

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 1137/Del/2022
Asstt. Year 2017-18

Dy. Commissioner of Income Tax, Circle-3(1), Gurugram	Vs.	M/s Posco Engineering and Construction India Private Limited, 515, 5 th Floor, Park Centra Building, Tower-B, NH 8, 32 nd Milestone, Sector-30, Gurugram 122001. PAN No.- AAACP1987E
(Appellant)		(Respondent)

C.O. No. 196/Del/2022
(Arising out of ITA No. 1137/Del/2022)
Asstt. Year 2017-18

M/s Posco Engineering and Construction India Private Limited, 515, 5 th Floor, Park Centra Building, Tower-B, NH 8, 32 nd Milestone, Sector-30, Gurugram 122001. PAN No.- AAACP1987E	Vs.	Dy. Commissioner of Income Tax, Circle-3(1), Gurugram
(Appellant)		(Respondent)

Revenue by:	Shri P N Barnwal, CIT(DR)
Assessee by:	Shri G S Kohli, CA
Date of Hearing:	29.11.2023
Date of pronouncement:	29.11.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue and Cross Objection filed by the assessee arise out of the order of the Ld. Commissioner of Income Tax (Appeals) NFAC, Delhi ("**CIT(A)**") dated 23.03.2022 pertaining to Assessment Year ("**AY**") 2017-18.

2. The Revenue has raised the following grounds:

"(i) That the Ld. CIT(A) has erred by deleting the disallowance of Rs. 11,49,71,000/- on account of unexplained share capital u/s 68 of the Income Tax Act, 1961.

(ii) The CIT (A) has erred in law and facts by observing that the Assessing Officer should made an independent inquiry from the Investor Korean Company while it was the duty of the Assessee to prove the investment.

(iii) The CIT (A) has erred in law and facts by observing that merely known identity of the investor can be accepted regarding its creditworthiness and genuineness of the transactions in absence of the requisite documents showing creditworthiness and genuineness while even identity was not well known to Assessing Officer.

(iv) The CIT (A) has erred in law and facts that known identity of the investor does not required to prove genuineness and creditworthiness of the transactions.

(v) That the Ld. CIT(A) has erred by deleting the disallowance of Rs.31,17,561/- u/s 36(1) (iii) of the Income Tax Act, 1961."

3. The grounds of Cross Objections filed by the assessee read as under:

"1. The department in 2nd 3rd and 4th "Grounds of Appeal" had twisted CIT's (Appeal) decision "the Investor Company, the holding Company and the profit or loss of the respondent company was immaterial thus issue of any investment is not valid, further where investor was known as Non-Resident holding Company their creditworthiness and genuinenity of the transactions deserves to be unquestionable.

2. The Ground No.5 seems to be raised in the spirit that it is lawful to oppose the issue. The ground taken is not self-explanatory.”

4. Briefly stated, the assessee company is a subsidiary company of Posco Engineering & Construction Co. Ltd., Korea with 100% holding by them. For A.Y. 2017-18, the assessee company which is in the business of construction by taking the assignment / project of Government, Public and Private sector e-filed its return on 17.03.2018 declaring loss of Rs. 7,75,09,740/-. The case was selected for complete scrutiny through CASS. Statutory notice(s) were issued and served upon the assessee. In response thereto, the assessee e-filed its replies. The Ld. Assessing Officer (“**AO**”) found that the assessee received during the year share capital of about Rs. 11,49,71,000/- from its holding company on issue of 1,14,97,100/- shares @ of Rs. 10/- per share. The Ld. AO asked for details, source and justification thereof. The assessee responded by submitting replies that the share capital has been received from its holding company along with a contract agreement regarding the same. The submission of the assessee was not acceptable to the Ld. AO in the absence of Share Certificates, Bank account statements of the assessee, ITRs, Balance Sheet and Profit & Loss Account of the holding company to substantiate the creditworthiness of the holding company. In para 2.2 of the Assessment Order, the Ld. AO arrived at the conclusion that the assessee neither had sufficient financial creditworthiness to receive huge amount of share capital nor offered any explanation with regard to the source of the same. He therefore, treated the said share capital as unexplained credit under section 68 of the Income Tax Act, 1961 (**the “Act”**) and added it to the income of the assessee.

4.1 The Ld. AO further found certain loans and advances of about Rs. 1,25,11,667/- mentioned as “retention from clients”. When asked about it, the assessee submitted that these are its sundry debtors. Since ledgers or confirmations were not produced, the assessee was show caused as to why proportionate interest on the said loans and advances be not disallowed under

section 36(1)(iii) of the Act. According to the Ld. AO, the assessee company's funds comprise of interest bearing funds as well as non-interest bearing funds and any advances made by the assessee company to "others" have not been proved by the assessee that they are for business purpose. Accordingly, the Ld. AO disallowed Rs. 31,17,561/- under section 36(1)(iii) of the Act, observing in para 3.3. of the Assessment Order as under:

"3.3 Since these advances of Rs.12511667/- to "others" were given for complete year hence an addition of Rs.1501400/- (i.e. 12% of Rs.12511667) is made to the returned income u/s 36(1) (iii) of the Income Tax Act, 1961. However, on perusal of the P&L a/c of the assessee for AY 2017-18 it observed that in this year the assessee claiming total financial expenses of Rs. 41,56,748/- in total, therefore understating the business expediency of the assessee 25% of these expenses are allowed to the assessee to incur its financial expense in the course of business and rest of them disallowed as per section 36(1)(iii) of the IT Act, 1961 as discussed above. The total disallowance hence comes out to be Rs. 31,17,561/-."

4.2 The Assessment was thus completed on income of Rs. 11,49,71,000/- on 16.11.2019 under section 143(3) of the Act.

5. The assessee appealed before the Ld. CIT(A). During appellate proceedings, the assessee uploaded the written submission on 22.02.2021, which is reproduced in para 4 of the appellate order. According to him, the Ld. AO made frivolous addition under section 68 of the Act which was actually share capital injection / investment of holding company at Korea in its subsidiary company at India. The Ld. CIT(A) recorded his findings on each observation of the Ld. AO as follows:

Sl. No	Reasons given by the Ld. AO for making the impugned addition	Why they are totally baseless and unacceptable and fail to pass the 'Test of Appeal'
1.	<i>Return of income filed by the assessee in the corresponding year of receipts of share</i>	<i>The appellant company may have returned losses for AY 2017-18 but that could not be any reason for the</i>

	<p>Premium i.e AY 2017-18 is of Rs. (-) 7,75,09,740 whereas the share capital received was of about Rs. 11,49,71,000/-</p>	<p>Ld. AO to disbelieve the premium of share capital particularly so when the capital was injected by the holding company of Korea and the appellant company was only a subsidiary company of that company which was injecting such huge amount of money in capital/premium.</p>
<p>1.</p>	<p>In view of no explanation provided by the assessee, it is a proven fact that the assessee neither had sufficient financial credentials to receive such huge amount of share capital nor has offered any explanation w.r.t. the source of the same.</p>	<p>These reasons given are almost similar to the reasons discussed above in SI. No. 1 e.g. i. That the appellant company had insufficient financial credential to receive such huge amount capital etc. and ii. That, no explanation was given regarding the source. It's a matter of record that during the asst. proceedings itself the appellant had told capital was, in fact, injected/pumped \invested by its holding company at Korea only which had its 100% shares. In the written submission uploaded and seen in these appeal proceedings, it has been stated more than once and from one of such places of the submission, the following is gainfully quoted as under: -</p> <p>"Coming to the merits of the case it is submitted that the assessee company had complied with the sought information as and when required time to time by the Assessing Authority.</p>
<p>1.</p>	<p>It is also worthy to mention here that in no practical circumstances someone will invest and introduce such huge share capital in such a less known and loss making concern.</p>	<p>Here again , the Ld. AO is basically giving same reason that how it was practical that SOMEONE will invest and Introduce such huge share capital in such a less known and loss making concern. In fact Ld. A.O. totally failed to appreciate and very irresponsibly overlooked (I am afraid to say like that that the) capital receiving appellant company was well known to the investor company, being its own HOLDING</p>

		<p>COMPANY and Secondly the subsidiary appellant company making loss or profit had hardly anything to do with the decision of the HOLDING COMPANY of Korea to invest in its subsidiary company at INDIA and if Ld. A.O. had any doubts, before making such HIGHLY PITCHED ADDITION and that too u/s 68 of the Act, She could/SHOULD HAVE MADE ATLEAST AN INDEPENDENT ENQUIRY FROM THE INVESTOR Korean Holding Company ABOUT THEIR SUCH DECISION TO INVEST Rs. 11,49,71,000 when the loss returned of appellant Indian subsidiary company in this A.Y. i.e. A.Y.2017-18 was Rs.7,75,09,740, the basic reason as to why the Ld. A.O. in her wisdom(?) had to make such frivolous & baseless addition. I am further inclined to say that once the identity of the investor was known to the Ld. A.O, she could not, in any case, make such addition u/s 68 of the Act without making any further enquiry (whatsoever) about the other two limbs of Section 68 i.e. credit worthiness and genuineness of the transaction.</p>
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5.1 The Ld. CIT(A) also deleted the addition of Rs. 31,17,561/- under section 36(1)(iii) of the Act accepting the argument of the assessee contained in written submission uploaded on 22.02.2021 mentioned in para 5.2.3 of the appellate order.

6. The Revenue is dissatisfied and is in appeal before the Tribunal. All the grounds relate thereto.

7. The Ld. CIT(DR) relied on the order of the Ld. AO and drew our attention to the relevant findings of the Ld. AO on the issue involved.

8. The Ld. AR submitted that during assessment proceedings, point wise reply to questionnaire of the Ld. AO was furnished, copy of which is at pages 148-152 of the Paper Book. In response to further query, reply was submitted, a copy of which appears at pages 155-157 of the Paper Book. The Ld. AR pointed out that before the Ld. AO, audited statements of affairs along with Auditor Report, Board Resolution for allotment of shares, list of allottees, Foreign Inward Remittance Certificate ("**FIRC**"), bank statements of Woori Bank where the foreign exchange was realised, Audited Financials of holding company etc. were submitted. All these documents have been ignored by the Ld. AO. These documents in fact establish the identity, creditworthiness and genuineness of the transaction.

8.1 As Regards disallowance under section 36(1)(iii), the Ld. AR submitted that the outstanding amount of Rs. 1,25,11,667/- related to "retention money receivable from clients". It was brought to the notice of the Ld. AO that for recovery of outstanding amount the assessee has filed suit and the matter is sub-judice before the Hon'ble Bombay High Court. He pointed out that there is no basis at all for the impugned disallowance.

9. We have carefully considered the rival submissions and perused the records. The Ld. AO made the impugned addition under section 68 of the Act for the reason that source of the share capital credited in the books of assessee was not explained. This is contrary to the evidence available in the records. In its reply dated October 17, 2019 the assessee explained that the assessee received share capital of Rs. 11,49,71,000/- from its 100% holding company of South Korea and submitted board resolution for allotment of shares and list of

allottees. On further query by the Ld. AO, the assessee in reply dated November 4, 2019 explained that it has received Foreign Direct Investment of Rs. 11,49,71,000/- from its 100% holding company and submitted FIRC filed with RBI and audited financials of holding company. In our opinion, the assessee discharged the onus which lay upon it to establish the identity, creditworthiness and genuineness of transaction and the Ld. CIT(A) was perfectly justified in deleting the impugned addition. We therefore reject the Revenue's ground Nos. (i) to (iii) being devoid of any substance.

10. As regards disallowance of Rs. 31,17,561/- under section 36(1)(iii) of the Act, it was explained to the Ld. AO that the "retention from clients" amounting to Rs. 1,25,11,667/- was due from Sinew Developers Private Limited ("**SDPL**") with whom the assessee had entered into contract for construction of residential towers. However, dispute arose between the parties and the project went into litigation. Dispute is still pending before the Hon'ble Bombay High Court. In fact, the amount represents deduction made by SDPL from invoices while releasing payment. The Ld. AO did not appreciate factual matrix of the issue and made the impugned disallowance by misapplying the provisions of section 36(1)(iii) of the Act. The Ld. CIT(A) has rightly deleted the disallowance. Ground No. (iv) of the Revenue is also rejected.

11. In the result, appeal of the Revenue is dismissed.

12. The Cross Objection filed by the assessee is in support of the order of the Ld. CIT(A). Since we have upheld the order of the Ld. CIT(A), the Cross Objection becomes infructuous and is dismissed as such.

13. Before parting, we would like to state that personal critical remarks against the Ld. AO made by the Ld. CIT(A) in the body of the appellate order is not in good taste. It should have been avoided.

Order pronounced in the open court on 29th November, 2023.

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 29/11/2023
Pooja, Sr.PS

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	21.02.24
Date on which the typed draft is placed before the dictating Member	22.02.24
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	