Show Cause Notice was issued on 16.12.2016. The assessee filed submission on 31.08.2016 along with the list of shareholders, balance-

sheet and bank statement for A.Y.2011-12. The AO extensively relied upon the statement of Mr. Dilip C Mehta. He also analyzed the details furnished by the assessee. He noted that, there is a difference in address of the companies as per income tax return as well as with registrar of the companies. The income shown by these companies is meager. The common address of the above parties, where the companies did not exist. The AO asked assessee to produce all his witnesses of the whole companies. Neither the assessee nor the investors and the accommodation entry providers Shri Dilip C Mehta appeared in response to summons issued u/s. 131 of the Act. Therefore, the Id. AO made an addition u/s. 68 of the Act as assessee failed to show the creditworthiness and genuineness of those transactions. The assessment order was passed u/s. 143(3) r.w.s. 147 of the Act on 27.12.2016.

06. Assessee aggrieved with the same preferred an appeal before the Id. CIT (A). The Id. CIT(A) deleted the addition holding as under:

" In the light of the facts of the case and various submissions made by the appellant, the judicial pronouncements relied upon by the appellant, it is concluded as under:-

The provisions of section 68 of the IT Act, 1961 before amendment (i.e. prior to A.Y. 2013-14) stated as under:

Where any sum is found credited in the books of a assessee maintained for any previous year, and the assessee offers no explanation about the nature addition source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

Perusal of these provisions divulges that there is an obligation on the part of the assessee to prove the identity, genuineness and creditworthiness of the person from where the money is actually received. The above three ingredients have been taken as basic parameters to be satisfied by the appellant.

Further, under what circumstances the invocation of section 68 of the IT Act, 1961 can be restored to

(a) When the assessee fails to prove the genuineness of the transaction that has entered into his books of account.

(b) When there is no satisfactory explanation provided on the part of the Assessee to the Assessing Officer with respect to the amount credited into the accounts.

(c) Where there are documentary evidences required to support the validity of the



amount credited but there are no such documents furnished by the assessee.

Thus, from the above, it is understood that the provisions of section 68 of the Act place the initial burden of proof upon the assessee.

In the case of appellant, when the Assessing Officer issued notices to the all the investors, the investors themselves in response to notice u/s. 133(6) have produced the details. PAN, details of the respective companies, address total amount received, nature of share premium, copy of income tax return, audited annual report, copy of bank statement of investor companies, account opening from in compliance to the KYC record of the MCA website of Register of companies, details of common identification member, CIN, copy of bank statement of the investor companies reflecting their source of investment into the appellant company; audited annual reports of the respective investing companies justifying their existence and sufficiency of net worth; Proof of source of investment made by the investing companies.

Further, if the Assessing Officer nurtures any doubt on the genuineness of the transaction as held by courts the Assessing Officer should have conducted investigation but the Assessing Officer did not do so.

By submitting PAN, ITR, opening of bank a/c, financial statements, bank statements of the investors, companies reflecting their source of investment not the appellant company proved the investors identify creditworthiness and genuineness of the transaction.

However, the Assessing Officer has doubted credit worthiness and the genuineness of the transaction stating that all are paper companies operated by Dilip Mehta but did not controvert or disapprove the facts. The appellant has further submitted that in similar facts and circumstances, where the companies managed and controlled By Dilip Mehta in whose cases additions were made, have been deleted by the Honble ITAT the case of M/s Om Percement (P) Ltd ITA No 4433/Mum/2016 Mehta Financial Services Pvt Ltd and MBM Tubes Pvt Ltd. In these cases also some of the investors are common. Thus, the appellant's contention that on similar facts the decisions of the Hon'ble ITAT's are to be applied to the facts of the appellant, is accepted.

2.8 Thus, it has to be said that the appellant has done everything in its wisdom to prove the 3 ingredients required to prove the satisfactory nature of the said share capital received from 8 companies. In these circumstances, the onus had shifted to the AO, but AO did not proceed further to bring any contrary finding on record.



Thus, the unequivocal conclusion is that all the 3 ingredients having been satisfied, the impugned Investment in share capital plus premium has to be treated as explained satisfactorily and the AO was not justified in disregarding the supporting evidence. No cogent material was adduced by him to show that the share capital and premium were unexplained. Therefore the impugned additions, made in the assessment order, have failed on several counts- 1) reliance on mere statement of third party that is totally inadequate 2) failure to make available any incriminating material (reports, statements etc.) forming basis for action by the AO; 3) failure to give due opportunity to the appellant to cross examine witnesses, whose statement might have been relied upon and 4) failure to recognize the satisfactory nature of the explanation/evidence tendered by the appellant to explain identity of said parties, creditworthiness and the genuineness of the share application transactions.

The appellant submitted that, when the three ingredients are satisfied, the addition cannot be made us/ 68 as held by Hon'ble High Court of Madhaya Pradesh in the case of Chain House International (P) Ltd [2018] 98 taxmann.com 47 The relevant portion of the judgment is as under:-



The learned ITAT after due examination of the order of CIT(Appeals) and the documents on record insofar as identity creditworthiness, genuineness of transaction of M/s Aadhaar Ventures (1) Lid Ms Dhanush Technologies Ltd. Ms Emporis Projects Lts and L.N. Industries Lts (formerly known as LN Polyester Ltd) came to the conclusion that the assessee company having receipt share application money through bank channel and furnished complete details of bank statements copy of accounts and complied with notices issued and the directors of the subscriber company also appeared with books of accounts before the appellate authority and confirmed the investment made by them with the assessee company, therefore the identity and creditworthiness of investor and genuineness of transaction of the share applicant has been proved in the light of the ratio laid down by the MP High Court Delhi High Court and the Hon'ble Supreme Court and were of the opinion that the onus cast upon the assessed at provided under section 68 of the Act has been duly is charged by the assessee the identity of the share subscriber creditworthiness and genuineness of the transaction is not to be doubled. The learned ITAT considered the case of the



ach company a great detail in paras 65 to 110 of the impugned order and recorded its finding. The aforesaid finding of fact recorded by the ITAT are based on the material available on record which is a finding based on appreciation of evidence on record.

52. Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and is the wisdom of shareholder whether they want of subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates is filed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of the shares is decided on the mutual understanding of the parties concerned.

53. Once the genuineness creditworthiness and identity are established the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case.



54. *There is no dispute about the receipt of funds through banking channel nor there is any dispute about the identity, creditworthiness and genuineness of the investors and, therefore, the same has been established beyond any doubt and there should not have been any question or dispute about premium paid by the inventors therefore, unless there is a limitation put by the law on the amount of premium the transaction should not be questioned merely because the assessing authority thinks that the investor could have managed by paying a lesser amount as Share premium as a prudent businessman The fest of prudence by substituting its own view in place of the businessman's has not been approved by the Supreme court in the decisions of CIT v Walchand & Company (P) L (1967) 65 ITR 381 and JK Woolen Mfg C17 ITR 612(SC)*

The appellant submitted that the above decision is applicable appellant.

The appellant has also relied on the jurisdictional High Court decision in the case of CIT-I v.M/s Gagandeep infrastructure Pvt Ltd (Income Tax Appeal No 1613 of 2014)



The appellant also led on the decision of Hon'ble Supreme Court in the case of CIT v Lovely Exports (P) Ltd 2008 (2010) 14 SCC 761.

50. In the case of CITv. Lovely Exports (P) Ltd 2008 (2010) 14 SCC 761, the Apex Court held that the share application money is received by the assessee from alleged bogus shareholders whose names are given to the assessing officer, then the department is free to proceed to reopen their individual assessments, in accordance with law but this allotment of share application money cannot be regarded as undisclosed income under Section 58 of the Act.

Considering all the facts and circumstances of the case the details filed by the investors and the assessee respectfully following the decisions in the cases of Om Procurement MBM Tubes Pvt Ltd & Mehta Financials of Hon'ble ITAT Mumbai referred to herein above as the facts of these cases are similar to the facts of the appellants case and decision in the case of Gagandeep Infrastructure (P) Ltd of Hon'ble High Court Mumbai and the decision of Honble High Court of Madhya Pradesh in the case of Chain House International (P) Ltd and the decision of Hon'ble Supreme Court in the case of Lovely Exports (P) Ltd the addition made by the Assessing Officer of Rs 10 crores as unexplained share application money is unwarranted and therefore addition made by the



*Assessing Officer is deleted. Thus, the grounds of appeal No 1 to 6 are **allowed**.”*

07. Therefore, the LD AO is aggrieved. The Id. DR relied upon the order of the Id. AO.
08. Despite notice, none appeared on behalf of the assessee. On several occasions earlier also, notices were issued to the assessee, but assessee chosenot to remain present. Therefore, the appeal of the Id. AO is decided on the merits of the case as per information available on record.
09. We have carefully considered the contentions of the LDDR and perused the orders of the lower authorities. The facts clearly show that assessee is a company which is engaged in construction and real estate development filed its return of income at Rs Nil. Subsequently, information was received that assessee has received share capital and share premium from 8 different companies aggregating to ₹ 10 crores which is operated by one entry operator Mr.Dilip C Mehta. Mr. Dilip Mehta also referred to the name of the person who is at the helm of affairs of this company, i.e.Mr. Amar Natwar Shah. The assessee on reopening of the assessment merely submitted the documents showing identity, creditworthiness and genuineness of the transaction such as address details, MCA Details, Annual Accounts etc. the Id. AO issued notices u/s 133 (6) of The Act and found that address of The Shareholders are not correct. The learned assessing officer issued notices u/s 133 (6) to the directors of the assessee company as the addresses provided by them to



show the identity of the company were not found to be correct. The assessee company did not give new address of shareholders. However, submitted the confirmation of the shareholders by post. The learned assessing officer once again asked the assessee to prove the identity, creditworthiness and genuineness of the transaction. The assessee was provided with all the statements, information based on which the learned assessing officer has given a show cause to make the addition. All the companies have meager income offered for taxation; the addresses provided which did not show the existence of these companies at that address. Assessee was directed to produce the parties who invested in the assessee company, assessee did not produce them. The shareholders were the witnesses of the assessee and not of the AO. Even assessee failed to produce its own directors before the AO. In the circumstances, the learned assessing officer made the addition u/s 68 of the income tax act. The learned CIT – A deleted the addition. The learned CIT – A has wrongly mentioned that all the notices u/s 133 (6) have been replied with by the shareholders by producing the relevant details. When the fact shows that at the addresses nobody exists, the learned CIT – A, did not even care to address this argument of the learned assessing officer while giving the above finding. Thus, the finding of the learned CIT – A that all the parties replied to notice u/s 133 (6) of the act is incorrect. Further, the learned CIT – A has put onus on the assessing officer that if the AO has any doubt, he should have conducted



the investigation and failure on the part of the AO to make such investigation, he deleted the addition. The learned CIT – A, has conveniently ignored the fact that the assessee was asked to produce the shareholders, the correct address of the shareholders, the directors of the assessee company itself, none of these was complied with by the assessee, therefore, when initial onus is not discharged by the assessee, burden does not shift on the assessing officer. Thus, the learned CIT – A is incorrect in putting unnecessary burden on the office of the learned AO. As the assessee has not given correct address of the shareholders, the Id. AO was prevented from making any inquiry further. Ld. CIT (A) failed to notice that even the summons issued u/s 131 of The Act to the investors shareholders returned unserved. We failed to comprehend the order of the Id. CIT (A) that when notices u/s 133 (6) were not complied with, when summons issued to shareholders u/s 131 remained unserved, what credibility can be assigned to the information submitted before the Id. AO. The learned CIT – A also did not consider it fit to consider the findings of the survey, statement of Mr. Dilip C Mehta, who is an accommodation entry provider, confirmation of that statement by one of the people who is at the helm of affairs of the assessee company i.e., Mr. Amar Natwarlal Shah, as well as several other persons, who confirmed that the amount of share capital of Rs 10 Cr is merely an accommodation entry. The learned CIT – A also referred to several judgments. But merely because in those



judgments, the addition with respect to Mr. Dilip C Mehta operated companies were deleted, it automatically cannot be applied to the facts of the present case for deleting the above addition. The necessary ingredients u/s 68 of the income tax act is required to be satisfied by the assessee before any such addition can be deleted. The learned CIT – A is further incorrect in stating that assessee has done everything in its wisdom to prove the 3 ingredients which are required to prove in nature of the share capital received from 8 companies. He conveniently forgot to refer to the fact that the AO has specifically asked the assessee to produce those shareholders before him for examination, which was not complied with by the assessee. Looking to the facts of the present case, we find that it is similar to the facts of the case before the Honorable Supreme Court in case of NRA iron and steel Ltd [2019] 110 taxmann.com 491 (SC)/ [2020] 268 Taxman 1 (SC) & [2019] 103 taxmann.com 48 (SC)/ [2019] 262 Taxman 74 (SC) wherein on identical facts and circumstances the addition u/s 68 of the act was confirmed. The Id. CIT (A) while deleting the addition did not examine the shareholders of the assessee company, nor examined the directors of the assessee company, even did not inquired the assessee questions about companies operated by Mr. Dilip C Mehta and several statements. Therefore Id. CIT (A) did not consider any of the reasons of the Id. AO for which addition is made. He merely swayed by the written submission of the assessee and deleted the addition. The Id. CIT (A) even did not find



it proper to question the assessee about its activities and justification of share premium to show the genuineness of the share capital. As the assessee is a private limited company, how it came in to connect with those all 8 companies for subscribing to the shares of the assessee company which does not have income generation, was not at all inquired by the Id. CIT (A). Ld. CIT (A) further failed to visualize a situation with perspective of genuineness that 8 non-descript companies investing Rs 10 Cr, having common address, in share capital of a private limited company at huge premium of Rs 180 per share and the assessee company does not have any knowledge about the whereabouts of such a valued investor in that company. Thus, the order of the learned CIT – A, is not sustainable in law in deleting the above addition. In view of this, we reverse the order of the learned and CIT – A and confirm the order of the learned assessing officer.

010. Accordingly appeal of the Id. AO is allowed.

Order pronounced in the open court on 30.12.2022.

Sd/-
(PAVAN KUMAR GADALE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 30.12.2022

Uday Mugal (Stenographer)

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)



4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai