

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "A" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 5691/Mum/2017 (A.Y. 2010-11)

ITO, Ward 4(2)(4) 6 th Floor, Room No. 647 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Lucky Star International Pvt. Ltd. 211/213, 2 nd Floor Kalbadevi Road Near Jewel World Mumbai-400 002. PAN : AABCL1519M
(Appellant)		(Respondent)

Assessee by	Shri Karan Jain
Department by	Shri Manoj Kumar Sinha
Date of Hearing	04.05.2023
Date of Pronouncement	19.07.2023

O R D E R

Per B.R.Baskaran (AM) :-

The revenue has filed this appeal challenging the order dated 18.4.2015 passed by Ld CIT(A)-9, Mumbai and it relates to the assessment year 2010-11. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.1.25 crores, being share application money received by the assessee as unexplained cash credit u/s 68 of the Act.

2. The facts relating to the case are stated in brief. The assessee is engaged in the business of manufacturing of Recycled Plastic Agglomerates/Grindings/Granuels. Its original return of income filed for the year under consideration was processed u/s 143(1) of the Act. Subsequently, the assessing officer received information from the Investigation wing that they have conducted search in the hands of Shrish C Shah and his associates on 09-04-2013, wherein it was found that the above

said group was engaged in providing accommodation entries in the form of share capital, share premium, share application money, unsecured loans, long term capital gains, short term capital gains etc., in exchange of cash received by them. It was noticed that the assessee has received accommodation entries in the form of Share Application Money from the following companies belonging to the above said group:-

Avance Technologies Ltd	-	50,00,000
Shri Ganesh Spinners Ltd	-	25,00,000
Mahan Industries Ltd	-	50,00,000

		1,25,00,000
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Hence the assessing officer reopened the assessment of the year under consideration by issuing notice u/s 148 of the Act.

3. During the course of assessment proceedings, the AO issued notices u/s 133(6) of the Act. However, one notice was returned unserved and there was no response from other two parties. In the mean time, the above said parties filed the details through tapal. Hence the AO issued another notice u/s 133(6) of the Act to them, but the above said parties again sent the details by speed post. The assessee reiterated before the AO that it has actually received share application money from the above said parties. However, the AO did not accept the genuineness of receipts as the investigation wing has given a report that the above said companies were providing only accommodation entries. The AO also relied upon the statement given by Shri Shrish C Shah, wherein he had admitted that he was providing only accommodation entries through his companies. Hence, the AO took the view that the assessee has failed to prove the above said cash credits in terms of sec.68 of the Act. Accordingly, he assessed the above said amount of Rs.1,25,00,000/- as unexplained cash credit u/s 68 of the Act.

4. The Ld CIT(A), however, deleted the addition and hence the revenue has filed this appeal before the Tribunal.

5. The Ld D.R submitted that the main person of the group Shrish C Shah has admitted that his group of companies are providing only accommodation entries by issuing cheques in exchange of cash received by them. The Ld D.R, accordingly, relied upon the sworn statement given by Shrish C shah. He further relied upon the decision rendered by Hon'ble High Court of Delhi in the case of PCIT vs. NDR Promoters (P) Ltd (2019)(102 taxmann.com 182)(Delhi). He further submitted that these kinds of accommodation entry providers have admitted that they have earned commission income and the said commission income has been assessed in their respective hands. In support of the above said submission, the ld D.R invited our attention to the order dated 23-10-2019 passed in ITA No.3205/Mum/2019 in the case of M/s Empower India Ltd. Hence the Ld CIT(A) was not justified in deleting the addition made u/s 68 of the Act.

6. On the contrary, the Ld A.R submitted that the assessee has furnished all the details that were required for the purpose discharging the burden placed upon it u/s 68 of the Act. He further submitted that the above said three investors have also directly filed their financial statements with the assessing officer two times. Thus, the assessee has proved the identity of the share applicants, their credit worthiness and genuineness of transactions. He submitted the AO has mainly relied upon the statement given by Shrish C shah, but the assessing officer did not confront the same with the assessee. He submitted that the assessee had received the share application money in the normal course of its activities and hence there is no reason to suspect their genuineness. The ld CIT(A) has rightly appreciated these aspects and accordingly deleted the addition. He submitted that the case laws relied upon by the Ld D.R has been rendered on the facts prevailing in that case. Accordingly, the Ld A.R contended that the order passed by Ld CIT(A) does not call for any interference.

7. We heard rival contentions and perused the record. In the instant case, the addition has been made u/s 68 of the Act, wherein cash credits, which are essentially share application money received by the assessee, have been added. Sec. 68 enables assessment of such types of cash credits, if the assessee fails to prove the nature and source of cash credits. "Nature of cash credit" would mean that the assessee is required to show that it is not of revenue nature. In order to prove the sources, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, the assessee is required to prove three main ingredients, viz., the identity of the creditor, the genuineness of the transactions and the credit worthiness of the creditor. If the assessee discharges the initial burden, then the burden would shift to the shoulders of the assessing officer, i.e., it is the responsibility of the AO to disprove the claim of the assessee by bringing evidences on record.

8. We shall now examine the facts prevailing in the instant case. It is noticed that it is not the case of the AO that the assessee did not discharge the initial burden placed upon it with regard to the share application money received by it. The assessee has furnished all the details relating to the three investors in order to discharge the burden placed upon it u/s 68 of the Act. In fact, the AO went ahead and issued notices u/s 133(6) of the Act. In response to the same, these three investors have filed the details two times before the AO. However, the AO has refused to accept the details filed by these companies through tapal, only for the reason that these companies have been categorized by the investigation wing as accommodation entry providers.

9. We noticed from the record that the assessee has filed following documents in order to discharge the burden placed upon it under section 68 of the Act :-

- a) Annual audited account of share applicants
- b) PAN number of share applicants.
- c) Copies of share certificates issued to share applicants.
- d) Bank statements showing receipt of money.
- e) Statements filed with Registrar of Companies.
- f) Copy of income tax returns filed by share applicants.

Thus, in our view the assessee has discharged initial burden placed upon it under section 68 of the Act by furnishing above said documents. The very same view has been expressed by the Ld CIT(A) as under:-

“....From the details submitted it can be seen that the share applicants have made payments from their bank accounts through account payee cheques, therefore these transactions cannot be treated as bogus. The AO has not been able to bring on record any valid material or evidence to discredit the evidences and explanation given by the appellant other than merely relying on discreet information received from Investigation Wing, Ahmedabad without himself making any further efforts to bring on record any valid or corroborative or concrete evidence against the appellant. The other reasons adduced by the AO have not real connection with the addition under section 68 of the Act made in case of the appellant.

The AO has been unable to refute the clear cut and cogent evidence submitted by the appellant and available on the AO's record, testifying to the genuineness of the share application money. The source of the said money thus stands proven. As has been held in several decisions of superior judicial authorities (Muralidhar Lahorimal vs. CIT (280 ITR 512)(guj), Labhchand Bohra vs. ITO (219 ITR 571)(Raj) and CIT vs. Dwarkadhish Investment Private Limited (299 ITR 268 (Del)), the cannot be called upon to prove the source of the sources of this money.”

10. The question as to whether the Assessing Officer could have made addition under section 68 of the Act by relying upon the statement given by an accommodation entry provider was examined by the Coordinate Bench in the case of M/s. Moraj Realty Pvt. Ltd. (ITA No.708 & 709/Mum/2019 dated 08-12-2020). The effect of amendment brought in sec.68 of the Act w.e.f. 1.4.2013 was also examined. It was held as under :-

“17. Moreover, except for relying on the statement of VVB the Assessing Officer has not done any inquiry himself except for referring to a notice issued under section 133(6) in A.Y. 2009-10 only. The learned counsel of the assessee has challenged the very veracity of this observation. He has submitted that assessee has asked for the copy of the said notice issued

under RTI Act. In response it was replied that copies thereof are not available. Hence, this shows that even the so called inquiry by the Assessing Officer was done in case of only one party for A.Y. 2009-10 and the veracity of which is itself in doubt.

18. We find ourselves in agreement with the submissions of the assessee's counsel. We note that except for the statement of the entry operator which was also retracted the addition made by the authorities below is devoid of cogent material. In this regard we note that in similar circumstances honourable Bombay High Court in the case of CIT Vs. Orchid Industries Pvt. Ltd. (ITA No. 1433 of 2014 dated 5.7.2017) held as under :-

"The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case."

19. Similarly honourable Bombay High Court in the case of Gagandeep Infrastructure Pvt. Ltd. (supra) has held as under :-

We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of

doubts” or that it is “declaratory”. Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied.

(ii) Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in CIT v/s. Lovely Exports (P)Ltd. 317 ITR 218 in the context to the preamended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee’s income as unexplained cash credit.

20. Similarly Hon'ble Bombay High Court in the case of CIT Vs. Apeak Infotech (3971 ITR 148) has held as under :-

“Amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it was not applicable for the subject Assessment year 2012-13, So for as the pre-amended Section 68 of the Act was concerned, the same cannot be invoked in this case, as evidence was led by the Respondents-Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium to tax. Similarly, the OT(A) on consideration of facts, found that Section 68 of the Act cannot be invoked, in view of the above, it was likely that the Revenue may have taken an informed decision not urge the issue of Section 68 of the Act before the Tribunal. High Court may also point out that decision of High Court in Major Metals Ltd. vs. Union of India, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers re shares of the Assessee - Company were not creditworthy in as much as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium of Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by High Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case

has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

High Court find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income. It was further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assesses in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that High Court in Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) ltd (Income Tax Appeal No. 1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14. In view of the above, Question No .B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of High Court in M/s Vodafone India Services Pvt. Ltd. (Supra) and in the Apex Court in M/s G.S. Homes & Hotels P. Ltd. (supra). Thus not entertained. ”

21. Accordingly in the background of aforesaid discussion and precedent in our considered opinion assessee has given all the necessary details required for establishment of identity creditworthiness and genuineness under extant provisions of section 68 of the IT Act. The onus cast upon the assessee stands discharged. The addition by invoking amended provisions of section 68 of the Act which are not applicable for the assessment year is not sustainable.”

11. In our view, the above said decision rendered by the co-ordinate bench supports the case of the assessee. Accordingly, following the above said decision, we hold that the addition made by the Assessing Officer under section 68 of the Act, in the facts and circumstances of the case, was not

justified. Accordingly we uphold the decision rendered by the learned CIT(A) on this issue in deleting the addition under section 68 of the Act.

12. In the result, the appeal filed by the revenue is dismissed.

Pronounced in the open court on 19.7.2023.

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 19/07/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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