

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

श्री संजय गर्ग, न्यायिक सदस्य
एवं
डॉ. मनीष बोराड, लेखा सदस्य
के समक्ष

**Before
SRI SANJAY GARG, JUDICIAL MEMBER
&
DR. MANISH BORAD, ACCOUNTANT MEMBER**

**I.T.A. No.: 59/KOL/2021
Assessment Year: 2012-13**

I.T.O., Ward-6(2), Kolkata.....Appellant

Vs.

***M/s. Gokul Infra Developers Pvt. Ltd.....Respondent
[PAN: AAECG 2980 Q]***

**C.O. No.: 11/KOL/2022
In I.T.A. No.: 59/KOL/2021
Assessment Year: 2012-13**

***M/s. Gokul Infra Developers Pvt. Ltd.....Appellant
[PAN: AAECG 2980 Q]***

Vs.

I.T.O., Ward-6(2), Kolkata.....Respondent

Appearances by:

Sh. G. Hukugha Sema, CIT, appeared on behalf of the Revenue.

Sh. V.K. Jain, FCA, appeared on behalf of the Assessee.

Date of concluding the hearing : November 29th, 2022

Date of pronouncing the order : January 9th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the Revenue and the Cross Objection filed by the assessee pertaining to the Assessment Year (in short "AY") 2012-13 are directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the "Act") by Id. Commissioner of Income-tax (Appeals)-7, Kolkata [in short Id. "CIT(A)"] dated 09.09.2020 arising out of the assessment order framed u/s 144 of the Act dated 17.03.2015.

2. Registry has informed that the appeal is time barred by 49 days. At the outset, Id. D/R submitted explaining the reasons for the delay in filing the appeal. After perusing the same, we find force in the reasons mentioned therein and are satisfied that the Revenue was prevented for reasonable cause in filing the instant appeal within statutory time limit. We, therefore, condone the delay and admit the appeal for adjudication.

3. The Revenue is in appeal before the Tribunal raising the following grounds:

"1. "That on the fact and circumstances of the case, the Ld. CIT(A) has erred in granting relief to the assessee on account of addition on undisclosed cash credit u/s. 68 of Rs. 40,39,00,000/- though the assessee has failed to prove the genuineness of transaction and creditworthiness of the subscribers."

2. "That on the facts and the circumstances of the case, the Ld. CIT(A) has erred in overlooking the principles which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-1, Delhi Vs. NRA Iron & Steel Pvt. Ltd. (412 ITR 161), which suggests that the assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the A.O., failure of which,

would justify addition of the said amount to the income of the assessee."

3. *"That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in ignoring the principle which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-1 Delhi Vs. NRA Iron & Steel Pvt. Ltd. (412 ITR 161), which also suggests that the Assessing Officer is duty bound to investigate the creditworthiness of the creditors/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name lenders. In the facts of the case, in spite of best efforts made by the assessing officer, he could not verify the same as there was no response from companies to whom shares were allotted on private placement basis. Thus, the decision of the Ld. CIT(A) is erroneous in holding that the raised share capital including share premium was not the assessee's own income."*

4. *"That on the facts and the circumstances of the case, the order of the Ld. CIT(A) is erroneous in ignoring the aspect of Section 68 of the Act and giving relief to the assessee. The principle which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-1, Delhi Vs. NRA Iron & Steel Pvt. Ltd. (412 ITR 161), also suggests that if the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack creditworthiness, then the genuineness of the transactions would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act. In the facts of the case, the Ld. CIT(A) completely ignored this aspect, thus he has erred in giving relief to the assessee."*

5. *"That on the fact and circumstances of the case, the Ld. CIT(A) was not justified in deleting the addition of Rs. 40,39,00,000/- made u/s. 68 wherein the identity, genuineness and creditworthiness of investor companies remained unsubstantiated, as they failed to appear before the A.O against summons issued u/s. 131 ignoring the decision of Hon'ble Supreme Court in the case of Pr. CIT(Central)-1, Delhi Vs. NRA Iron & steel Pvt. Ltd. (412 ITR 161)."*

6. *"That on the fact and circumstances of the case, the Ld. CIT(A) was incorrect in granting relief where the assessee failed to discharge its legal obligation to prove the receipt of share capital and share premium money to the satisfaction of the A.O."*

7. "That on the fact and circumstances of the case, the Ld. CIT(A) was not justified in allowing the appeal without considering the fact that the sources of share application money including share premium were not properly explained by the assessee and it lacked any real profit-making business credence."

8. "That on the fact and circumstances of the case, the Ld. CIT(A) was not justified in ignoring the facts that the creditworthiness of the subscribing companies were not established before the A.O. during the course of the assessment proceedings, though the onus of providing the identity of the creditor vests solely with the assessee."

9. "That on the fact and circumstances of the case, the Ld. CIT(A) has erred in not considering the facts that the real intention of the assessee company for introducing such huge amount in the form of share capital and share premium in its business only to introduce its unaccounted money in the form of fresh share capital."

10. "That the Department craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or during hearing of this appeal."

4. The assessee has raised the following grounds in the cross objection filed against the appeal filed by the Revenue:

"1. On the facts and circumstance of the case and in law, the Learned Commissioner of Income Tax (Appeal)-7, Kolkata erred in not adjudicating the objection of the assessee that the jurisdiction to pass the impugned order by TRO-2, Kolkata is bad in law.

2. On the facts and circumstance of the case and in law, the Learned Commissioner of Income Tax (Appeal)-7, Kolkata erred in not adjudicating the objection of the assessee that the assessment order passed ex-parte u/s.144 of the Act is bad in law."

5. First, we will take the Revenue's appeal in I.T.A. No.: 59/KOL/2021.

6. Brief facts of the case as culled out from the records are that the assessee is a private limited company engaged in the business of trading. Income of Rs. 750/- declared in the return of income

for AY 2012-13 on 25.09.2012. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. Ld. AO during the course of assessment proceedings, from perusal of the return, observed that the assessee company was incorporated on 28.06.2011 i.e. during the AY 2012-13 and this is the first year of incorporation. It had no business income but during the year it issued share capital of Rs. 1,45,87,250/- and received share premium of Rs. 38,93,12,750/-. In total a sum of Rs. 40.39 Cr. received towards share capital and share premium during the year. To verify the genuineness of the share transactions and to verify the identity and creditworthiness of the share subscribers, ld. AO issued summons u/s 131 of the Act to the directors of the assessee company but there was no compliance. Further, as observed by ld. AO, various opportunities were given but there was no compliance. Thus, ld. AO came to a conclusion that it is beyond human probability that a company with no past track record and no business activity during the year has been able to fetch a huge amount of share capital and share premium of Rs. 40.39 Cr. and such type of transaction clearly shows that the assessee company is a paper/shell company and is part of the racket of various entry operators engaged in providing accommodation entries. Further, ld. AO held that the alleged sum is an unaccounted income of the assessee company and is liable to be taxed as unexplained cash credit u/s 68 of the Act.

7. Aggrieved, the assessee preferred appeal before ld. CIT(A) and succeeded in getting relief.

8. Aggrieved, the Revenue is now in appeal before this Tribunal.

9. Ld. D/R vehemently argued supporting the order of ld. AO stating that the assessee company is a paper/jamakharchi company and is part of the racket of entry operators where such type of funds in the form of share capital and share premium is received and thereafter, given as loan and advances/investments in other such companies and there is layering and rotation of funds and the share subscribers do not have creditworthiness to invest such huge amount and they are not genuine transactions of share capital investment and therefore, rightly held by ld. AO as unexplained cash credit.

10. On the other hand, ld. Counsel for the assessee vehemently argued supporting the detailed finding of ld. CIT(A) and also referred to various documents filed in the paper book dated 24.08.2022 containing 497 pages. It is contended by ld. Counsel for the assessee that the assessee has successfully discharged its onus by proving the identity and creditworthiness of the share applicants and genuineness of the transactions and therefore, finding of ld. CIT(A) may be confirmed.

11. We have heard rival contentions and perused the records placed before us. The Revenue is in appeal before this Tribunal challenging the finding of ld. CIT(A) deleting the addition of Rs. 40.39 Cr. made by ld. AO towards unexplained cash credit u/s 68 of the Act. We notice that the assessee company in its very first year of incorporation i.e. 28.06.2011 relevant to AY 2012-13, had no regular business income and minor other income of Rs.

45,500/- and expenditure of Rs. 44,748/- were incurred during the year. However, within few months of its incorporation share capital with share premium totalling to Rs. 40.39 Cr. were issued, subscribed and received by the assessee company from 19 share applicants, the list of which is provided at page 8 & 9 of the impugned order. We further notice that the assessment order is an *ex-parte* order u/s 144 of the Act wherein ld. AO has alleged that the assessee has not cooperated and complied to the notices of hearing and has not placed relevant documents nor presented the directors to explain the identity, creditworthiness and genuineness of the share applicants.

12. On the other hand, on perusal of the impugned order, we notice that ld. CIT(A) has observed that all the relevant documentary evidences were filed before ld. AO but he failed to decide the case on merit and even when the copies of replies filed by the assessee were sent to ld. AO, no remand report has been received from ld. AO in spite of several reminders. However, ld. CIT(A) on going through the details, came to a conclusion that the alleged share capital and share premium is genuine and the share applicants have sufficient creditworthiness to invest such sum.

13. However, from perusal of the grounds raised by the Revenue wherein by placing reliance on the decision of the Hon'ble Supreme Court of India in the case of *PCIT vs. NRA Iron & Steel (P.) Ltd.* reported in [2019] 412 ITR 161 (SC), has contended that "Ld. AO is duty bound to investigate the creditworthiness 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.” In the instant case, from perusal of the assessment order, we find that the same is framed as best judgment assessment u/s 144 of the Act and as per ld. AO, since no documentary evidences, as required, were filed, the investigation could not be carried out and for such non-compliance on the part of the assessee, the alleged transactions could not be examined properly. It is an admitted fact that there have been many cases where unaccounted incomes are routed through shell/paper companies in the garb of avoiding tax and beneficiaries are provided accommodation entries in the form of share capital and share premium issued at huge premium and thereafter such equity shares are sold at loss to the company owners. Though we have not arrived at any conclusion that in the instant case the alleged sum is in the nature of accommodation entry and that the assessee is a paper company, however, as per the view taken by the Hon'ble Apex Court in the case of *NRA Iron & Steel (P.) Ltd. (supra)* where it is held that ld. AO is duty bound to investigate the creditworthiness of the subscribers and verify the identity and genuineness of the transactions and also considering the fact that the assessee company is newly incorporated and *prima facie* it seems to be beyond human probability that a company with a track record of just six months has been able to receive share capital and share premium of 40.39 Cr. and also going through the decision of this Tribunal in the case of *M/s. Bisakha Sales Pvt. Ltd. vs. CIT* in *ITA No.1493/Kol/2013* order dated 19.09.2014 referring to such kind of colourable transaction and mushrooming growth

of professional entry operators, we are of the view that ld. AO ought to have carried out necessary investigation and examination of the documents filed by the assessee and if necessary may have called for the directors of the assessee company as well as the share subscribers to examine the genuineness of the alleged transactions and creditworthiness of these companies.

14. Though the assessee has filed the details before ld. CIT(A) but since there are contradictory claims from the side of the Revenue since on one hand ld. AO is passing an *ex-parte* order for non-compliance on the part of the assessee and on the other hand ld. CIT(A) is observing that all details were filed before ld. AO and also ld. AO has not replied to the papers sent for comments, we, in the interest of justice and being fair to both the parties and in order to get examined such type of transactions which in some cases are carried out in the garb of evading tax and are colourable transactions, deem it necessary to restore all the issues raised before us by the Revenue before ld. CIT(A) for afresh adjudication to be carried out after calling for a detailed remand report from ld. AO who shall examine the alleged transactions as per our discussions made herein above and shall send the remand report within three months of the letter to be issued by ld. CIT(A) to ld. AO and further, we direct the assessee to remain vigilant and if necessary, shall file documents and should not take adjournment, unless otherwise required for reasonable cause. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

15. As far as the cross objection is concerned the grounds in the cross objection are made in support of the finding of Id. CIT(A) and since we have restored all the issues raised in the Revenue appeal to Id. CIT(A) for afresh adjudication the grounds raised in the cross objection become infructuous and are therefore, dismissed as infructuous.

16. In the result, the appeal filed by the Revenue in ITA No. 59/KOL/2021 is partly allowed for statistical purposes and the cross objection filed by the assessee in CO No. 11/KOL/2022 is dismissed.

Kolkata, the 9th January, 2023

Sd/-
[Sanjay Garg]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 09.01.2023

Bidhan (P.S.)

Copy of the order forwarded to:

1. **I.T.O., Ward-6(2), Kolkata.**
2. **M/s. Gokul Infra Developers Pvt. Ltd., 27, Brabourne Road, 5th Floor, Room No.512, Kolkata-700 001.**
3. CIT(A)-7, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata