

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 1172/Kol/2018
Assessment Year: 2012-13

Income Tax Officer, Ward-5(1), Kolkata	Vs	M/s. Coolhut Merchants (P) Ltd. 41-A, AJC Bose Road Kolkata - 700017 [PAN: AA ECC7555M]
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Vinod Jain, A/R
Revenue by :	Shri Abhijit Kundu, CIT, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 04/05/2023
घोषणा की तारीख /Date of Pronouncement: 25/07/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The captioned appeal has been preferred by the revenue against the order of Learned Commissioner of Income Tax (Appeals) - 7, Kolkata, (hereinafter referred to as "the ld. CIT(A)"), passed u/s 250 of the Income Tax Act, 1961 (hereinafter 'the Act') dated 16/02/2018, for Assessment Year 2012-13.

2. The Registry has pointed out that there is a delay of 11 (eleven) days in filing the present appeal before the Tribunal. The revenue has filed a petition for condonation along with an affidavit stating the reasons for the said delay. After perusing the same, we are convinced that the department was prevented by sufficient cause from filing the appeal in time. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

3. The revenue raised the following grounds of appeal:-

"1. Whether the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition made by the AO u/s.68 of the I. T. Act 1961.

2. Whether the facts and circumstance of the case the Ld. CIT(A) has erred in law in deleting the addition of Rs.9,86,00,000/- u/s.68 of the Act without going through the facts and circumstances of the case.

3. Whether the facts and circumstance of the case the Ld. CIT(A) has erred in law in violating Rule 46A(3) without remitting the issue before the AO for the purpose of examination of creditworthiness of the share applicants.

4. Whether the facts and circumstance of the case the Ld. CIT(A) has erred in law in accepting the findings of the AO in the matter of non compliance to summon u/s.131 issued to the share applicants.

5. That the appellant craves for leave to add, delete amend or modify any ground before or at the time of appellate proceedings."

4. Facts in brief are that the assessee is a private limited company engaged in the business of shares transactions and investments. The assessee company is incorporated in the year 2012 and income of Rs.450/- declared in the return filed on 17/08/2012. Case selected for scrutiny through CASS followed by issuance of notice u/s 143(2) and 142(1) of the Act. Various notices were sent to the assessee by the Id. Assessing Officer u/s 142(1) of the Act to file certain details in relation to the transactions carried out during the year but there was no compliance. Even the summons issued under section 131 of the Act issue to the directors were also not complied. The Id. Assessing Officer accordingly decided to frame her best judgement assessment under

section 144 of the Act. The Id. Assessing Officer going through the return of income noticed that this it is the first year of the assessee company as it got incorporated on 21/03/2012. It had no business income but only shown other income of Rs.7,000/- and expenditures at Rs.6,552/-. However, during the year share capital has been issued at Rs.1,98,500/- and share premium of Rs.9,84,01,500/- has been charged. In total Rs.9,86,00,000/- has been shown to be the share capital and share premium entered in the books during the year. Since the genuineness of the transactions of the share premium including face value, identity and creditworthiness of the share subscribers were not proved, the Id. Assessing Officer after placing reliance on the various decisions confirmed the addition under section 68 of the Act at Rs.9.86 Crores and assessed income accordingly.

4.1. Aggrieved the assessee preferred appeal before the Id. CIT(A) and filed detailed submissions. However, the Id. CIT(A) without going into the financials and other documents of the share applicant company, deleted the addition on the ground that no bank/cash transactions took place during the year regarding the alleged transactions. In other words as per the Id. CIT(A), there was fresh share capital and share premium entered into the book during the year but only because no cash/bank transactions took place against the said share premium and share capital, the Id. CIT(A) came to the conclusion that the addition under section 68 of the Act is uncalled for. However, the Id. CIT(A) also observed that all the 11 share subscribers

were assessed by their respective Assessing Officers in the earlier Assessment Years u/s 143(3) of the Act.

5. Aggrieved the revenue is in appeal before this Tribunal.

6. The Id. D/R submitted that there are transactions in the books of accounts during the year and fresh share capital and share premium have been entered therein and, therefore, the Id. Assessing Officer was well within its jurisdiction to examine the said transactions in the light of the provisions of section 68 of the Act. However, the Id. CIT(A) failed to consider the same and also in not examining the financials of the share subscriber companies and further and not providing an opportunity to the Assessing Officer to examine the fresh evidence filed before the Id. CIT(A), thereby violating Rule 46A(3) of the Act.

7. On the other hand, the Id. Counsel for the assessee, referring to the written submissions firstly stated that since the sum was not received through bank/cash mode during the year against the issue of equity shares at a premium, section 68 of the Act, cannot be invoked and, therefore, Id. CIT(A) has rightly deleted the said addition. So far as the merits of the case is concerned, no details have been filed before us with regard to the documents of each of the share subscribers. However, the Id. Counsel for the assessee stated that all these details were filed before the Id. CIT(A) and further all the share applicants are duly assessed to tax and have passed through scrutiny proceedings.

8. We have heard rival contentions and carefully gone through the findings of the Id. CIT(A), the judgements and decisions referred and relied therein as well as the judgements and decisions referred in the

written submissions and marginal notes filed by the Id. Counsel for the assessee during the course of hearing.

9. The issue before us is whether the Id. CIT(A) has erred in deleting the addition made by the assessing officer under section 68 of the Act at Rs.9.86 Crores. We observe that the assessee company in the very first year of its incorporation i.e., the date of incorporation was 21/03/2012 and within 11 days of its incorporation has issued shares at whooping premium of 500 times of its face value, so much so that against the face value of Rs.1,98,500/-, it had charged premium of Rs.9,84,01,500/-. There is no business activity during the year. It is also not the case that assessee company is part of a big group company having huge turnover. It is also not the case that the assessee company has a big project in its hands and is going to have a good profit in the future. Irrespective of these aspects, the assessee company issued the equity shares to certain share applicants and rather than receiving the payments against the said issue of equity share capital it had claimed to have received the investments from the share applicants. The gamut of such transactions carried out within 10 days of its incorporation can be summarized in the form of the following table:-

<i>Date of agreement</i>	<i>Name of seller</i>	<i>Particulars of investments sold</i>	<i>Amount of debts discharged by allotting equity shares</i>	<i>Number and amount of equity shares allotted</i>
30.03.2012	<i>Vision Niketan Pvt. Ltd.</i>	<i>22750 fully paid-up shares of Deserve Trexim Pvt. Ltd</i>	<i>Rs. 9100000</i>	<i>9100 equity shares of appellant for Rs.9100000</i>
30.03.2012	<i>Seaside Projects Pvt. Ltd.</i>	<i>38400 fully paid up shares</i>	<i>Rs. 9600000</i>	<i>9600 equity shares of</i>

		of Acumen Vyapaar Pvt. Ltd.		appellant for Rs.9600000
30.03.2012	Overall Realtors Pvt. Ltd.	36,000 fully paid-up shares of Fastflow Software Pvt. Ltd.	Rs. 9000000	9000 equity shares of appellant for Rs. 9000000
30.03.2012	Sunbright Securities Pvt. Ltd.	36800 fully paid-up shares of Goldmoon Vyapaar Pvt. Ltd.	Rs.9200000	9200 equity shares of appellant for Rs.9200000
30.03.2012	Finlink Tracom Pvt. Ltd.	34000 fully paid up shares of Sarla Finance Pvt Ltd.	Rs. 8500000	8500 equity shares of appellant for Rs.8500000
30.03.2012	Gateway Towers Pvt. Ltd.	9300 fully paid-up shares of Express Infrabuild Pvt. Ltd.	Rs. 9300000	9300 equity shares of appellant for Rs.9300000
30.03.2012	Vital Enclave Pvt. Ltd.	33200 fully paid-up shares of Rocky Software Pvt. Ltd.	Rs.8300000	8300 equity shares of appellant for Rs.8300000
30.03.2012	Darkin Distributors Pvt. Ltd.	36800 fully paid-up shares of Asha Apartments Pvt. Ltd.	Rs.9200000	9200 equity shares of appellant for Rs.9200000
30.03.2012	Newjet Trexim Pvt. Ltd.	23500 fully paid-up shares of of Pepsons Leasing & Finance Pvt. Ltd.	Rs.9400000	9400 equity shares of appellant for Rs.9400000
30.03.2012	Amritvani Exim Pvt. Ltd.	88000 fully paid up shares of Divine Trexim Pvt. Ltd.	Rs.8800000	8800 equity shares of appellant for Rs.8800000
30.03.2012	Silvertoss Dealtrade Pvt.	81000 fully paid up shares	Rs.8100000	8100 equity shares of

	<i>Ltd.</i>	<i>of Anurodh Hirise Pvt. Ltd.</i>	<i>appellant for Rs.8100000</i>
	TOTAL		9850000

10. On going through the above table, the details are well evident that the company which is newly incorporated and not having any business base, has sold certain investment in various private limited companies to the share applicants who have applied for the equity shares of the assessee company at a whooping premium of almost 500 times. The claim of the assessee is that carrying out all these transactions of selling the investments as well as allotting the equity shares to the share applicants no transactions have been carried out through banking channel and, therefore, section 68 of the Act cannot come into operation. Even the Id. CIT(A) has deleted the impugned addition only on this ground. Though the Id. CIT(A) as well as the Id. Counsel for the assessee have referred to plethora of decisions, however, we find that since they are distinguishable and, the same are not applicable on the facts of the instant case.

11. To arrive at this conclusion we will first go through the provisions of Section 68 of the Act, which reads as follows:-

“Cash credits.

68. *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :*

Provided *that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless –*

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of [section 10](#)."

11.1. The heading of Section 68, states "Cash credits". Now the head itself cannot mean that only the credits that are received in cash needs to be examined under section 68 of the Act. Now moving on to the content of section 68, it starts with the line "Where any sum is found credited in the books". Now since cash credit does not contemplate that only cash entries are to be examined, we have to go through the content of the provision which says that any sum which is found credited. Now we have to understand the accounting part while dealing with this aspect that when does a credit entry appear in the books. Books of the assessee can be maintained either on cash system or mercantile system. In case books are maintained on cash system then only cash/bank book and Ledger account is to be maintained as all the transactions/injuries which are carried out through cash or bank mode are to be entered in the books. The other one is mercantile system of accounting in which apart from cash/bank book, Ledger account, Journal book is also maintained. The Journal book is maintained for making those entries in the books which are not carried out through cash/bank mode, for example, if a purchases is made on credit, in this case purchase account will be debited and the vendor's

account will be credited. Later on when the payment is made then the vendor's account is debited and cash/bank account is credited. Similarly in case of any sales or expenses incurred on due basis or when the sales are not realised and the expenses are not actually paid, then transactions are carried out through journal entries. The important aspect which we need to see while applying section 68 of the Act is a credit entry in the books. The credit can be either against the purchases or against any income or any other journal transactions, the effect of which is that there is a credit entry in the books and the moment such credit entry is for examination before the Assessing Officer, he may ask the assessee to offer an explanation about the nature and source of such credit entry. The purpose for such examination is that the credit entry can be in the form of a liability as well as income. The duty is casted upon the assessee to explain the said credit entry as to whether it is in the nature of liability or income. In case it is an income and it is offered as income by the assessee then, there is no requirement of invoking section 68 of the Act. However, in case the assessee has claimed such credit entry as a liability and if the assessee is unable to prove it as a liability then in that case only recourse left with the assessing officer is to treat it as income. Even in cases of purchase when the assessee claims the purchase as an expenditure but is unable to explain the sundry creditors then also section 68 of the Act is invoked to examine the genuineness of such purchases. Same is the case with unsecured loans as well as share capital and share premium.

12. On the basis of the above discussion we humbly come to the conclusion that for invoking the provisions of section 68 of the Act, it is not necessary that the transactions should have been carried out through cash/bank mode and, therefore, the moment there is a credit entry found in the book of the assessee maintained for the previous year on mercantile basis, the Id. Assessing Officer can ask for the explanation about the nature and source thereto. Under these given facts and circumstances of the case, we fail to find any merit in the finding of the Id. CIT(A) deleting the addition merely on the ground that no cash/bank transactions took place. Since the assessee has issued equity share capital at a huge premium and had made credit entries in the books in the name of share applicants then all those transactions need to be examined in the year in which such credit entries appear. We, however, notice that the assessee did not appear before the Id. Assessing Officer during the assessment proceedings and the assessment order has been framed *ex-parte* u/s 144 of the Act. Assessee has filed a detailed written submissions before the Id. CIT(A) but there is no documentary evidence to prove that any remand report has been called for by the Id. CIT(A) from the Assessing Officer under Rule 46A(3) of the Act. Even, the Id. CIT(A) has also not dealt with these documentary evidences in detail except summarily observing that the share applicants are assessed to income tax

which in itself cannot be a basis for accepting that the assessee has explained the nature and source of the credit entries.

13. We, therefore, restore the issue on merits to the file of the Id. CIT(A), who shall examine all the evidences and details filed by the assessee to prove the identity and creditworthiness of the share applicants and genuineness of the transactions, after giving opportunity to the AO by way of calling remand report on all these evidences and thereafter decide in accordance with law keeping in mind that this is the first year of incorporation of the assessee company and huge premium has been charged and what is the basis of charging such huge premium even when there were no assets appearing at the time of issuing the equity share capital to the share applicants.

14. Thus, in terms of the above discussion, appeal of the revenue is partly allowed for statistical purposes.

Order pronounced in the Court on 25th July, 2023 at Kolkata.

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Sd/-
(DR. MANISH BORAD)
ACCOUNTANT MEMBER

Kolkata, Dated 25/07/2023
*SC SrPs

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
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Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata