

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

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

**ITA No.1632/Kol/2017
Assessment Year: 2012-13**

Divine Alloys & Power Co. Ltd. Block-A-139, Regent Estate, 176/14/139, Rajpur Road, Kolkata-700092. (PAN: AACCD 1367 Q)	Vs.	Deputy Commissioner of Income - tax, Circle-3(1), Kolkata.
(Appellant)		(Respondent)

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**ITA No.1838/Kol/2017
Assessment Year: 2012-13**

Deputy Commissioner of Income - tax, Circle-3(1), Kolkata.	Vs.	Divine Alloys & Power Co. Ltd.
(Appellant)		(Respondent)

Present for:

Assessee by : N o n e
Department by : Shri Abhijit Kundu, CIT, DR

Date of Hearing : 18.05.2023
Date of Pronouncement : 20.06.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This captioned cross appeals filed by the assessee and revenue are against the order of Ld. CIT(A)-1, Kolkata vide Appeal No. 939/CIT(A)-1/Circle-3(1)/2015-16 dated 19.05.2017 against the assessment order of Ld. DCIT, Circle-3(1), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 26.03.2015 for AY 2012-13.

2. In the appeal filed by the department there is a brief delay of three days in filing the appeal for which petition for condonation of delay is placed on record, wherein the delay has been attributed to the administrative procedures in getting approval for filing the said appeal. Considering the explanation, we find it proper to condone the delay and take it up for adjudication.

3. When the appeal was called for hearing, no one was present on behalf of the assessee to represent the case. There is no application seeking adjournment either. Considering the nature of dispute, we proceed to dispose of the appeal ex parte qua the assessee after hearing the Ld. CIT, DR and on the basis of material available on record.

3.1. In the course of hearing, we notice that there is a submission dated 26.08.2019 addressed to the Bench filed by Shri Rajesh Kumar Agarwal, Resolution Professional (RP) of the assessee. In this letter, it is stated that assessee has gone into the Corporate Insolvency Resolution Process (CIRP) under the Insolvency & Bankruptcy Code, 2016 (IBC) admitted by Ld. National Company Law Tribunal (Kolkata Bench) (NCLT) vide order No. CP(IB) No. 1412/KB/2018 dated 07.03.2019 and the undersigned i.e. Shri Rajesh Kumar Agarwal has been appointed as the Interim Resolution Professional (IRP). Through this letter, the IRP has submitted that no proceeding by any authority could have been continued or initiated when the moratorium comes into effect. In the case of assessee, as per the said letter, moratorium has come into effect on and from 07.03.2019. Against this letter, appeal was adjourned sine die on 27.08.2019. Subsequently, matters which had been adjourned sine die were fixed for hearing for the update on developments in those cases from the respective departments. This case was fixed for hearing on 10.02.2023. The matter was adjourned for 20.03.2023. On 17.04.2023, direction was

given to Ld. CIT, DR to confirm the present status/whereabouts of the assessee. Finally, the matter was taken up on 18.05.2023 wherein none represented the assessee and Shri Abhijit Kundu, CIT, DR represented the Department. From the above chronology of events and the only letter dated 26.08.2019 available on record, giving information about the assessee being under CIRP and moratorium into effect on and from 07.03.2019, there has been no other update or representation from the Resolution Professional.

3.2. From the order of Ld. NCLT dated 07.03.2019, we note that in para (vii), it is noted that moratorium shall have effect from the date of admission, till the completion of the CIRP. Further, in para (viii), it is noted that if the Resolution Plan is approved by the adjudicating authority or an order for liquidation of the corporate debtor (assessee) is passed, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. We also take note of para (xii) wherein it is stated that the Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

3.3. In the present case, there is no update as to whether the Resolution Plan has been approved or the liquidation order has been passed. Thus, we find that the Resolution Professional has not taken any steps or actions in respect of present litigation before the Tribunal except for aforesaid one letter of apprising of the assessee going through the CIRP. Such an approach at the end of RP reflects an unprofessional approach which is not appreciated. Since the matter before us is quite old, continued since year 2017, in absence of any update on the outcome of CIRP since, moratorium being a time bound event must have ceased to have effect, we have no other choice but to adjudicate on the same, based on material available on record. If CIRP

has gone through successfully, new management must have taken control over the assessee company on whom the findings of these appeals will apply. In case, CIRP failed and liquidation process was set in motion, findings will apply in consonance with provisions of section 178 of the Act.

4. The issues involved in the two appeals are unrelated and different. We first take up the appeal of the assessee where the grounds raised by the assessee are reproduced as under:

“1. That the order of learned Commissioner of Income Tax (Appeals) is bad in law as well as on the facts and in the circumstances of the case.

2. That the learned Commissioner of Income Tax (Appeals) has erred in sustaining the addition of Rs.19,10,96,000/- made by the Assessing Officer by adding back the entire share application/ allotment money under section 68 as undisclosed income of the appellant.

3. That the learned Commissioner of Income Tax (Appeals) has erred in holding that the appellant was unable to establish the genuineness of the subscribers to the share capital/share application money/ share premium and creditworthiness / sources of income of the investors could not be established satisfactorily.

4. That the learned Commissioner of Income Tax (Appeals) has erred in holding that there is no infirmity in finding of the AO in treating the impugned share capital from the two companies amounting to Rs.19,10,96,000/- as unexplained cash credit u/s. 68 of I.T. Act, 1961.

5. The above grounds of appeal are without prejudice to each other.

6. The Appellant craves leave to add, alter, amend and/or modify the above grounds of appeal.”

5. Brief facts of the case are that assessee filed its return of income on 28.09.2012, reporting total income at Rs.6,14,76,280/-. While making the assessment, Ld. AO made the following additions/disallowances –

a)	Addition in respect of share capital and share premium by treating it as unexplained cash credit u/s. 68	Rs. 19,10,16,000/-
b)	Bogus purchases	Rs. 198,01,40,620/-
c)	Disallowance u/s. 14A	Rs. 20,18,578/-
	Total	Rs. 217,32,55,198/-

5.1. Total income assessed is at Rs.223,47,31,480/-. Assessee went in appeal before the Ld. CIT(A) wherein part relief was granted by way of deleting the addition towards bogus purchases and disallowances u/s. 14A for which revenue is in appeal before the Tribunal. Addition

was sustained in respect of share capital and share premium for which the assessee is in appeal before the Tribunal.

6. In the course of assessment proceedings, Ld. AO found that assessee received share application money from two investor companies viz., (i) Phoneix Consumer Goods Pvt. Ltd. Rs.6,16,96,000/- and (ii) Raj Gharana Properties Pvt. Ltd. Rs.12,94,00,000/-, totalling Rs.19,10,96,000/-. Ld. AO called for explanations and details towards share capital and share premium by issuing notice u/s. 142(1) which according to Ld. AO, were partially complied. Addition was made by the Ld. AO by drawing conclusions as under:

“1. The assessee company entered into a sham transaction with the investor to introduce the unaccounted income in form of share application/allotment.

2. The assessee company did not have any regular business transaction or regular acquaintance with the investor.

3. The investor has no reason to invest such huge amount in the business of the assessee.

4. The investor has no business transaction with the assessee company in past or future except this one time entry.

5. Assessee cannot withstand the cross examination before A.O., if the above questions arise.

6. Assessee was unable to proof with proper evidence that the investor company is a group company.”

6.1. Ld. AO also placed reliance on several judicial precedents for making this addition. Ld. CIT(A) while dealing with this issue has called for remand report from the AO for the additional evidence placed before him and has also obtained a rejoinder from the assessee on the said remand report. After considering the written submissions, remand report, rejoinder and various case laws, Ld. CIT(A) arrived at a conclusion that assessee could not establish the genuineness of the transaction of raising of share capital along with share premium.

According to the Ld. CIT(A), assessee has failed to satisfactorily discharge its onus in establishing the genuineness of the transaction since copies of bank statements were not produced during the assessment as well as first appellate proceeding despite specific requisition by the Ld. AO. From the perusal of detailed proceedings undertaken before the Ld. CIT(A), we are not inclined to interfere with the finding given by the Ld. CIT(A) in this respect. Accordingly, grounds taken by the assessee in this respect are dismissed.

7. In the result, appeal of the assessee is dismissed.

8. We now take up the appeal by revenue which is in respect of two issues i.e. addition towards bogus purchase and disallowance u/s. 14A of the Act. On the first issue, Ld. AO had noted that information was received from Dy. Director of Income-tax (Inv.) Unit-II(3) vide letter dated 15.07.2014 based on which it appeared that assessee was indulged in transactions with the entities maintained by one Shri Abhishek Sharma in whose case a survey was conducted u/s. 133A of the Act and was stated to be engaged in providing bogus bills to different parties. Ld. AO identified the following transactions of purchase relevant to the assessee from the said alleged bogus entry provider. The details are as under:

Sl. No.	Firm / Company of Abhishek Sharma	Transaction with Firm / Co.'s	Transaction with assessee	
			F. Year	Dr.
1	Mayank Steel Enterprises OBC-(06261131001104) Salkia, Bandhaghat- 711106	Divine Alloys & Power Co. Ltd. AACCD1367Q VAT:19627303011	2011-12	764135685
2	R.S. Trading	-Do-	2011-12	47986057
	-Do-	-Do-	2011-12	306105453
3	National Traders	-Do-	2011-12	195764463
4	Sashi Steel Trading Pvt. Ltd. AAMCS7301M	-Do-	2011-12	629919579
5	Dakshineswar Moulds	-Do-	2011-12	1457254
6	Dcepmala Vinimay Pvt. Ltd. AADCD4505D	-Do-	2011-12	34772129
				1980140620

8.1. Ld. AO called for various details from the assessee in respect of said transaction of purchase to prove its genuineness or rebut the same. Since nothing came up from the assessee, Ld. AO arrived at a conclusion to add the entire amount of bogus purchase. While making this addition, Ld. AO noted that assessee can take the plea that the total material consumed is less than the addition but according to Ld. AO, since the assessee is taking accommodation entries from the entry operator, there is no legal sanctity of the purchases shown by the assessee. Thus, he took a stand to add the entire amount of bogus purchase instead of GP ratio for blocking the leakage of revenue.

8.2. Ld. CIT(A) called for a remand report in respect of the submissions made by the assessee in this respect. Assessee also made a rejoinder to the remand report. After considering all the material available on record, ld. CIT(A) concluded to give relief to the assessee on three observations, that –

- (a) All the transactions with the assessee are supported with documentary evidence in the shape of bills.
- (b) All the transactions are duly recorded in the books of account of the assessee which have been audited.
- (c) All the payments were made against the said transactions through banking channels.

8.3. Ld. CIT(A) also placed his credence on the copies of ledger accounts of the parties furnished by the assessee while giving relief to the assessee.

8.4. From the perusal of the observation and finding arrived at by the Ld. CIT(A), we note that there is no enquiry which has been conducted or caused to be conducted by him who has co-terminus powers that

of an AO to call for the relevant information and details from the concerned parties from whom assessee has made the purchases. It is also noted that the basis of giving relief is primarily on the bills and their delivery challans coupled with their entries in the books of account and claim that payments have been made through banking channels.

8.5. From the survey conducted u/s. 133A of the Act in the case of Shri Abhishek Sharma who is alleged to be a provider of bogus bills, it is observed that what is under dispute is the purchase from the parties from whom bills have been taken and cheques have been issued to them. There is nothing on record which substantiates that quantitative detail of stock with respect to purchase and sales have been furnished and analysed by the authorities below to demonstrate that there is actual dealing of the goods. There are no detailed investigations made by the authorities below on the stock records. In such a situation, where issue relating to purchase is under dispute, what is important is to take into consideration the movement of stock with their quantitative details to justify the claim. Another scenario relating to purchase is worth considering where purchase itself need not be in dispute but the parties from whom purchases are shown to be made are disputed and suspicious, in which case, only the profit element is taken as unexplained income for the purpose of addition. In the present case before us, there is nothing on record which demonstrates the quantitative movement of the stock against the alleged purchases, except for existence of bills, their accounting entries and payment through banking channel, we are inclined to set aside the order of Ld. CIT(A) and uphold the addition made by the Ld. AO. Accordingly, grounds taken by the revenue in this respect are allowed.

8.6. On the second issue in this appeal of revenue relating to disallowance u/s. 14A of the Act, Ld. AO has noted that assessee has made considerable investment in equity but no expenditure is disallowed u/s. 14A in computing the total income. He thus, made an addition by applying Rule 8D(2)(ii) and 8D(2)(iii) i.e. ½% of average investment i.e. Rs.6,80,000/- and Rs.13,38,578/- towards interest expenditure, totalling to Rs.20,18,578/-. Before the Ld. CIT(A), it was claimed that assessee had not earned any exempt income. It was thus, argued that in the absence of exempt income, no disallowance is called for u/s. 14A of the Act. For this, we place our reliance on the judicial precedents in the case of Hon'ble Delhi High Court in the case of PCIT Vs. Era Infrastructure (India) Ltd. in ITA No. 204/2022 & C. M. Application No. 31445/2022 which has been followed by the coordinate bench of ITAT, Kolkata in the case of *Babul Fiscal Services (P) Ltd v. ACIT in ITA No. 318/Kol/2022 dated 02.08.2022* holding that no disallowance is required to be made in the case of the assessee because it has not earned any tax-free income and allowed the appeal of the assessee by deleting the addition so made. Considering this, the disallowance made in this respect is deleted and finding given by the Ld. CIT(A) is upheld. Accordingly, grounds taken by the revenue in this respect are dismissed.

9. In the result, appeal of the assessee is dismissed and that of the revenue is partly allowed.

Order is pronounced in the open court on 20th June, 2023.

Sd/-

(Rajpal Yadav)
Vice President

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 20th June, 2023

JD, Sr. P.S.

Copy to:

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

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata