

**THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'A', NEW DELHI**

Before Sh. C. M. Garg, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 29/Del/2018 : Asstt. Year: 2012-13

ITO, Ward-4(1), New Delhi	Vs.	M/s Baba Alloys Pvt. Ltd., B-3, M-Block, AVG Bhawan, Connaught Place, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AACCB7329N		

**Assessee by : Sh. P. C. Yadav, Adv.
Revenue by : Sh. Kanv Bali, Sr. DR**

Date of Hearing: 08.02.2023

Date of Pronouncement: 14.03.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by Revenue against the order of the Id CIT(A)-2, New Delhi dated 31.08.2017.

2. The Revenue has raised the following grounds of appeal:

"1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made u/s 68 of the IT Act, 1961 amounting to Rs. 2,30,00,000/- on account of unexplained cash credits shown as share capital/share premium received.*

2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred and failed to appreciate that the assessee failed to prove the identity of share applicants, genuineness of transactions and creditworthiness of the share applicants to invest in Assessee Company.*

3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in observing that the assessee had discharged the onus laid upon it.*

4. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in admitting additional evidences filed by the assessee even as the case of the assessee does not fall in any of the exceptions laid down in Rule 46A of the Income Tax Rules, 1962."*

3. The Assessing Officer made addition of Rs.2.3 Cr. on account of share capital received from seven corporate entities of which two were registered at West Bengal and the remaining five at Delhi. The shares of face value of Rs.10/- has been issued with a premium of Rs.90/-. Before the AO, the entities has submitted replies to the notices issued u/s 133(6) of the Income Tax Act, 1961 and also filed their respective ITRs, bank statement and confirmed copy of account. The AO held that there were transfer of monies in the account of these entities a few days before subscribing to the shares of the assessee company. From the page no. 7 of the Assessment Order, it can be observed that the notices issued u/s 133(6) of the Income Tax Act, 1961 have been duly complied and summons issued u/s 131 of the Income Tax Act, 1961 have been responded. In response to the summons u/s 131 issues, statement of Sh. Arun Kumar Mittal and Sh. Satish Garg has been recorded by the Assessing Officer who confirmed that the share premium of Rs.90/- per share was decided on the basis of further prospects of the assessee company. The AO made addition holding that the summons issued to Directors of the other companies have been unserved and they were not produced by the assessee before the AO and also owing to the low returned income of these parties. The amount of share application received by the assessee has been treated u/s 68 of the Income Tax Act, 1961.

4. The matter travelled to Id. CIT(A).

5. Before the Id. CIT(A), the assessee filed the ITRs, company master data, Form 23AC, Audit Report, Form No.AOC4, copy of the registry of shareholders. The Id. CIT(A) forwarded the additional evidence to the AO who offered "no new comments". Further, the AO vide report dated 04.01.2017 submitted that summons have been issued u/s 131 of the Income Tax Act, 1961 dated 13.12.2016 and 23.03.2016 to all the seven share applicants out of which two notices issued to Vasudev Enterprises and Skand International Pvt. Ltd. have been returned and the remaining five notices were served. However, the AO submitted that none of the persons appeared before the AO. The AO further submitted that the case of the assessee do not fulfill in the provisions of Rule 46A(1)(a) to 46A(1)(d). After considering the remand report, the Id. CIT(A) held that the assessee has duly discharged their burden of proving the sources and deleted the addition. For the sake of ready reference, the operative part of the Id. CIT(A) order is reproduced as under:

"3.5.1 I have found that appellant has furnished requisite details of the transactions to the AO. The details filed by the appellant and the share applicants before the AO include the following documents pertaining to the transactions:

- a. Copy of the return of income of each share applicant.*
- b. Copies of the Audited Balance Sheets of the share applicants.*
- c. Confirmations of transactions by the applicants.*
- d. Copies of the Bank Statements of the applicants.*

3.5.2 The notices issued u/s 133(6) were replied to by the investors. Thus their existence is established and there is no doubt about their existence. The other documents filed by the appellant, in support of its arguments, have also been examined and it was found that:-

- All the investors are companies incorporated by law.*
- Unique identification nos., named as Company Identity Numbers (CIN) have been allotted to the investors by the MCA.*
- CIN is allotted on the basis of certain set of documents duly certified by a CA or CS.*
- PANs have been allotted to all the investors by the I.T. department.*
- Being artificial persons, companies work through their directors, to each of whom Director Identity (DIN) is allotted by the MCA.*
- Again, DIN is allotted on the basis of certain set of documents duly certified by a CA or CS.*
- Appellant had issued shares to all the investors. Copy of register of share holders/members of the appellant company containing details of the aforesaid Seven (7) companies, has been filed. It is pertinent to note that shares cannot be allotted to any non existing entity.*
- Under these circumstances, non existence of a company cannot be imagined.*
- Further all the investors have filed their financials which show that the net worth of each is much more than the amount invested by it in the appellant company.*

- *It is not the case of the appellant that the investments have been made out of the current income. Thus the observation of the AO regarding low income is of no relevance, in view of the adequate net worth of the investors.*

3.5.3 The above documents, in possession of the AO, squarely satisfy the three ingredients of Section 68 of the I.T. Act, 1961, namely identity and creditworthiness of the investing persons and genuineness of the transactions. The case laws relied upon by the AO have also been examined and it is found that those pronouncements are quite different on facts and circumstances. For instance, in the case of M/s. Nova Promoters and Finlease Pvt. Ltd. 18 Taxman.com 217, the Assessing Officer was in receipt of information from the Investigation Wing that the assessee had obtained accommodation entries in the garb of share application money, which is not the case in the instant appeal. Hence the judgments relied upon by the A.O. cannot be applied in the case of the appellant, looking into the aspect that there are contrary pronouncements, by the Hon'ble jurisdictional Delhi High Court, on this issue, subsequent to the judgments upon which the AO has placed reliance.

3.5.4 Before proceeding to make addition with regard to sec. 68, the AO was required to discharge his burden as laid upon him under the law by bringing sufficient material on record to disbelieve the claim of the appellant. However, the AO has failed to bring any material on record that the amount of Rs.2,30,00,000/- is the appellant's own unaccounted money which was routed through the seven companies. As far as non production of directors of investor companies is concerned,

reliance is placed on the recent judgment of Hon'ble Bombay High Court in the case of The Commissioner of Income Tax v M/s. Orchid Industries Pvt. Ltd., Income Tax Appeal No. 1433 of 2014, wherein the court has held as under:-

"no response/appearance by shareholders before Revenue against summons issued not fatal as all the available documentary evidences were sufficient to establish the genuineness of the parties; ITAT had observed the documents submitted by assessee such as PANs of the shareholders along with the confirmations, their bank statements showing payment of share application money; ITAT had also observed that assessee had produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, as also the books of account; ITAT had upheld assessee's reliance on Division Bench ruling in Gagandeep Infrastructure (P.) Ltd. which had the same facts and ruled in assessee's favour; ITAT had noted that the balance sheet and profit and loss account of these persons disclosed that they had sufficient funds in their accounts for investing in the shares of the assessee [TS-304-HC-2017 (BOM)]"

Therefore, the addition made by AO without any evidence deserves to be deleted.

3.5.5 Reliance is placed on the recent judgment of the Hon'ble Jurisdictional Delhi High Court, extracts of which are as under-

"Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of

Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

(Para 38)

For all the aforementioned reasons, the Court is of the view that the IT AT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the assessee herein was not justified in law.

(Para 39)

Turning to the additions under Section 68 of the Act made on merits for three of the AYs. A perusal of the common impugned order of the ITAT reveals that a very detailed discussion has been undertaken after analyzing the seized material.

(Para 40) PRINCIPAL COMMISSIONER OF INCOME TAX & ORS. vs. BEST INFRASTRUCTURE (INDIA) PVT. LTD. & ORS. (2017) 99 CCH 0163 Del (HC)"

3.5.6 Thus the action of the AO clearly establishes that there is no adverse material with him and the addition has been made

contrary to his own findings and facts and circumstances of the case and against the settled proposition of law and thus the addition of Rs. 2,30,00,000/- is deleted.

3.5.7 My above view is fortified by the following decisions:-

"Where appellant had furnished income-tax returns, balance sheets, ROC particulars and bank account statements of shareholders, source of share application money had been satisfactorily explained. Section 68 of the Income-tax Act, 1961 - Cash credits (Share application money) - Assessment Year 2000-01 - Assessee received share application money during relevant assessment year - Assessing Officer held that assessee had not given satisfactory explanation and included entire amount under section 68 - On appeal, assessee furnished income-tax returns, balance sheets, ROC particulars and bank account statements of shareholders - Commissioner (Appeals) considering said materials held that share application money or source of share application money had been satisfactorily explained and deleted addition - Tribunal confirmed order of Commissioner (Appeals) - Whether entire issue being purely factual, no interference was called for with Tribunal's order - Held, yes [Para 7] [In favour of assessee] Commissioner of Income-tax v. Expo Globe India Ltd. [2014] 51 taxmann.com 208 (Delhi)."

3.5.8 Hon'ble High Court of Allahabad in the case of CIT (Central) v. Vacmet Packaging (India) (P.) Ltd. [2014] 45 taxmann.com 204 has held that Assessing Officer made addition under section 68 on account of share application money received by the appellant company even though appellant had filed all documentary evidences, like share application forms,

copies of bank statements, income-tax returns, balance sheets, share allotment certificates, board resolutions of share applicants, PAN cards, certificate of Registrar - Moreover, applicant companies also confirmed investments made by them and submitted all relevant documents - since the appellant had discharged onus establishing identity and creditworthiness of applicant companies and genuineness of transactions, addition made by Assessing Officer under section 68 was to be deleted.

3.5.9 Jurisdictional Hon'ble Delhi High court in the case of CIT v. Fair Finvest Ltd. 357 ITR 146(Delhi) has held that - "Where assessee had filed documents including certified copies issued by Registrar of Companies in relation to share applications and affidavits of directors, Assessing Officer could not make addition on account of share application money solely on basis of investigation report." Similar view has been taken by Allahabad High court in the case of CIT (Central) v. Vijay Kumar Jain 221 Taxman 180(All) - assessee had taken a loan from company 'B' - Assessing Officer noticed that a raid was conducted in case of 'B' wherein it was found that said company was engaged in providing accommodation entries - Assessing Officer thus added amount of loan taken from said company in assessee's taxable income under section 68 - Commissioner (Appeals) found that lenders were regular income-tax assessee and their PANs were on record - Further, amount had been advanced through account payee cheques and before issuing cheques, lenders had got balance in their accounts - Amount of loan had also been repaid through account payee cheques - In aforesaid circumstances, Commissioner (Appeals) opined that identity and creditworthiness of lenders had duly been proved -

Accordingly, addition made by Assessing Officer was deleted - Tribunal confirmed order of Commissioner (Appeals) - Whether on facts, impugned order passed by appellate authorities did not suffer from any infirmity and, thus, revenue's appeal was to be dismissed - Held, yes [Para 6] [In favour of assessee]

5.12 In an identical case before High Court of Gujarat in the matter related to CIT vs. Apex Therm Packaging (P.) Ltd. [2014] 42 taxmann.com 473 (Gujarat) it has been held that when full particulars, inclusive of confirmations with names, addresses and PAN Numbers, copies of income tax returns, balance sheets, profit and loss accounts and computations of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan accounts were duly reflected in balance sheet, Assessing Officer was not justified in making addition.

3.5.13 High Court of Rajasthan while deciding appeal of the Revenue in the case of CIT, Ajmer v. H.S. Builders (P.) Ltd [2012] 26 taxmann.com 86 (Raj.) has observed, "Tribunal deleted addition on account of cash credits noting that assessee had submitted accounts of returns, computations of income, and balance-sheets of creditors and also supplied all their particulars, that money given to assessee had been shown in respective balance-sheets of creditors, and that creditors who were called by Assessing Officer did affirm fact of giving money and explained source - findings of Tribunal being based on appreciation of evidence and relevant considerations and not shown to be perverse could not be interfered with"

Thus in my considered opinion, based upon the position of law and facts as discussed above, the appellant has been able to

discharge its onus and AO's action in making addition of the above said amount was contrary to law and facts of the case. Therefore, keeping in view the entire facts of the case and the position of law discussed above, this ground of appeal is decided in favour of the appellant and the addition of Rs. 2,30,00,000/- is hereby deleted."

6. Heard the arguments of both the parties and perused the material available on record.

7. We find that AO has not brought any material on record to dislodge the sanctity of the above documents submitted that after the filing of the above documents the burden casted upon the assessee, stood discharge and the burden is on revenue to refute the documentary evidences filed by assessee with cogent material. It is not a case of share application money or a case where there is any information of investigation wing vis-à-vis generation of share application money/long term capital gain etc. Further, the assessee relied on the observations of the Id. CIT(A) made in Para-3.5.4 at page no-12 of the Id. CIT(A) order. The same could not be disputed by the Revenue by bringing any evidences contra to dispute the stand of the Id. CIT(A). It is settled position of law that no 3rd party would come forward with false evidence to oblige an assessee. Reference can be made to the judgment of Hon'ble Allahabad High Court in the case of Sheo Narian Duli Chand reported in 72 ITR 766(AII) wherein it was held that there is no presumption that a witness appearing for an assessee come forward to give false evidence to oblige an assessee. Similarly provisions of section 277A (For third party) provides that if any person willfully helps another person for falsification of books of

accounts then such person would be punishable with imprisonment and fine. Therefore discarding the 3rd party confirmation without bringing any material on record is arbitrary. Further, non service of summons by inspector or the presumption that investor companies are not in existence, without refuting the documentary evidences, alone cannot be a ground to make addition under section 68 of the Act. In this regard judgment of Hon'ble Delhi High Court in the case of Kamdhenu steels reported in 361 ITR 220 (Del) is relevant where it has been observed as under:-

"34. No doubt, what the AO observed may make him suspicious about such companies, either their existence, which may be only on papers and/or genuineness of the transactions, when he found that investing companies are not available at given addresses or that the issuance of the cheque representing share application money or preceded by the deposit of cash in the bank account of these investment companies.

35. The important question which arises at this stage is as to whether on the basis of these facts, could it be said that it is the assessee which has not been able to explain the source and receipt of money. According to the assessee, he had given the required information to explain the source and was not obligated to prove source of the money. It is the submission of the assessee that even in case there is some doubt about the source of money in giving into coffers of the share applicants which they invested with the assessee, it would not automatically follow that the said money belongs to the assessee and becomes unaccounted money. According to us, the assessee appears to be correct on this aspect. We feel that

something more which was necessary and required to be done by the AO was not done. The AO failed to carry his suspicious to logical conclusion by further investigation. After the registered letters sent to the investing company had been received back undelivered, the AO presumed that these companies did not exist at the given address. No doubt, if the companies are not existing, i.e., they have only paper existence, one can draw the conclusion that the assessee had not been able to disclose the source of amount received and presumption under s. 68 of the Act for the purpose of addition of amount at the hands of the assessee. But, it has to be conclusively established that the company is non-existence.

36. The AO did not bother to find out from the office of the Registrar of Companies the addresses of those companies from where the registered letter received back undelivered. If the address was same at which the letter was sent or the Inspector visited and no change in address was communicated, perhaps it may have been one factor. In support of the conclusion which the AO wanted to arrive at, that by itself cannot be treated as the conclusive factor. As pointed out above, these applicant companies have PANs and assessed income-tax. No effort was made to examine as to whether these companies were filing the IT returns and if they were filing the same, then what kind of returns these companies were filing. If there was no return, this could be another factor leading towards the suspicion nurtured by the AO. Further, if the returns were filed and scrutiny thereof reveals that such returns were for namesake, this could yet another be contributing factor in the direction AO wanted to go. Likewise, when the bank statements were filed, the AO

could find out the address given by those applicant companies in the bank, who opened the bank accounts and are the signatories, who introduced those bank accounts and the manner in which transactions were carried out and the bank accounts operated. This kind of inquiry would have given some more material to the AO to find out as to whether the assessee can be convicted with the transactions which were allegedly bogus and/or companies were also bogus and were treated for namesake. We say so with more emphasis because of the reason that normally such kind of presumption against the assessee cannot be made as per the law laid down in various judgments noted above. Just because of the creditors/share applicants could not be found at the address given it would not give the Revenue a right to invoke s. 68 of the Act without any additional material to support such a move. We are reminding ourselves of the following remarks of a Division Bench of this Court, in its decision dt. 2nd Aug., 2010 in the case of CIT .vs. Dwarkadhish Investment (P) Ltd. (IT Appeal No. 911 of 2010) [reported at (2010) 45 DTR (Del) 281: (2011) 239 CTR (Del) 478—Ed.] in the following words:

"Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke s. 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the 'source of source'.

8. Hence, keeping in view, the entire facts specific to the instant case, we decline to interfere with the order of the Id. CIT(A).

9. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 14/03/2023.

Sd/-

(C. M. Garg)
Judicial Member

Dated: 14/03/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR