

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

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरडलेखा सदस्य के समक्ष ,
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.530/Kol/2020
Assessment year: 2009-10

Atlantic Dealers Pvt. Ltd.....Appellant

C/o Rajesh Mohan & Associates,
Unit No.18, 5th Floor, Bagati House,
34, Ganesh Chandra Avenue,
Kolkata-700013.

[PAN: AAHCA5518K]

vs.

ITO, Ward-9(1), Kolkata.....Respondent

Appearances by:

Shri Rakesh Joshi, AR, appeared on behalf of the appellant.

Shri Subhrajyoti Bhattacharjee, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing :February 21, 2023

Date of pronouncing the order : May 08, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्यद्वारा/ Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 28.02.2017 of the Commissioner of Income Tax (Appeals)-16, Kolkata [hereinafter referred to as the 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee, in this appeal, has taken the following grounds of appeal:

"1. For that the order of the Ld. CIT (A) is arbitrary, illegal and bad in law.

2. For that the order passed by the Ld. CIT(A) is bad in law since the ld. CIT(A) has not decided the issues ground wise in respect of the grounds raised by the appellant in the Memo of Appeal.

3. For that the Ld. CIT (A) is bad in law since the order passed is not any speaking order nor the CI.TA) has looked into the assessment records and relevant materials to conclude that the order of the Ld. AO cannot be interfered with.

4. For that the Ld. CIT(A) erred in accepting the contention the Ld. AO that there was no compliance at the time of assessment proceedings while the assessee have duly complied with all the notices issued. Moreover, the notices issued by the Ld. Assessing Officer to verify the identity and creditworthiness of the share applicants and genuineness of the transactions were duly served upon the share allottees and complied with wherein each of the share allottees confirmed the transactions.

5. For that Ld. CIT(A) erred in confirming the action of Assessing Officer in assessing the share capital and share premium as unexplained cash credit merely for the reason of non-compliance to summon u/s 131 of the IT Act, 1961.

6. For that the Ld CIT(A) erred in confirming the order of the AO simply relying on the judgment of Calcutta High Court in Rajmandir Estates Pvt. Ltd. which was rendered in connection with the proceedings u/s 263 by which the assessment order was simply set aside for fresh assessment and was not an authority for the purpose of addition u./s 68.

7. For that on the facts and in the circumstances of the case the Ld. CIT(A) erred in confirms the order of the AO without examining the assessment records since the evidences with regard to the receipt of share capital including confirmation from the shareholders, their accounts, PAN and Bank statements were on record and the Ld. AO failed to bring any evidence disproving such evidences as per directions of the Ld. CIT passed u/s 263.

8. For that the under the facts and circumstances of the case the Ld. CIT(A) erred in considering the share application money of 14,78,00,000/- as unexplained cash credit whereas all the information were duly on records

9. For that on the facts and in the circumstances of the case the order passed by the Ld. CIT(A) is not maintainable.

10. For that the appellant craves leave to add, alter or withdraw any ground/s of appeal on or before hearing of the appeal.

3. The brief facts of the case are that the appellant is a Private Limited Company engaged in the business of investing in shares and

securities. The Income Tax Return for AY 09-10 was filled electronically on 06/11/2009 declaring total income of Rs. 229/-. Thereafter, the appellant suomoto submitted that while filing return of income the appellant had not offered to tax the amount of service charges and extra charges earned by it to the tune of Rs. 24150/-. Against which the learned AO reopened the assessment u/s 147 and considered the issue and completed the assessment determining the total income at Rs.64640/-. Subsequently the Commissioner of Income Tax III, Kolkata (hereinafter referred to as 'CIT') exercising his revision jurisdiction u/s 263 of the Act, examined the records and held that the assessment order was erroneous and prejudicial to the interest of the revenue on the ground of want of necessary verifications by the Assessing officer regarding the identity and credit worthiness of the subscribers to the share capital received by the assessee during the year under consideration. The Ld. CIT held the assessment order in the reopened proceedings u/s 147 of the Act as erroneous and prejudicial to the interest of revenue and set aside the said assessment order directed the assessing officer to make enquiries and verifications on the share capital issue and pass the assessment order a fresh.

4. In the set aside assessment proceedings, The Ld. Assessing Officer noted that the assessee during the year has shown receipt of share application money of Rs.14,78,00,000/- on allotment of 144000/- shares to 37 share applicant companies. To verify the identity and creditworthiness of the shareholders and also about the genuineness of the transaction, the assessing Officer issued notices u/s 133(6) to them calling for various details including the source of fund for investment in the assessee company. Out of them, 13 letters issued to different

shareholders had been returned back. Further, summons u/s 131 of the Act to the directors of the share subscriber companies. Since the said summons u/s 131 were not complied with, the AO held that the assessee had failed to discharge the burden of proof to substantiate the identity and creditworthiness of the share subscribers and genuineness of the transaction. The learned AO, therefore, passed fresh assessment order u/ss 143(3)/263/147/143(3) and made the impugned additions treating the share capital received by the assessee as unexplained income of the assessee. The ld. CIT(A) confirmed the additions so made by the Assessing Officer.

5. We have heard the rival contentions and gone through the record. The Ld. Counsel for the assessee has contended that in this case, the assessee had filed all evidences to prove the identity and creditworthiness of the subscribers and genuineness of the transaction including the address, PAN & Form 2 & Form 5 filed with Registrar of Companies of the share subscriber companies, their audited financial statements, acknowledgement of filing their Income Tax Return, copy of bank statement of the allottee company highlighting the payment of the entire amount of share capital . That all the transactions were done through banking channel and duly confirmed by the share subscribers. That even the notices u/s 133(6) of the Act were issued by the AO which were duly complied with by the share applicant companies and requisite documents were furnished evidencing their identity, and creditworthiness and that even source of investment was also provided. In respect of some companies, which did not respond to the notices issued u/s 133(6) of the Act, the Ld. Counsel has submitted that a request letter was written to the assessing officer requesting therein that

since the assessment pertained to the Assessment Year 2009-10 after which almost 5 year , have elapsed, therefore, it was quite possible that many of the parties with whom the assessee had transactions might have moved to other places or may not be bothering to comply with notices, if any, issued to them. That since the assessment was getting time barred on 31.03.2014, it was requested to the assessing Officer to intimate the assessee about the notices which could not be served /served but not complied with. It was further requested to afford the assessee sufficient opportunity to enable it to ensure necessary compliances as a matter of principles of natural justice. The Ld. Counsel for the assessee in this respect has relied upon the following letter dated 17.03.2014:

To

17.03.2014

*The Income Tax Officer
Ward 9(1)/Kolkata
AayakarBhawan, 5th Floor,
P-7, Chowringhee Square
Kolkata- 700069*

Sir,

*In the matter of : M/s Atlantic dealers Pvt. Ltd.
P. A. No. : AAHCA 5518 K
Assessment Year:2009-10
Regarding : Assessment proceedings pursuant to order u/s 263
Reference : Proceedings u/s 143(3)/263*

Please refer to above. We do hereby state that the necessary compliances are being made from time to time in the above case as required from us.

In the meantime to expedite proceedings and to fulfil the onus lying with us to prove the identity and creditworthiness of the shareholders and genuineness of the transaction, we do hereby enclose a paper book containing (1) Company master data, (3) Details of Present Directors (3) Details of share applicants with their present addresses (4)Details of Bank Accounts (5) Copy of our Bank

Statements (6) Bank Reconciliation Statements (7)Printout of Bank Book (8) Documents relating to share applicants (a) Acknowledgement of Return of Income (b) Audited Financial Statements (c) List of Investment (d) Bank Statements (e) Source of Fund (f) Master Data (g)Directors details.

We would like to state that since the assessment pertains to the Assessment Year 2009-10 after which almost 5 year , have elapsed. Therefore, it is quite possible that many of the parties with whom we had transactions may have moved to other places or may not be bothering to comply with notices, if any, issued to them. Since the assessment is getting time barred on 31.03.2014, kindly intimate us about the notices which could not be served /served but not complied with. Kindly afford us sufficient opportunity to enable us to ensure necessary compliances as a matter of principles of natural justice.

Thanking you,

Yours faithfully

For Atlantic Dealers Pvt. Ltd.

Rajesh Kumar Agarwal, FCA, A/R

Enclosed: As stated

The Ld. Counsel for the assessee has submitted that the assessee, otherwise, had provided all the details to the assessing officer to prove the identity and creditworthiness of the subscribers and genuineness of the transaction, as noted above. He has further submitted that the subscribing companies were having adequate reserves and surpluses to invest in the assessee company. Further, that all these subscribers were income tax assesseees and further that all the investor companies were duly incorporated with the Registrar of Companies. That there were no paper companies involved in the transactions.

The Ld. Counsel has further contended that the AO, however, instead of examining the relevant documents, insisted for the personal presence of the directors of the subscribers which was not in the hands of the assessee. He therefore, has submitted that the identity and

creditworthiness of these companies was duly established. He has further submitted that the AO could not point out any defect or discrepancy in the evidences/documents submitted by the assessee to prove the identity and creditworthiness of the subscribers and genuineness of the transaction. He has further submitted that instead of pointing out any defect or discrepancy in the evidences and the details furnished by the assessee, the AO proceeded to take adverse inference only on the ground that the directors of the subscriber companies did not appear personally before the AO. The Id. Counsel for the assessee in this respect has relied upon the decision of the Jurisdictional Calcutta High Court in the case of Crystal networks (P) Ltd. vs CIT (supra). The Id. Counsel has also relied upon the decision of the Co-ordinate Kolkata Bench of the tribunal in the case of 'M/s Satyam Smertexpvt. ltd. vs. DCIT', ITA No.2445/kol/2019 vide order dated 29.05.2020, wherein, the coordinate bench of the tribunal, while further relying upon the decision of the Hon'ble Allahabad High Court in the case of CIT vs Raj Kumar Agarwal vide ITA No.179/2008 dated 17.11.2009 has held that non production of the director of the company, which is regularly assessed to income Tax having PAN, on ground that the identity of the subscriber is not proved, cannot be sustained.

6. The Id. D/R on the other hand, has relied upon the observations made by the AO. He has further relied upon the impugned order of the Id. CIT(A). The Ld. DR has further relied upon the decision of the hon'ble Supreme Court in the case of PCIT vs NRA Iron & Steel (P) ltd. reported in [2019] 103 taxmann.com 48(SC).

7. We have considered the rival submissions of the ld. representatives of the parties and also gone through the record. In this case a perusal of the Assessment order would reveal that the AO has duly acknowledged the receipt of the relevant documents/evidences not only from the assessee, but also from the subscriber companies. However, he insisted for personal appearance of the directors of the subscriber companies without even going through and discussing about the discrepancies, if any, in the documents furnished by the assessee as well as by the share subscriber companies to prove the identity and creditworthiness of the subscribers and the genuineness of the transaction. The AO has not pointed out in the Assessment Order as to what further enquiries he wanted to make from the directors of the subscribers to insist for their personal presence. The Assessee in this case, as noted above, explained about the identity, creditworthiness and financials etc. of each of the share subscriber company individually. However, we note that in the assessment order that the AO has not even mentioned the names of the share subscriber companies and even has not mentioned a word as to which of the share subscriber company or the corresponding transaction thereof was not genuine and on what grounds. 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) 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) laid down 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 conduct 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. It has to be further noted that though powers of the ld. CIT(A) are co-terminus with the AO and the ld. CIT(A) had all the plenary powers as that of the AO. The Hon'ble Delhi High Court in the case of *Commissioner of Income-tax vs. Manish Build Well (P.) Ltd.* reported in [2011] 16 *taxmann.com* 27 (Delhi) has held that the CIT(A) is statutory first appellate authority and has independent power of calling for information and examination of evidences and possesses co-terminus power of assessment apart from appellate powers. However, a perusal of the impugned order of the ld. CIT(A) shows that the ld. CIT(A) has not discussed anything about the material facts of the case. He has not pointed out any defect and discrepancy in the evidences and details

furnished by the assessee but simply upheld the order of the Assessing Officer in mechanical manner. The order of the ld. CIT(A) is a non-speaking order. The same is not sustainable as per law.

10. In view of the above discussion we do not find justification on the part of the lower authorities in making the impugned additions and the same are accordingly ordered to be deleted.

11. In the result, the appeal of the assessee stands allowed.

Kolkata, the 8th May, 2023.

Sd/-
[डॉक्टर मनीष बोरोड /**Dr. Manish Borad**]
लेखा सदस्य /**Accountant Member**

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

Dated:08.05.2023.
RS

Copy of the order forwarded to:

1. Atlantic Dealers Pvt. Ltd
2. ITO, Ward-9(1), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches