

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.50/Kol/2021
Assessment Year: 2012-13**

Income Tax Officer Ward-4(1) Kolkata	Vs.	Tulsi Rolling & Flour Mills Pvt. Ltd. 3/1, Mango Lane Kolkata-700001 (PAN : AABCT2339P)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri G. H. Sema, CIT, DR
Respondent by : Shri S. K. Tulsiyan, Advocate & Ms. Puja
Somani, ARs

Date of Hearing : 17.01.2023
Date of Pronouncement : 21.03.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A)-7, Kolkata vide ITA No. 713/CIT(A)-7/Ward-4(1)/Kol/15-16 dated 14.09.2020 against the order of Ld. ITO, Ward-4(1), Kolkata passed u/s. 144 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 12.03.2015.

2. Revenue has taken as many as nine grounds of appeal all of which relate to granting of relief by the Ld. CIT(A) to the assessee on account of addition of undisclosed cash credit u/s. 68 of the Act for Rs.6,35,00,000/- for share capital and share premium raised by the

assessee during the year. Grounds are not reproduced for the sake of brevity.

3. We note that there is a delay of 43 days in filing the present appeal for which a petition for condonation of delay is placed on record which is dated 16.03.2021. We note that the impugned order of Ld. CIT(A) is dated 14.09.2020 and the present appeal was ought to be filed by 05.01.2021 by taking the date of communication of the order as 06.11.2020 noted in Form 36. This period of delay falls within the period of Pandemic of Covid-19 which has been excluded by the Hon'ble Supreme Court in the case of *suo moto* Writ Petition (C) No. 3 of 2020 dated 10.01.2022 by which the period from 15.03.2020 to 28.02.2022 has been directed to be excluded for the purpose of limitation. Vide this order a further period of 90 days has been granted for providing the limitation from 01.03.2022. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

4. Brief facts of the case are that assessee was incorporated on 10.03.1989 with the object of carrying on business of cereals, cereal products, atta, suji, wheat and other allied products. Assessee filed its return of income on 22.09.2012 reporting total income of Rs.2,78,754/-. During the year, assessee had issued 6,35,000 shares at a face value of Rs. 10/- per share and share premium of Rs. 90/- per share. Case of the assessee was selected for scrutiny with the reasons "large share premium received" for which statutory notices were issued to the assessee. These notices could not be complied with and Ld. AO completed the assessment u/s. 144 of the Act by treating the amount of Rs.6,35,00,000/- as unexplained income of the assessee. Aggrieved, assessee went in appeal before the ld. CIT(A). Before the Ld. CIT(A), assessee claimed that it had appeared before the ld. AO and had submitted the following documents:

- (i) Audited accounts of the assessee company;
- (ii) Relevant bank statement of the assessee company;
- (iii) Form 2 filed with ROC
- (iv) Ledger of all the eleven share applicant companies in the books of the assessee.
- (v) Relevant bank statement, audited accounts, ITR Acknowledgement for AY 2012-13, share application form, source of funds, certificate of incorporation, Memorandum & Articles of Association of all the 11 share applicant companies.

4.1. Before the Ld. CIT(A), all these documents were furnished who had considered the same in the appeal. While allowing the appeal of the assessee and granting it the relief on the addition made u/s 68 of the Act, ld. CIT(A) had placed reliance on the submissions made by the assessee. There is nothing mentioned in the impugned order which demonstrates about any enquiry conducted or cause to be conducted by the ld. CIT(A) on the submissions made before him since it is a case of assessment completed u/s 144 of the Act. The observations of the ld. CIT(A) are more in the nature of philosophical rendition on the subject of unexplained cash credit which is treated as income of the assessee u/s 68 of the Act by simply quoting the paragraphs from several judicial precedents. It is difficult to discern as to how the judicial precedents referred are applicable in the given set of facts and circumstances of the present case. According to us, it is important to reproduce the relevant extracts of the narration and finding given by the ld. CIT(A) excluding the reference to several judicial precedents made therein for a meaningful appreciation of our observations. The same is as under:

“4.5. To sum up the foregoing, it is observed that all the share subscribers had furnished copies of Income-tax Acknowledgments and their respective scrutiny assessment orders u/s 143(3) or u/s 147 which showed that each of them were regular income-tax

assessee who were assessed in their own rights with reference to their audited financial results. These facts established the identity of the share applicants. It is further noted that each of the share subscriber had furnished copies of the audited accounts for the FY 2011-12. Examination of these accounts revealed that each share subscribing company was having substantial own funds in the form of capital & reserves which were several times more than the share subscription amount paid to the appellant. I find that only a fraction of the net owned funds of the respective subscribing companies was invested in assessee's equity shares. The investments made by each of the share subscribers were paid by way of account payee cheques and/or RTGS and there was no prior cash deposit in their bank accounts. In view of the aforesaid facts it can be safely inferred that the assessee had discharged its onus of substantiating the creditworthiness of the shareholders. The shareholders had also furnished copies of their share allotment advices. They had also explained the nature of their respective source of funds. All these facts considered cumulatively substantiate the genuineness of the transactions involving subscription of share capital.

4.6 It is noted that in the impugned order much emphasis was placed on the fact that the shareholders did not respond to the notices u/s. 131. I however find that although the share subscribing companies did not appear before the AO yet the material documents requisitioned by the AO in his notice u/s 131 had already been furnished before the AO by the appellant. From the perusal of the assessment order, I find that save & except making an assertion that the Directors of the share applicant companies failed to appear before him, the AO did not bring on record any substantive material to disprove the documentary evidences which the appellant as well as the share subscribers had placed on AO's record in support of the share subscription transactions. The facts and documents furnished by the shareholders in response thereto, supported the AR's contention that the identity of all the eleven share subscribing companies stood established. Referring to the copies of the bank statements, the AR established that payment of subscription amounts were recorded in the bank statements of the respective companies. The entries in the bank statement proved that the share subscription amount was transacted through banking channel. Besides the entries in the bank statements also substantiated that before payment of share subscription amounts, no cash was deposited in the bank accounts of the subscribing companies. The AR further pointed out that appellant had furnished explanations before the AO with regard to immediate sources from which share subscription amounts were

paid. On these facts therefore I find that in terms of Section 106 of the Evidence Act, the creditworthiness of the share subscribers and the genuineness of the transactions could not have been doubted by the AO merely on the ground that Directors of the share subscribers did not appear before the AO for verification.

4.8 There is also no denial that the AO while assessing the income is permitted to take into consideration the human probabilities and if he proves that the conduct of the parties is not in conformity with the actions of prudent person then he may overlook the form of the transaction and find out the substance of the transaction and determine the tax consequences based on the real facts. In the impugned order the AO has doubted the genuineness of the entire transaction on the ground that it was against the human probability that the companies would invest in shares of the appellant company. The AO has also alleged that the unaccounted monies belonging to the assessee was ploughed back in the form of share capital by the appellant. I however find that before these conclusions were recorded the AO himself did not bring on record sufficient tangible and cogent material to support his conclusion that the amount credited in the assessee's books in the form of share capital and premium actually represented assessee's undisclosed income.

4.9 I find that in the appellant's case, the AO did precious little to bring on record any affirmative evidence which proved that issue of shares was not genuine. On the contrary; the materials on record showed that the assessee had furnished documents requisitioned which established that each company had subscribed to the equity shares of the assessee.

The AO while making the addition u/s 68 was also influenced by the fact that the assessee had charged high premium from the share subscribing companies. In my view for deciding the issue of application of Section 68 to the receipt of share subscription amounts, all that the assessee was required to prove was the identity & creditworthiness and genuineness of the transactions. Adequacy or inadequacy of share premium charged was not relevant consideration in deciding the application of Section 68 of the Act.

Applying the judicial principles laid down in the above decisions to the appellant's case, I find that the AO had made addition u/s 68 without proper application of mind and incorrect appreciation of the

relevant provisions of the Act. In the above judicial decisions, it has been held that before an addition u/s 68 is made, it is necessary for the AO to bring on record irrefutable material or evidence which would prove that there was no valid issuance of the shares and for that reason the assessee had failed to prove identity & creditworthiness of the shareholders and also failed to substantiate genuineness. If these touchstones are applied to the appellant's case then I find that the copies income-tax acknowledgments and service of notices at their addresses established the identity of all the share subscribers. In the balance sheets of the respective share subscribers, the investments in assessee's share were recorded and each subscriber in its balance sheet had disclosed sufficiently large investible funds. The assessee had also filed copies of the bank statements of the respective share subscribing companies which established that the share subscription amounts were received through banking channel. The sources of making payment were also furnished and the entries in bank statements indicated that there was no deposit of cash prior to clearance of the cheques in assessee's favour. All these facts and documents considered cumulatively establish that the assessee had discharged the onus of proving creditworthiness of the share subscribers and the genuineness of the transactions. I therefore hold that the AO was not justified in making the impugned addition of Rs.6,35,00,000/- u/s 68 of the Act which is accordingly deleted. These grounds are therefore allowed.

In the result, the appeal of the appellant is treated as allowed.”

5. It is important to keep in mind, the vital fact of assessment being completed u/s 144 of the Act by the ld. AO in perspective which has a bearing on the conclusions drawn by the ld. CIT(A). In para 4.8, ld. CIT(A) has observed that there is no denial that the Ld. AO while assessing the income is permitted to take into consideration the human probabilities and if he proves that the conduct of the parties is not inconformity with the action of a prudent person, then he may overlook the form of the transaction and find out the substance of the transaction to determine tax consequences based on real facts.

5.1. Ld. CIT(A) has observed that AO has doubted the genuineness of the entire transaction on the ground that it was against the human

probabilities that the company would invest in shares of the assessee. He has also noted that Ld. AO has alleged that the unaccounted monies belonged to the assessee and was ploughed back in the form of share capital by the assessee. On these observations, Ld. CIT(A) further noted that before drawing of such conclusions by the Ld. AO, he himself did not bring on record sufficient tangible and cogent material to support the conclusion drawn by him that the amount credit in the books of the assessee in the form of share capital and share premium actually represented the undisclosed income of the assessee. We take note of the finding given by the Ld. CIT(A) that the Ld. AO did not do anything to bring on record any affirmative evidence which prove that issue of shares was not genuine.

6. In the light of these observations made by the ld. CIT(A) in respect of the approach adopted by the Ld. AO in the assessment proceeding vis-à-vis the examination and verification undertaken by the Ld. CIT(A) himself on the details and documents furnished, we are of the view that Ld. CIT(A) ought to have given reasonable opportunity to the Ld. AO for making his case on the material made available before him by way of calling remand report, more importantly when the assessment is completed u/s 144 of the Act and assessee claims that all these were furnished in the course of assessment proceeding.

6.1. Thus, in view of above, we find it proper to remit the matter back to the file of Ld. CIT(A) for afresh adjudication so as to afford a reasonable opportunity of being heard to the Ld. AO by way of calling a remand report on the material placed on record in respect of the claim made by the assessee towards issue of share capital and share premium. We also direct the Ld. AO to be diligent in expeditious compliance on furnishing the remand report as and when called by

the Ld. CIT(A) in this respect. Needless to say, that the assessee be also given a reasonable opportunity of being heard to make any further submission, if the situation so demands. Further, in the present regime of faceless procedure adopted by the Department for assessments and first appeals, we also direct that office of Id. Jurisdictional Assessing Officer (JAO) should facilitate transmission of case records of the assessee to the appropriate first appellate authority through National Faceless Appeal Centre (NFAC), for the purpose of efficacious execution of our aforesaid directions. Accordingly, appeal of the revenue is allowed for statistical purposes.

7. In the result, appeal of the revenue is allowed for statistical purposes.

Order pronounced in the open court on 21st March, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 21st March, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT(A)-7, Kolkata
 4. ITO, Ward-4(1), Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata