

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1329/Mum/2023 (A.Y.2009-10)

M/s Cybele Paradise Pvt. Ltd.

111, Industrial Area, Sion Circle,
Beside Croma Showroom,
Sion East, Mumbai-400022

PAN: AACCC7098K

..... Appellant

Vs.

DCIT Circle 6(1)(1),

5th floor, Aayakar Bhawan,
M. K. Road,
Mumbai-400020

..... Respondent

Appellant by : Shri Piyush Chaturvedi, Ld. AR
Respondent by : Shri H. M. Bhatt, Ld. DR

Date of hearing : 25/07/2023
Date of pronouncement : 16/10/2023

ORDER

PER GAGAN GOYAL, A.M.:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (NFAC), Delhi dated 22.02.2023 u/s. 250 of the Income Tax Act,

1961 (in short 'the Act') for A.Y. 2009-10. The assessee has raised the following grounds of appeal:-

1. The Learned CIT (A) NFAC erred in sustaining the addition of Rs. 6,92,90,000/- u/s 68 of the Act by completely ignoring the submissions, documents, and evidence provided by the appellant during the reassessment proceedings and as additional evidence in respect of proving the identity of the investors, creditworthiness, and genuineness of the transactions.

2. The Ld. CIT (A) NFAC erred in holding that share capital received from related concerns is non-genuine when there was a business loss and Losses from the earlier years.

3. The Ld. CIT (A) grossly erred in sustaining the addition just because the appeal is pending for a long time without appreciating that there was a failure on part of the AO in giving a remand report for which the poor assessee cannot be penalized.

4. The Appellant Company craves leave to add, withdraw, amend, or alter any grounds of appeal as and when advised.

2. The brief facts of the case are that the assessee is a company involved in the business of public and private amusement, entertainment and edutainment of every description including, exhibition, production and management of theatres or any other venue of entertainment. For the year under consideration assessee filed its return of income on 26.09.2009 declaring net loss of Rs. (-) 4, 15, 99,713/-. Return of assessee was processed and accepted u/s. 143(1) of the Act. Case of the assessee was re-opened vide issuance of notice u/s. 148 of the Act, dated: 28.03.2014, reasons recorded were supplied to the assessee. Further, notice u/s. 142(1) of the Act was

issued to enquire about share capital and share premium amounting to Rs. 6,92,90,000/- received by the assessee during the year. Assessee was asked to prove identity, genuineness, creditworthiness and justification for the premium charged on share capital.

3. Assessee in its reply furnished certain details on record during the assessment proceedings, but AO did not find the same as sufficient to prove genuineness, creditworthiness and justification for the premium charged on shares, accordingly added back the same to the income of assessee u/s. 68 of the Act. Assessee being aggrieved with the same and preferred an appeal to the Ld. CIT(A), who in turn partly allowed the appeal of assessee and confirmed the order of AO on merits but, allowed the set-off of business losses incurred by the assessee and declared in the return. Assessee being further aggrieved prefers this present appeal before us.

4. We have thoroughly considered the order of AO, order of Ld. CIT(A) and submissions of the assessee. It is observed that assessee issued 10,66,000/-equity shares of face value of Rs. 10/- each total amounting to Rs. 1,06,60,000/- and share premium of Rs. 65/- each amounting to Rs. 6,92,90,000/-. AO accepted the amount of share capital amounting to Rs. 1,06,60,000/- but, added the amount of Rs. 6,92,90,000/- received on account of share premium. Assessee is continuously incurring business loss as well as brought forward depreciation loss, which are unabsorbed due to insufficiency of current business profits.

5. It is pertinent to mention here that specific section to deal with the issue of share premium, i.e., section 56(2) (viib) of the Act introduced in the statute w.e.f. from Finance Act, 2012, w.e.f. A.Y. 2013-14 and relevant rules for valuation of share premium, i.e., Rule 11U and 11UA inserted by the IT (Second Amdt.) Rules, 2010, w.r.e.f. 1-10-2009 and by the IT (Fifteenth Amdt.) Rules, 2012, w.e.f. 29-11-2012. Matter before us pertains to F.Y. 2008-09, when neither Rules for Valuation nor Charging Section was there. Although, there is no bar in application of section 68 of the Act in absence of these provisions. Now, another important aspect emerged out of AO's order is to be noted that he accepted the amount of share capital from the same investors and there is no doubt to his mind for Identity, genuineness and creditworthiness.

6. Notwithstanding, the above facts we have gone through the paper-book submitted by the assessee in open court on 6th July 2023. There was total three investors in this case, i.e., M/s. Twinkle Hospitality Pvt. Ltd., Mr. Gaurav Goenka and Mr. Om Prakash (As per Page 145 of the Paper Book). Vide page No. 226 to 228 assessee submitted the copies of response by investors against notice issued by AO u/s. 133(6) of the Act. We have gone through the same but not find the same in order as there is no specific information furnished before us about source of investment like Profit & Loss Account, Balance-Sheet, ITRs and Bank statement. We further gone through the page nos. 150 to 189 about calculation of share premium by consultant on discounted cash flow method, page no. 192, confirmation by consultant on the assignment of valuation assigned to him and term sheet finalized

between assessee and M/s. Twinkle Hospitality Pvt. Ltd. For the transaction of share issuance on share premium.

7. Despite of going through all these information we find that neither AO nor Ld. CIT (A) passed any specific observation on the issue of applicability of section 68 of the Act, under which additions was made. On the other hand, assessee is filing copies of investors replies u/s. 133(6) of the Act, but the annexures mentioned in replies are not before us for verification. In addition to these missing facts, order of AO is found to be contradictory, as he accepted the amount of share capital, but the same is not satisfied about the amount of share premium received by the assessee. The ground on which he added the amount of share premium is non-justification of the same by the assessee, whereas vide page nos. 150 to 189 of the paper book assessee tried to justify calculation of share premium by consultant on discounted cash flow method. But there are no remarks on the same by AO in his order. We find the whole proceeding before the authorities below a total chaos of procedure and law applicable. Assessee also has not filed any information mentioned (supra) which are relevant for us to decide the matter.

8. In the given situation to be fair for both the sides, we deem it fit to restore the matter to the file of AO for fresh adjudication considering the paper book filed by the assessee and assessee is direct to establish investor's source for investment in its shares. In these terms matter is remanded back to the file of AO with above remarks.

9. In the result, Appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 16th day of October, 2023.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 16/10/2023

Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai