

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI M. BALAGANESH, AM

आयकर अपील सं/ I.T.A. No. 1814/Mum/2021

(निर्धारण वर्ष / Assessment Year: 2012-13)

AMS Trading & Investment Pvt. Ltd. Shatrunjay Apartments, 1 st Floor, 28 Sindhi Lane, Nanubhai Desai Road, Greater Mumbai-400004.	बनाम / Vs.	DCIT, Central Circle-2(3) Room No. 803, 8 th Floor, Old CGO Annexe Building, M. K. Road, Mumbai-400020.
स्थायी लेखा सं. /जीआइआर सं. /PAN/GIR No. : AAFCA6183N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Ajay Singh
Revenue by:	Smt Vranda Matkari

सुनवाई की तारीख / Date of Hearing: 13/01/2023

घोषणा की तारीख /Date of Pronouncement: 31/01/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee company against the order of the Ld. Commissioner of Income Tax (Appeals)-48 dated 26.07.2021 for assessment year 2012-13.

2. The assessee has raised three (3) grounds of appeal. The main grievance of the assessee is against the action of the Ld.CIT(A) confirming the addition of share capital and share premium received to the tune of Rs. 30,00,000/- from M/s Emporis Projects Ltd (herein after "M/s. EPL"). The facts as noted by the AO is that assessee has filed the return of income declaring total income of Rs. Nil on 09.03.2012; and later the case of the assessee was reopened by issuing notice u/s 148 of the Income Tax Act, 1961 (hereinafter 'the Act') dated 27.03.2015. After recording the reason for reopening which shows that he received information from the office of the DGIT



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investigation Mumbai regarding assessee's case wherein it has been stated that assessee had taken accommodation entry from hawala operators and that the assessee is beneficiary of hawala transaction in this assessment year (AY 2012-13) wherein assessee received Rs. 30 Lakhs from a transaction dated 07.04.2011 with M/s Emporis Projects Ltd (EPL) which was an accommodation entry. Therefore, he reopened the assessment of AY 2012-13; and the AO noted in the assessment order that assessee company got accommodation entries of Rs.30,00,000/- in the form of share capital and share premium from M/s Emporis Projects Ltd. According to the AO, M/s Emporis Projects Ltd was a company managed and controlled by an entry operator Shri. Shirish Chandrakant Shah. According to the AO, pursuant to a search and survey action at his [Shri Shirish C Shah] residence and office on 09.04.2013, he admitted that he is providing accommodation entries in the form of share capital, share premium, share application money, unsecured loans, Long Term Capital Gain (LTCG), Short Term Capital Gain (STCG) wherein cash was received from various clients/beneficiaries to whom he provided accommodation entries through his various companies/concerns. According to the AO, Shri. Shirish Shah has admitted about this entry operation even during post-search proceedings. Further according to the AO, for providing these accommodation entries he has 212 companies incorporated by him and one of his company is M/s Emporis projects Ltd. And thereafter the AO discussed about the modes-operandi adopted by these companies/paper companies floated by the Shri. Shah and he also



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reproduced the statement of one of the employee Mr. Rajendra Kachalia who has also stated that they were indulging in entry operation. Thereafter the AO noted that the assessee when asked about Rs. 30,00,000/- which has come in its books of account, the assessee admitted that the Rs. 30,00,000/- was received from M/s Emporis Projects Ltd. However according to assessee, the transaction was genuine and in order to prove identity and genuineness of M/s Emporis Project Ltd filed the copy of PAN Card of M/s Emporis Projects Ltd, and filed following relevant documents viz, copy of the bank statement highlighting the transaction, copy of form/application for equity shares, copy of Form 2 filled with ROC by the assessee company and the audit report. Thus it claimed to have discharged the burden to prove the identity creditworthiness and genuineness of the transaction. However, the AO noted that the assessee company had issued its share at a very high value to M/s Emporis Projects Ltd i.e, at paid up capital of Rs. 60,000/- plus share premium of Rs.29,40,000/-. The AO noted that 7500 shares were issued by assessee company at a face value of Rs. 10/- and at a premium Rs. 490/-. However, M/s Emporis paid only Rs. 400/- per share (i.e. Rs. 8 per share and Rs. 392 towards premium) and thus Rs. 100/- was not received per share. According to the AO, the share premium charged by the assessee is very high as compared to the assessee's net worth. Therefore, according to him share premium received by the assessee is unexplained in nature and that the source of the amount received (Rs.30,00,000/-) is through an entry operator. So he added the same under section 68 of the Act as unexplained credit.



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The AO also added estimated expenses of this entry at 5% of the transaction and added Rs.1,50,000/- as unexplained expenditure u/s 69 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the same.

3. Aggrieved by the aforesaid action of the Ld.CIT(A), the assessee is before us.

4. We have heard both the parties and perused the records. We note that the AO has made an addition of Rs. 30,00,000/- which assessee had collected from M/s Emporis projects Ltd for allotment of its 7500 share (i.e. share capital of Rs. 60,000/- and share premium of Rs. 29,40,000/-). According to the assessee, the assessee had allotted 7500 shares to M/s Emporis Projects Ltd at a face value of Rs. 10 per share at a share premium of Rs. 490/-. However, M/s Emporis Projects Ltd at the time of applying for share of assessee company gave Rs. 400/- (Rs.8 per share and Rs. 392 toward premium). And when called upon by the AO to prove the nature and source of Rs. 30,00,000/-, the assessee brought to his notice that this was the share capital and premium collected from M/s Emporis Projects Ltd and to substantiate the nature and source of the amount it collected furnished a copy of the PAN, MCA master data, copy of share application, copy of the annual accounts of M/s Emporis Projects Ltd, printed balance sheet of M/s Emporis Pvt Ltd, (M/s EPL) certificate of incorporation of M/s EPL, Form 23CA filed by M/s EPL, Form 20B filed by M/s EPL etc. It was also brought to the notice of the Ld.CIT(A)/AO that M/s EPL is a listed company and that the transaction with M/s EPL was a genuine



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transaction. However, the AO was not convinced and on the basis of the information from DGIT investigation that M/s EPL is a company controlled by Shri. Shirish C Shah who when searched on 09.04.2013 had admitted that he was an entry operator. And thus according to the AO/CIT(A) the assessee has received the money from an entry operator and so the paper work given by the assessee would not suffice. However, we are not able to accept the stand taken by both AO as well as CIT(A). We note that remand report was taken by the Ld CIT(A) and in that remand report the AO has admitted that on 07.04.2011 M/s EPL has transferred the money (Rs.30,00,000/-) to the assessee company and the source of M/s EPL was it received money from M/s Avance Technologies Ltd through RTGS which was also on the same day that is on 07.04.2011 which was also a company controlled by Shri. Shirish C Shah. Therefore the Ld.CIT(A) held that the “*M/s Emporis Projects Ltd*” had received Rs. 30,00,000/- from M/s Avance Technologies Ltd through RTGS on 07.04.2011 and the same was transferred on the same day to the appellant/assessee company which is found to be suspicious transaction. And Shri Shirish C Shah had categorically admitted the fact that funds were made available to clients/beneficiaries through bank accounts of companies controlled floated/managed by him as loans and advances against cash received from such clients by noting as under.

“It is found that M/s Emporis Projects P. Ltd had received Rs. 30,00,000/- from M/s Avance Technologies Ltd through RTGS on 07.04.2011 and same was transferred on the same day to the appellant company which is found to be suspicious transaction.



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Shri Shirish C Shah has categorically admitted the fact that funds were made available to clients/beneficiaries through bank accounts of companies controlled/floated/managed by him as loans and advances against cash received from such clients. Subsequently such entries were reversed after a period of time wherein cheque had been received from the company and cash was paid back to the client. M/s Avance Technologies Ltd is one of the bogus company controlled by Shri Shirish C Shah.”

5. Based on the aforesaid reason the Ld CIT(A) dismissed the appeal of the assessee. Thus, we find that whole basis of rejecting/ignoring all the documents filed by the assessee was based on the statement recorded by the department during search/survey of Shri. Shirish C Shah who had admitted that he was providing accommodation entry through his companies (210) companies which included 16 listed companies; and that he operates 220 bank accounts etc. and that he is/was providing accommodation entry in the form of share capital, share premium, long term capital gain, short term capital gain, loans, advance etc; and in lieu of the services rendered, he gets commission. However, according to us the aforesaid reason could have been a good ground to proceed against the assessee but the problem is that if the AO/Ld. CIT(A) was going to use any material/evidence against an assessee, then he should have first of all provided a copy of the same to the assessee and then gave an opportunity to it to rebutt it. Admittedly, in this case search has happened on third party premises of Shri. Shirish C Shah on 09.04.2013; and the purported incriminating statement of Shri. Shirish C Shah has been recorded behind the back of



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the assessee. It is settled principle of law that any statement which is being adversely used against the assessee should be confronted to assessee and he should be given an opportunity to rebutt the same. We note that in this case AO/CIT(A) have not furnished the full text/contents of the statement of Shri. Shirish C Shah. And if the statement of Shri. Shirish C Shah is being used against the assessee, then the assessee should have been provided an opportunity to cross examine Shri. Shirish Shah, which in this case have not been done in this case. Further, we note that the assessment year under consideration is AY 2012-13, so proviso u/s 68 of the Act cannot be used to make addition of the share premium because, the provision for adding the share premium only came into statute book from the next assessment year that is AY 2013-14. For such a proposition reliance was placed on the decisions of the Hon'ble Bombay High Court in case of Principle CIT vs SDB Estate private Ltd (ITA no 1356-2015) dated 27.03.2015 Bombay and Principle CIT vs. Paradise Inland Shipping P. Ltd (2018) 400 ITR 439, CIT vs Orchid Industries private Ltd 397 ITR 136 and several other cases, and we agree with the assessee that the AO could not have brought to tax the share premium of Rs. 29,40,000/- u/s 68 of the Act. Be that as it may, we also note that assessee has discharged the burden casted on it to prove prima-facie to prove identity by filling the PAN of M/s Emporis Projects Ltd (refer page 66 PB) the master data from MCA of M/s EPL which shows that M/s EPL is a listed company (refer page 88 of PB) and certificate of incorporation of M/s EPL is found placed at page 107 &



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108 of the PB. Thus, the identity of M/s EPL stands proved. And bank statement of the assessee highlighting the receipt of Rs.30,00,000/- is found placed at page 59 of the PB. Thus, proving the genuineness of the transaction. We also take note from perusal of the copy of share application Form filed by M/s EPL; and Form 2 shows that the book value of shares of the assessee company was determined at Rs. 891 per share (refer page 65 PB); and creditworthiness of the M/s EPL can be seen from perusal of the printed balance sheet of EPL found place at page 46 PB. We find from perusal of the balance sheet of M/s EPL that it has share capital and surplus to the tune of Rs. 259 Cr. Therefore the creditworthiness also stands proved. Thus, the assessee company has discharged the burden to prove the identity, creditworthiness and genuineness of the share transaction. Therefore, the AO/CIT(A) erred in making the addition without finding any infirmity in the aforesaid relevant documents filed by the assessee. Therefore, we are inclined to allow the appeal of the assessee and direct deletion of the addition of Rs.30,00,000/-. Consequently, the purported commission added of Rs.1,50,000/- is also directed to be deleted.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 31/01/2023.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/01/2023.
Vijay Pal Singh, (Sr. PS)



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**