

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.646/Kol/2020
Assessment Year: 2012-13

ITO, Ward-6(1), Kolkata..... Appellant

vs.

M/s M.D. Ornaments Pvt. Ltd..... Respondent
1/1A, Vansittart Row,
Dalhousie, Kolkata-1.
[PAN:AAACD9561A]

Appearances by:

Shri Rajeeva Kumar, Adv., appeared on behalf of the appellant.

Shri Vijay Kumar, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : February 09, 2023

Date of pronouncing the order : April 19, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 02.09.2020 of the Commissioner of Income Tax (Appeals)-7, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The Revenue in this appeal is aggrieved by the action of the CIT(A) in deleting the additions made by the Assessing Officer in respect of receipt of Rs.2,28,00,000/- by the assessee company which was treated by the Assessing Officer as unexplained income of the assessee u/s 68 of the Act on the ground that the assessee had failed to establish the identity, genuineness and creditworthiness of the share subscribers.

3. At the outset, the ld. counsel for the assessee has invited our attention to para 2 of the impugned assessment order to submit, wherein, the Assessing Officer has noted as under:

“3. In response to the aforesaid notices, Shri P. K. Ketan(FCA), Authorized Representative (A/R) of the assessee-company appeared from time to time to explain the return and file various details and documents as per requisition u/s 142(1).”

4. The ld. counsel has further invited our attention to the impugned assessment order to submit that despite specifically noting that the assessee has furnished all the details and evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the Assessing Officer did not bother to examine the details and evidences furnished by the assessee. That the impugned addition has been made by the Assessing Officer solely on the ground that the directors of the shareholder companies did not appear before the Assessing Officer in response to the summons issued u/s 131 of the Act.

5. The ld. counsel has further invited our attention to the impugned order of the CIT(A) to submit that the ld. CIT(A) has categorically noted that the assessee during the year had raised share capital including share premium amounting to Rs.2,28,00,000/- from four share subscribers. The Assessing Officer had issued notices u/s 133(6) of the Act to the share applicants and in response, they all confirmed the transactions and furnished details/documents as called for including source of fund in their hands. The ld. CIT(A) has considered the evidences and details on record and found that the assessee has been able to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction. The relevant part of the order, for the purpose of ready reference, is reproduced as under:

“4.2 I have considered the submission of the AR of the appellant in the backdrop of the assessment order. I have also considered the various judicial decisions referred to by the AO as well as the AR in support of their respective stands in the matter. I have also considered the relevant materials on record in deciding the matter. The brief facts of the issue in the case are that the AO treated the entire share capital raised by the appellant to the extent of 2,28,00,000/- to be assessable us 68 of the Act. On the other hand, the AR of the appellant contested on the action of the AO to the effect that section 68 was not applicable in the appellant's case for the year under consideration for the following reasons: (a) that identities of the share subscribers stood proven as per documentary evidences (supra) (b) that creditworthiness of the share subscribers stood proven (supra) (c) that the genuineness of the transactions stood proven (supra). In such view of the matter, I find the AO cannot abruptly come to the conclusion that section 68 of the Act was applicable in the appellant's case just for the allegations as launched by the AO. I find that all relevant documentary evidences were before the AO who could have decided the case on merit but however this did not happen. The copies of the documents submitted in the course of the assessment proceedings appear at Page Nos. 1 to 97 of the paper book submitted by the appellant. In the instant case, the appellant, in response to the notices issued during the assessment proceedings, had fled a number of documents in Support of the receipt of share application money and no defect whatsoever was found therein, hence there was no reason for drawing any adverse inference merely for the reason of non-appearance of the directors of the share applicant companies. The appellant has submitted several judicial pronouncements to the effect that mere non-appearance of the share applicant is no basis for invoking provisions of Sec. 68 which includes the decision of the Hon'ble Supreme Court in the case of CIT Vs. Orissa Corpn. (P) Ltd. [1986] 159 ITR 78 (SC) wherein the Hon'ble Supreme Court held as follows: In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were the income-tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such could arise.

The High Court was, therefore, right in refusing to refer the questions sought for. Decision of the High Court affirmed"

In view of the foregoing discussion as well as the judicial precedents pertinent to the issue at hand (supra), I do not find any premise to endorse the action of the AO in making the impugned addition of ₹2,28,00,000/- as unexplained cash credit u/s 68 of the Act.

4.3. *With regard to the issue of charging high premium on the shares issued by the appellant company, it may be noted that fixing of share premium is a commercial decision and therefore the same cannot be interfered with. It was further argued that Share Premium is a capital receipt, and in the absence of any statutory provisions, share premium cannot be assessed as income. The matter is well covered by various judicial decisions as mentioned in the written submission of the AR (supra). The AO has drawn adverse inference on account of high share premium charged by the assessee considering its EPS. It has been held in plethora of cases that once the identities and creditworthiness of the share applicants and genuineness of the transaction is established, Sec. 68 cannot be invoked on the ground of high share premium. Reference in this regard is made to the decisions in the following cases (a) **PCIT Vs. Chain House International (P.) Ltd. [2018] 98 taxmann.com 47 (Madhya Pradesh)**. Once genuineness, creditworthiness and identity of investors are established, no addition could be made as cash credit on ground that shares were issued at excess premium (SLP against the order has been dismissed by the Hon'ble Supreme Court in PCIT vs. Chain House International (P) Ltd. (2019] 103 taxmann.com 435 (SC), (b) **Principal Commissioner of Income Tax v. Rohtak Chain Co. (P) Ltd.* [2019] 110 taxmann.com 59 (SC)**. In this case also the SLP filed by revenue against High Court ruling that once genuineness, creditworthiness and identity of investors were established, no addition could be made as cash credit on ground that shares were issued at excess premium has been dismissed, (c) **Principal Commissioner of Income-tax v. Bharat Securities (P.) Ltd.* [2020] 113 taxmann.com 32 (SC)**. In this case also the SLP of the revenue against High Court ruling that once genuineness, creditworthiness and identity of investors are established, no addition could be made as cash credit on ground that shares were issued at excess premium has been dismissed.*

4.4. *Further I find the share subscribers have sufficient net worth of their own to make investments as elucidated below:*

<i>Name of the company</i>	<i>Capital</i>	<i>Reserves</i>	<i>Net Worth</i>	<i>Invested in Assesses company</i>	<i>Percent age of NW</i>
<i>Neelanchal Distributor</i>	<i>32,91,500</i>	<i>3,40,54,573</i>	<i>3,73,46,073</i>	<i>40,00,000</i>	<i>10.71</i>

<i>Pvt. Ltd</i>					
<i>Windson Vinimay Pvt. Ltd</i>	58,59,000	6,61,69,111	7,20,28,111	83,00,000	11.52
<i>Subhdhristi Advisory Pvt. Ltd</i>	55,38,500	6,95,85,797	7,51,21,297	35,00,000	4.65
<i>Khusi Dealer Pvt. Ltd</i>	70,55,000	9,31,50,581	10,02,05,581	70,00,000	6.98

4.5. That, as evident from the 4 (four) share subscribers' information on record, all of them were either subjected to assessment u/s 147/143(3) of the Act or the returns accepted by the AO. That the profiles of the assessment status of the five subscriber companies are as follows:

- a) *Neelanchal Distributor Pvt. Ltd:* Return for the AY 2012-13 was processed u/s 143(1) of the Income Tax Act, 1961.
- b) *Windson Vinimay Pvt. Ltd:* Return for the AY 2012-13 was processed u/s 143(1) of the Income Tax Act, 1961 vide order dt.15.02.2013.
- c) *Subhdhristi Advisory Pvt. Ltd.:* Return for the AY 2012-13 was processed u/s 143(1) of the Income Tax Act, 1961.
- d) *Khusi Dealer Pvt. Ltd.:* Return for the AY 2012-13 was processed u/s 143(1) of the Income Tax Act, 1961.

4.6. On the ground of High Share Premium, the AO in its order has relied upon the decision in the case of **CIT V Durga Prasad More 82 ITR 540 (SC)**. It has been held in the case of *Green Infra Ltd. ITO [2013] 38 taxmann.com 253 (Mumbai)* and *ITO v Trident Shelters Ltd., ITA No, 1160/Hyd/2012 dated 22.01.2014* that fixing of issue price is a commercial decision and in the absence of any provision under the Act, the same cannot be interfered with. Even section 56(2)(vii)(b) does not permit the AO to question the share premium charged by the assessee. It merely provides for charging share premium to tax in the circumstances and to the extent provided therein. Reference in this regard is made to the decision of the Hon'ble jurisdictional ITAT in the case of **Subhlakshmi Vanijiya Pvt. Ltd. vs CIT [2015] 60 taxmann.com 60 (Kolkata-Trib.)** wherein the Hon'ble ITAT held as under:-

"13.aj. We are in full agreement with the ld. AR that the judgment in the case of *Vodafone India Services (P.) Ltd. (supra)* is an authority for the proposition that share capita/premium are capital receipts and cannot be charged to tax. We also fully endorse the argument about the introduction of section 56(2)(vii)(b) w.e.f. assessment year

2013-14 which provides for charging share premium to tax in the circumstances and to the extent provided therein.....”

4.7. The issue of invoking the test of human probabilities on account of high share premium is directly covered by the decision of the Hon'ble ITAT Bangalore in the case of **Janani Infrastructure Pvt. Ltd. v ACIT in ITA No. 698-699/Bangalore/2018 decided on 02.08.2019** wherein it was held as under: -

"61. We noticed that the Ld CIT(A) has applied the theory of Human Probabilities. We also noticed that the Hyderabad bench of Tribunal has observed in the case of Bharati Cement Corporation (supra) that the test of human probabilities cannot be applied to business transactions, as they are based on cogent materials. In any case, the Ld D.R has agreed that the receipt of share premium has to be tested u/s 68 of the Act. Hence the theory of human probabilities cannot be applied in this case."

Therefore, the AO has erred in invoking the test of human probabilities.

4.8. The AO has further relied upon the decision in the case of **M/s Bisakha Sales Pvt Ltd. v CIT [2014] 52 taxmann.com 305 (Kolkata- Trib.)**. In this case, it was said that where assessee-company received share application money with huge unjustified share premium from Corporate entities, merely because said amount was received through banking channel, Assessing Officer was not justified in accepting said transactions as genuine without making proper enquiries. Apparently, The AO has not properly appreciated that decision of the Hon'ble ITAT. The Hon'ble ITAT has never held that share capital and share premium can be assessed as unexplained cash credit merely for high share premium even though the identities and creditworthiness of the share applicant and genuineness of the transactions have been established. What is held by the Hon'ble ITAT is that revision proceedings u/s 263 are valid where the transactions have been accepted as genuine without making proper enquiries.

4.9. As such all the case laws relied upon by the AO are factually distinguishable.

5. The fact remains that the assessee filed complete details of share capital raised. All the investor are income tax assesseees and transactions have taken place through banking channels from accounts held by the investors in their own name and that each of the investors have net worth many times more than the amount invested. The notices and summons issue to the share applicants were duly served and complied with by filing details and evidences as called for and also confirming the investments made by them and explaining source thereof. As such I am of the considered view that the assessee has duly discharged the onus lying upon it u/s 68 and the burden shifted upon the AO whereas no

adverse material has been brought on record. In such case, provision of Sec. 68 cannot be invoked. In this regard, reference is made to the decisions in the following cases:

5.1. In the case of **Nemi Chand Kothari 136 Taxman 213 (Gauhati)**, the Hon'ble Gauhati High Court has thrown light on another aspect touching the issue of onus on assessee under section 68 of the Act, by holding that the same should be decided by taking into consideration also the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge.

5.2. In the case of **CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(All.)** on the issue of discharge of assessee's onus in relation to a cash credit appearing books of account, the Hon'ble High Court has observed and held as under.

"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors, (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AAC, setting aside the assessment order."

5.3. Hon'ble jurisdictional High Court, Calcutta in the case of **S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata 347 ITR 347 (Cal)**, has held as follows:

"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."

5.4. On the issue of creditworthiness of a creditor who is an income tax assessee and where the amount has been received through banking channels from bank account held by the creditor in his own name, the Hon'ble Jurisdictional Calcutta High Court in the case of **CIT Vs. Dataware Pvt. Ltd. ITA No. 263 of 2011 Date: 21st September, 2011** held as under:

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the Concurrent findings of fact recorded by both the authorities."

5.5. In the case of *Lovely Exports* reported in 216 CTR 295 (SC), the Hon'ble Supreme Court while dismissing SLP held as under:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee-Company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual

assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.”

5.6. Replying on the above decision in the case of *Lovely Exports, Hon'ble jurisdictional High Court in the case of CIT v Roseberry Mercantile (P) Ltd., ITAT No. 241 of 2010 dated 10-01-2011* held as follows:

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction."

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4,00,000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00,000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of [C.I.T. vs. M/s. Lovely Exports Pvt. Ltd.](#), reported in (2008) 216 CTR 195 allowed the appeal by holding that share capital/premium of Rs.24,00,000/- received from the investors was not liable to be treated under [Section 68](#) as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of [C.I.T. vs. M/s. Lovely Exports Pvt. Ltd.](#) [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

5.7 Again the Hon'ble High Court, Calcutta in the case of CIT v. Nishan Indo Commerce Ltd. (ITA No.52 of 2001) dated 02.12.2013 held as follows:

“We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds.”

5.8 Basically the law requires documentary evidences on record in dealing with the issue of authenticity. It is not the case of the AO that necessary documentary evidences are not on record but the only major reliance placed on his action is based on non attendance of the directors of the subscriber companies before him u/s 131 of the Act. It is no longer *res integra* that such non attendance should be considered as a factor which should be used by the AO in coming to an adverse conclusion against the appellant. On an overall analysis of the issue, I find that the AO has not made out his case with cogent material on record that the appellant could come under the purview of section 68 of the Act with regard to share capital as reflected in the balance sheet when there is no finding with any cogent material evidence that the same was actually bogus in nature. It is accordingly observed that creditworthiness of the share subscribers to make investment in the share capital of the appellant company cannot be a disputed matter as per material facts on record. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their creditworthiness and source of funds, as well as the genuineness of the transactions being investments in the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant during the year under consideration as clearly evident not only from their respective books of accounts but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant, in relation to section 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on the issue. Since the conditions precedent for discharging of burden of proof under the provisions of section 68 of the Act is met with adequate evidence, the addition made under such pretext deserves to be deleted. In this respect it is imperative to refer to the decision of the jurisdictional High Court in the case of CIT vs. Sagun Commercial (P) Ltd. [ITA No. 54 of 2001 dated 17.02.2011] wherein it was held as under:

“After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.

We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed.”

5.9 Further, the Hon’ble jurisdictional High Court in the case of CIT vs. Gayatri Portfolio Fund (P) Ltd. [ITA No.664 of 2004 dated 26.08.2014], it was observed as under:

“We find that the learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following observation:

“... We find that the identity of the 5 parties investing in the share capital is not in doubt. They are body corporates and their complete addressees are on record. This is the very first assessment in the life of the assessee company. The amounts were deposited by these 5 corporates per account payee cheques. These parties were not shareholders of the assessee company at the time when the case was reopened under [section 147](#) or when the summons were issued to them. We find that the assessee has filed before the A.O. copies of share application forms duly signed along with the complete addresses of the investors along with their I.T. file numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts. In these facts we find that the assessee has discharged its initial onus to prove the identity of the investors as well as their creditworthiness. It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels.”

Having found such, the Tribunal had relied on the judgement in [Hindusthan Tea Trading Co. Ltd. v. CIT \(Cal\)](#): 263 ITR 289 (Cal) to uphold the order of the CIT.

In view of the findings above noted, no substantial question of law arises and therefore, the appeal and the application are dismissed."

5.9 Again, the Hon'ble Jurisdictional High Court in the case of [CIT vs. Sanchati Projects \(P.\) Ltd.](#) [ITAT 140 of 2011 dated 08.06.2011] it was observed as under: -

"It appears from record that the assessee company during the relevant assessment year under appeal raised its share capital by way of receiving share application money against 1,64,000 equity shares aggregating to Rs. 82,00,000/- from 8 different parties. The Assessing Officer, however, treated the share application money of Rs. 45,00,000/- received from five different persons as unexplained cash credit in the hands of the assessee.

According to the Assessing Officer, those parties had the same addresses as that of the assessee and they had no fixed assets and utilised their capitals in share application of the assessee company. The Assessing Officer, therefore, was of the view that the money ultimately went to the beneficiary through these companies and there was no advertisement even published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant/companies were assessed to the tax and their PAN and acknowledgement of I.T. returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and thus, according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing Officer failed to establish that the share applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of share capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the share applicants.

We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of Rs.45,00,000/- done by the Assessing Officer. We are of the view that the order impugned does not suffer from any defect whatsoever and no question of substantial error of law arises justifying our interference.

The appeal is, thus, summarily dismissed."

5.11 There is no evidence adduced on record to show by the A.O that the identities of the share applicants are not proved and/or that the subscription made by them to the share capital of the appellant was not genuine and/or the source of investment was not fully explained to the satisfaction of the A.O. In view of the foregoing, the A.O is directed to delete the impugned amount of Rs.2,28,00,000/- made u/s 68 of the Act. There grounds are allowed."

6. A perusal of the above concluding part of the order of the CIT(A) reveals that the ld. CIT(A) has categorically noted that the share subscribers has enough net worth of their own to make investment. The ld. CIT(A) has further noted that the share subscribers were either subjected to assessment u/s 147/143(3) or their returns were accepted by the Assessing Officer and therefore, their identity and creditworthiness were duly established.

7. The Assessee, in this case, as noted above, explained about the identity, creditworthiness and financials etc. of each of the share subscriber company individually. The AO, in our view, could have taken an adverse inference, only if, he would have pointed out the discrepancies or insufficiency in the evidences and details received in

his office and pointed out as to on what account further investigation was needed by way of recording of statement of the directors of the subscriber companies. Even if the directors of the subscriber companies have not come personally in response to the summons issued by the AO, in our view, adverse inference cannot be taken against the assessee solely on this ground as it is not under control of the assessee to compel the personal presence of the directors of the shareholders before the AO. The Ld. Counsel for the assessee has rightly placed reliance upon the decision of the Hon'ble Bombay High Court in the case of PCIT, Panji vs. Paradise Inland Shipping Pvt. Ltd. reported in (2017) 84 taxman.com 58 (Bom) wherein the Hon'ble High Court has held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish their case. Further the jurisdictional Calcutta High Court in the case of "Crystal networks (P) Ltd. vs CIT" (supra) has held as under:

"We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter creditworthiness. As rightly pointed out by the learned counsel that the CIT(Appeals) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued in our view is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the produce of the assessee or not. When it was found by the CIT(Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

8. So far as the reliance of the Ld. DR on the decision of the hon'ble Supreme Court in the case of "PCIT v/s NRA Iron & Steel (P) Ltd." (supra) is concerned, we note that the hon'ble Supreme Court in the

said case has taken note of the observations made by the Supreme Court in the “the land mark case of *Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC)* and *Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC)* laying down the proposition that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.”

Thereafter the hon’ble Supreme court summed up the principles, which emerged after deliberating upon various case laws, as under :

“11. *The principles which emerge where sums of money are credited as Share Capital/Premium are :*

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness 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.*
- iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.*

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.”

The Hon'ble Supreme court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound to conduct an independent enquiry to verify the same. However, as noted above, the Assessing Officer in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee having furnished all the details and documents before the Assessing Officer and the Assessing Officer has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifted upon the Assessing Officer to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, even applying the ratio laid down by the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron and Steel Pvt. Ltd., impugned additions are not warranted in this case.

9. As the ld. CIT(A), in this case, has not only duly examined the facts and explanation as furnished by the assessee but also has given a categorical finding that the identity and creditworthiness of the share subscribers and genuineness of the transaction stood established.

10. The ld. DR could not point out any distinct facts warranting our interference in the order of the CIT(A).

11. In view of the above discussion, we upheld the order of the CIT(A). The appeal of the revenue is, therefore, dismissed.

12. In the result, the appeal of the Revenue stands dismissed.

Kolkata, the 19th April, 2023.

Sd/-
[गिरीश अग्रवाल /Girish Agrawal]
लेखा सदस्य/Accountant Member

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य/Judicial Member

Dated: 19.04.2023.

RS

Copy of the order forwarded to:

1. ITO, Ward-6(1), Kolkata
2. M/s M.D. Ornaments Pvt. Ltd
3. CIT
(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches