

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A', KOLKATA

[Before Shri Sonjoy Sarma, Judicial Member &
Shri Girish Agrawal, Accountant Member]

I.T.A. No. 521/Kol/2023
Assessment Year : 2012-13

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| Pragya Traders Pvt. Ltd. | vs | ITO, Ward-5(2), Kolkata |
| PAN: AABCP 5604 K | | |
| Appellant | | Respondent |

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| Date of Hearing | 15.02.2024 |
| Date of Pronouncement | 12.04.2024 |
| For the Assessee | Shri Sunil Surana, AR |
| For the Revenue | Shri S. Datta, Addl. CIT, DR |

ORDER

Per Sonjoy Sarma, JM:

This appeal of the assessee for the assessment year 2012-13 is directed against the order dated 31.03.2023 passed by the ld. Commissioner of Income-tax, Appeals, NFAC, Delhi [hereinafter referred to as 'the ld. CIT(A)'].

2. Brief facts of the case are that the assessee is a company filed its return of income for the A.Y. 2012-13 disclosing total income at Rs. Nil. The return of the assessee was processed u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny followed by notices u/s 143(2) and 142(1) of the Act along with questionnaire issued upon the assessee. In turn, the ld. AR of the assessee appeared before the ld. AO time to time and submitted various details and documents as asked for. During the assessment proceedings, the ld. AO notice that assessee company had received share application money of Rs. 8,63,25,000/- issuing 17265 shares having face value of Rs.

10/- each with the premium of Rs. 4,990/- raising a total amount of Rs. 8,63,25,000/- as share application money during the year under consideration. The ld. AO in order to verify the genuineness of the transactions as well as verify the identity and creditworthiness of the shareholders of the assessee company issued notice u/s 131 of the Act. But none appeared before the assessing officer. However, shareholders submitted only photocopy of identity, address proof, IT PAN card, copy of share application, details of bank account, details of source of fund etc. in the form of paper book furnished by the relevant parties. Moreover, the ld. AO issued notice u/s 131 of the Act upon the directors of the assessee-company to appear personally before him but assessee-company has failed to appear before him. Therefore, ld. Assessing officer that credit of Rs. 8,63,25,000/- in the books of assessee-company during the year under consideration and it was added to the total income of the assessee as unaccounted cash credit u/s 68 of the Act. The ld. Assessing officer also added Rs. 25,750/- disallowing expenses u/s 14A of the Act applying Rule 8D(2)(3) of I.T. Rules.

3. Aggrieved by the above order, assessee went into appeal before the ld. CIT(A) where the appeal of the assessee was partly allowed. However, the main grievance of the assessee regarding confirmation of addition of Rs. 8,65,76,750/- u/s 68 of the Act was not properly addressed passing the impugned order by the ld. CIT(A).

4. Dissatisfied with the above order, assessee is in appeal before this Tribunal raising multiple grounds of appeal. However, ground no. 1 is in relation to dismissing the appeal of the assessee confirming the addition of Rs. 8,65,76,750/- in the hands of assessee made by the AO u/s 68 of the Act ignoring the documents/evidences submitted by the assessee.

5. At the time of hearing, ld. AR stated that assessee-company issued 17265 shares of face value of Rs. 10/- per share along with a premium of Rs. 4,990/- per share to 8 companies namely: Baba Metalies Pvt. Ltd., Ayush Business Pvt. Ltd., Mojijika Sales Pvt. Ltd., Kalyani Synthetics Pvt. Ltd., Redlily Enterprises Pvt. Ltd., Uday Overseas Pvt. Ltd., Prateek Traders Pvt. Ltd. and Contemporary Finvest Pvt. Ltd. The assessee had duly filed all the evidences of all the subscriber companies to prove the identity and creditworthiness of the subscriber companies and also prove the genuineness of the transactions. The assessee in order to substantiate its claim also produces various documents of the subscriber companies before this Tribunal filing relevant documents such as IT return acknowledgement for A.Y. 2012-13, copy of audited P & L account, balance sheet as on 31.03.2012, copy of certificate of incorporation, copy of MCA data, a copy of their bank statement showing payment made, copy of bank book, copy of statement of source of funds etc. before this bench. Similarly, the ld. AR submitted before the bench stating that net worth of the company which can be clearly identified from the balance sheet of the company. This itself shows that

creditworthiness of the subscriber company has been fulfilled. Similarly, the subscriber companies were active company as per MCA records. Therefore, all the three limbs i.e. identity, genuineness and creditworthiness are proved. However, the alleged addition in the hands of assessee is uncalled for. The ld. AR prayed before the bench that the assessee has discharged its initial onus establishing the identity, creditworthiness of the share subscribers and genuineness of the transaction. He further submitted that no verification worth name made by the AO making necessary verification from the assessment records of the parties. It has been held in the case of Hon'ble Jurisdictional High Court of Calcutta in the case of PCIT vs Shree Leathers in ITAT/18/2022 (IA No. GA/02/2022) dated 14.07.2022. He, therefore, prayed before the bench that appearance of the directors of the assessee company has nothing to do with decree of proof for the purpose of section 68. The assessee has produced all relevant evidences as asked for. In the present case, the initial onus to prove the receipt of the share capital u/s 68 was duly discharged by assessee company and the department has not brought on record any evidence to prove the fact to the contrary and shift back the onus on the assessee. He also stated that section 68 nowhere speaks about production of the creditor for acceptance of the cash credit. It has only required that the assessee has to prove the nature and source of the credit. Since the assessee has proved the amount was received towards share application, there was no legal obligation on the part of the assessee to present itself physically before the AO and the same

cannot be a ground for making addition u/s 68 of the Act. As held by jurisdictional High Court as in the case of Crystal Networks P Ltd. in ITA 158 of 2002 dated 29.07.2010. The appearance of the director is not necessary if credit is proved u/s 68 has been held by ITAT, Kolkata in the case of M/s. Cygnus Developers Pvt. Ltd. (I) P Ltd. in ITA No. 282/Kol/2012 dated 02.03.2016.

6. The ld. AR placed reliance on the decision of the Kolkata Tribunal as in the case of Kanchan Plywood Products Pvt. Ltd. vs ITO vide order dated 01.05.2019, Kolkata ITAT which is held as under:

" contra, the Learned DR vehemently supported the order of the authorities below and wondered us to how the assessee-company issued share to three Private Limited Companies when its face value of Rs. 10/- at a premium of Rs. 990A According to the Learned DR, the assessee-company had a meager return of income in the year under consideration and therefore, question of any person subscribing such high premium to the shares of the assessee-company cannot be believed. According to the Learned DR when the income of the assessee is meager, the action of the share subscribing companies in giving astronomical prices for the shares is against preponderance of probabilities and cited the decision of the Hon'ble Supreme Court as well as Delhi High Court in CIT vs N.R. Portfolio Pvt. Ltd.

Further, according to Ld. AR in the case of unlisted companies, it is common knowledge that premium fixed is a matter of mutual agreement and ITAT Mumbai in the case of Gagandeep has held that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. And the aforesaid view of the ITAT has been upheld by the Hon'ble Bombay High Court order dated 20th March 2017. Further the Hon'ble High Court observed 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. Infact, 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 Section 68 of the Act with retrospective effect nor does the proviso so introduced 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 has 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 vis. Lovely Exports (P) Ltd. 317 ITR 218 in the context to the pre-amended 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."

7. Similarly, he relied on the decision of the Hon'ble Jurisdictional High Court of Calcutta as in the case of PCIT vs Naina Distributors Pvt. Ltd. in ITAT/113/2023 vide IA No. GA/1/2023 dated 28.06.2023 wherein similar issue has been dealt by the Hon'ble High Court dismissing the revenue and sustained the order of Tribunal. The ld. AR also invited our attention to the judgment of Hon'ble Bombay High Court as in the case of CIT vs Orchid Indus Pvt. Ltd. in ITA No. 1433 of 2014 pronounced on 5th July, 2017.

8. We have heard the rival submissions of the parties and perused the material available on record find that the ld. AO has

not point out any defect or default in the document furnished by the share subscribing company. These evidences never have been controverted by the ld. AO during the assessment proceeding but the ld. AO simply added the amount of share capital and share premium on the ground that assessee has not produced the directors/shareholders. Thus, going by the records placed by the assessee of all the share subscribing companies, it can be safely held that the assessee held that the assessee has discharged its initial burden and the burden shifted on the AO to enquire further into the matter which he failed to do so. It is also noted from the audited balance of the investing company have sufficient own funds available to make investment in the assessee's company. On perusal of the impugned order passed by the ld. CIT(A), we notice that the ld CIT(A) has not pointed out any defect or discrepancy furnished by the assessee but simply citing certain case laws brushed aside the appeal of the assessee. Fact and case law as in the case of CIT vs Orchid Indus Pvt. Ltd. is clearly covered in the case of assessee and which applies on the factual matrix of the present case and following the jurisdictional Tribunal as in the case of Kanchan Plywood Products Pvt. Ltd. vs ITO vide order dated 01.05.2019, Kolkata. We find that the assessee has produced sufficient evidence in order to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transaction. Accordingly, we set aside the issue to the file of ld. AO with a direction to re-examining the issue afresh after affording

reasonable opportunity of being heard to the party on merits of the case.

9. Ground no. 2 is in relation with passing the impugned order confirmed the disallowance u/s 14A for an amount of Rs. 2,51,750/-. In this connection, the ld. AR submitted that assessee did not earn any exempt income during the year under consideration and the fact is clear from the profit & loss account submitted by the assessee. The disallowance was made by AO even without regarding any satisfaction if at all and expenses have been incurred by the assessee in relation to exempt income. Thus, it is clear that the addition u/s 14A has been confirmed without even considering the fact of the case. In this connection, the ld. AR invited to the Kolkata Bench ITAT in the case of Micro Management Ltd. in ITA No. 1399/Kol/2011 dated 21.05.2012 held that recording of the satisfaction is imposed by the AO. Therefore, the disallowance is uncalled for and may be pleased to direct the same.

10. We after hearing the rival submissions of the parties find that the ld. AO straightway embark to make disallowance which is not in accordance with law and hence disallowance of expense of Rs. 2,51,750/- u/s 14A is hereby deleted. In terms of the above, ground no. 2 is hereby allowed.

11. Ground no. 3 & 4 is consequential in nature need not required to be adjudicated.

12. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 12.04.2024.

Sd/-

Sd/-

(Girish Agrawal)
Accountant Member

(Sonjoy Sarma)
Judicial Member

Dated: 12.04.2024
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- Pragya Traders Pvt. Ltd., 167, Marshall House, 25, Strand Road, Kolkata-700001.
2. Respondent – ITO, Ward-5(2), Kolkata.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata