IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H" DELHI

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.1711/Del/2023
Assessment Year 2018-19

DCIT Central Circle-I, Noida	Vs.	**Taptap Meals Pvt. Ltd.,** B-23, Sector-48, G.B. Nagar Noida.
TAN/PAN: AAFCT5948J		
(Appellant)		(Respondent)

Applicant by:	Shri Raghav Bajaj, Advocate Shri Aanchal Jain, Advocate		
Respondent by:	Shri Amit Katoch, Sr.DR		
Date of hearing:	09	04	2024
Date of pronouncement:	19	04	2024

O R D E R

PER PRADIP KUMAR KEDIA - A.M.:

The captioned appeal filed by the Revenue against the order of the Commissioner of Income Tax (Appeals)-IV, Kanpur ('CIT(A)' in short) dated 21.03.2023 arising from the assessment order dated 30.09.2021 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2018-19.

2. The grounds of appeal raised by the Revenue read as under:

"1. On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in deleting the addition of Rs.78,85,190/- on account of share capital even though the assessee failed to furnish the confirmation from parties, their ledger accounts, ITRs and bank statements or any necessary documentary evidence to prove their identity, creditworthiness and establish the genuineness of transaction. The primary onus was on the assessee to prove this. However, it failed to do so. No response was also received to the notice u/s. 133(6) issued to the parties. Hence, the identity, creditworthiness and genuineness of the parties and funds received was not established. The claims of the assessee without documentary evidence cannot be accepted. Thus the addition was rightly made."

2. On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in admitting the additional evidence at the stage of appeal ignoring the fact that the assessee failed to furnish any reply to the queries despite providing numerous opportunities."

3. Briefly stated, the assessee is a private limited company with an object to carry on business as an online e-commerce and local delivery services provider. The assessee is stated to be recognized as a start up by Department of Promotion of Industry and Internal Trade in 'Logistics Industry' and 'Others' sector w.e.f. 04.08.2015. The assessee filed return of income for A.Y. 2018-19 in question declaring loss of Rs.1,34,87,061/-. In the relevant F.Y. 2017-18, the assessee has issued equity shares and preference shares having Face Value (FV) of Rs.10/- per share to the existing as well as new shareholders at a Fair Market Value (FMV) stated to be Rs.1,776/- per share and thereby received a premium of Rs.1766/- per share.

4. The return filed by the assessee was selected for scrutiny assessment and the assessment was completed under Section 143(3) of the Act. The AO *inter alia* made an addition of Rs.78,85,190/- as unexplained credit under Section 68 of the Act attributable to share capital so introduced at premium. In the assessment order, the AO alleged that assessee has failed to furnish the confirmation of the parties / subscribers, their ledger accounts, ITRs and bank statements and other documents in corroboration of identity, creditworthiness and genuineness of the transactions. The assessee thus alleged that primary onus which lay upon the assessee was not discharged in terms of Section 68 of the Act. The AO also alleged that no response was received from the subscribers in pursuance of notice issued under Section 133(6) of the Act. The AO thus questioned the propriety of subscription received while resorting to Section 68 of the Act.

5. Aggrieved by the additions made under Section 68 r.w. Section 115BBE of the Act, the assessee preferred appeal before the CIT(A).

5.1 The CIT(A) re-appreciated the factual matrix and found merit in

the plea raised by the assessee. The CIT(A) accordingly reversed the additions so made by the AO on contours of Section 68 r.w. Section 115BBE of the Act.

5.2 The relevant operative paragraph of the order of the CIT(A) is reproduced hereunder for ready reference:

> *"6.5 From the facts of the case it has been found that Ld. AO has made addition of share premium amount of Rs. 78,85,190/- u/s 68 of IT Act. This year appellant issued 4,465 shares to M/s. Ved Power Ventures Pvt. Ltd., M/s. Maple Capital Advisor Pvt. Ltd., Sh. Abhinav Grover, Sh. Anuj Sanghi, M/s. Munjal Investors Pvt. Ltd. and Sh. Ruchiransh Jaipuriya which carried face value of Rs. 44,650/- and premium amount of Rs. 78,85,190/- and thus total capital introduction of Rs. 79,29,840/- has been made. It has further been found that the appellant has provided address, PAN, creditworthiness details of these share holders in the assessment proceedings but the same have been ignored. From the facts of the case it has been found that only M/s. Ved Power Ventures Power Ltd. is new share subscriber and all other share holders are existing share holders, to whom additional shares have been allocated. It has also been found that Sh. Anuj Sanghi and Sh. Ruchiransh Jaipuriya are directors of appellant company. All the amounts have been received through banking channel and in the paper book the detailed bank statements have been filed. As per the balance sheet of M/s. Ved Power Ventures Pvt Ltd. investment of Rs. 40,00,000/- is made in M/s. Taptap Meals Pvt Ltd. this share holder has sufficient creditworthiness for the same. From the balance sheet of M/s. Maple Capital Advisors Pvt Ltd. it is found that this concern has equity and liabilities of Rs. 3.46 crores and the total investment of Rs. 6,60,000/- in M/s. Taptap Meals Pvt Ltd. is reflected. Similarly returns of income of Sh. Abhinav Grover and Sh. Anuj Kumar Sanghi show gross total incomes of Rs. 6,11,487/- and Rs. 15,50,464/- in AY 2018-19 respectively. From the balance sheet of M/s. Munjal Investments Pvt Ltd., it is seen that this has equity of Rs. 20.84 crores. Sh. Ruchiransh Jaipuriya is not only director of the appellant company but he has also sufficient creditworthiness, the appellant has also filed his balance sheet, according to which he has capital and liabilities of Rs.13.00 crores.*
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> *From the facts of the case it is clear that vide notices issued u/s 133(6) of IT Act dt. 23.09.2021 to these share holders, Ld. AO has given time of response on or before 25.09.2021 and none of the notice is reported to have returned. Therefore it is clear that the identity of these share holders was not doubted. From these facts it is very clear that the appellant has successfully proved identity, creditworthiness and genuineness of transactions and hence all the three limbs of a genuine cash credit have been proved in the matter of entire share capital amount of Rs.79,29,840/-.*
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> *6.6 In the matter of expenditures, an observation is made in the assessment order that the assessee fails to prove the genuineness of the*

expenditures shown in its books of account, therefore amount of expenditures is being disallowed. Ld. AO has not made any addition on account of such claim of expenses, in the final assessment of the income. From these facts it is clear that such observation is without any context and is meaningless since no disallowance is been made in this regard. Therefore no observation is required in the appellate proceedings in this regard.

6.7 From the facts of the case it is clear that Ld. AO has made addition of Rs.78,85,190/-. This amount is share premium amount since the appellant issued 4,465 shares in the year under consideration, which had face value of Rs. 44,650/- and share premium amount of Rs.78,85,190/- In this regard it is pertinent to note that the appellant is a Start-up as declared by the Department for Promotion of Industry and Internal Trade (DPIIT) in "Logistics Industry" and "Others" Sector w.e.f. 04.08.2015 to 03.08.2025 vide certificate no. DIPP88065. Therefore the appellant is covered under proviso (ii) of sub section (viib) of section 56 of IT- Act. And provisions of section 56(2)(viib) are not applicable in case of the appellant in the light of Circular no. 16/2019 dt. 07.08.2019, letter F. No. F. 173/354/2019-ITA dt. 09.08.2019 and Circular no. 22/2019 dt. 30.08.2019. Therefore addition on account of share premium amounting to Rs.78,85,190/- cannot be made.

6.8 Looking to the facts and circumstances of the case, it is observed that the source of entire share capital received during year under consideration amounting to Rs.79,29,840/- (comprising face value of 4,465 shares of Rs.44,650/- and share premium amount of Rs.78,85,190/-) is explained. Therefore the addition made by Ld. AO cannot be sustained and hence relief is allowed to the appellant. All the grounds of appeal are adjudicated accordingly."

5. The Revenue has challenged the first appellate order of the CIT(A) granting relief to the assessee before the Tribunal. The ld. DR for the Revenue strongly assailed the action of the CIT(A) and defended the order of the AO.

5.1 Assailing the first appellate order, the ld. DR pointed out that; (a) the CIT(A) has clearly proceeded on misconception of facts and law while determining the issue in favour of the assessee; (b) the onus under Section 68 of the Act was always upon the assessee to offer satisfactory explanation towards credits received by way of subscription and share premium where the assessee has miserably failed. The assessee failed to lead evidences in corroboration of subscription record. The CIT(A) overlooked the fact that notice issued under Section 133(6) remained uncomplied with before the Assessing Officer; (c) the CIT(A) acted in

undue haste and accepted the version of the assessee towards *bona fides* of credits without any demur and without seeking any remand report. No inquiries were made towards overriding factual aspects and huge premium charged. The CIT(A) casually admitted the additional evidences placed before him without confronting such facts to the AO in gross contravention of mandate of Rule 46A of the Income Tax Rules; (d) The response from the investors in question, if any, were not made available to AO for further inquiries if so needed. (e) The financial credibility of the subscriber and justification for subscription at huge premium was not enquired in earnest while admitting the submission of assessee unilaterally.

5.2 The ld. DR thus submitted that the CIT(A) has failed to perform its *quasi judicial* duty envisaged in law and the resultant appellate order is thus unsustainable in law. The ld. DR thus urged for setting aside the first appellate order and restoration of the assessment order or any other suitable relief as may be considered expedient in the circumstances.

6. Per contra, the ld. counsel for the assessee pointed out that the AO has issued notice under Section 133(6) of the Act at the fag end of the assessment on 23.09.2021 seeking reply from the investors within a span of 2 days i.e., on or before 25.09.2021. Despite such short time given for meeting the requirement under Section 133(6), certain parties have duly filed reply and placed the documentary evidences on the records of AO as required. The ld. counsel thus submitted that the AO has wrongly observed that none of the six parties have responded when certain parties did respond. The ld. counsel also submitted that the action of the AO itself is bad in law in the absence of any opportunity desired in observance of principle of natural justice as held in *S. Velu Palandar vs. DCIT (1972) 83 ITR 683 (Mad.).* The Hon'ble High Court in that case observed that opportunity given to the assessee must be real and effective, realistic and not mere notional or empty formality. The subscribers of the assessee-company were thus having no real opportunity to meet the contents of notice under Section 133(6) of the

Act. Under the circumstances, the action of the CIT(A) cannot be faulted where the relevant material were made available before the CIT(A). The ld. counsel thus submitted that no interference with the order of CIT(A) is called for.

7. We have carefully considered the rival submissions and perused the material available on record.

8. It is unnecessary to go into the nuanced details on the merits of the *bona fides* of credit entries towards share subscription / share premium. We straightaway agree with the contentions on behalf of the Revenue that the AO has not been given any opportunity while dislodging his findings based on new material / evidences placed before the first appellate authority at the first instance. The CIT(A) appears to have decided the issue in haste and in an abrupt manner without seeking any remand report as emerged in the course of hearing before us. No inquiries have been made by the CIT(A) himself either as desirable in exercise of co-terminus and co-extensive powers on crucial points. The CIT(A) has casually accepted the plea of the assessee on discharge of onus overlooking factual aspects and by admitting the additional evidences in support of the creditworthiness of the subscribers and genuineness of transactions. The AO has alleged that the subscribers have not responded to a notice under Section 133(6) of the Act. The CIT(A) has not returned any finding of fact that such notice has been duly responded in full before the AO. The CIT(A) himself has also not made any suitable inquiries in this regard either.

9. The CIT(A) in the instant case has granted relief on the ground that the AO has failed to provide proper opportunity to the subscribers to respond to notice issued under Section 133(6) of the Act. Admittedly, a solitary opportunity given to the subscribers to respond to the notice without sufficient time is grossly improper and in the league of an empty formality. However, the CIT(A) in exercise of co-terminus powers vested under Section 251 of the Act ought to have asked the AO to make

inquiries as may be considered necessary during the pendency of the appellate proceedings. No remand report on such aspect has been called for while admitting fresh evidences. In the absence of relevant facts available towards the *bona fides* of the credits in question, the CIT(A) in our view was not justified in dislodging the findings of the AO completely. The findings of the CIT(A), in our view, lacks comprehension. As a matter of course and to reach logical conclusion, the CIT(A) ought to have initiated the inquiry as desired either himself or through the AO. In the hierarchy or powers, the first appellate authority possesses co-terminus powers as well as duties in equivalence with that of AO apart from the appellate powers to adjudicate the grievance of the assessee. These are the special and exceptional attributes of jurisdiction of a Tax Appellate Authority. These attributes underline the proposition that the appellate authority is no different, functionally and substantially from the assessing authority itself. In exercise of scope of its plenary powers co-terminus with sub-ordinate authority, the CIT(A) could have called the assessment records himself to ascertain the compliance of the notice issued under Section 133(6) and in the absence of compliance, inquiry ought to have been initiated as enjoined in law towards corroboration of credit entries under challenge. The CIT(A), in our view, has wrongly reversed the action of the AO without ensuring a degree of objectivity in making inquiries and verifications in accordance with law. The action of the CIT(A) clearly violates Rule 46A of the IT Rules as well. We thus see manifest merit in the plea of Revenue for recalling the order of the CIT(A).

10. In the circumstances narrated above, we consider it expedient to set aside the order of the CIT(A) on the point in context and restore the matter for fresh determination to the file of the AO rather than with CIT(A). The AO shall determine the issue afresh in accordance with law after making necessary inquiries and verifications as may be considered expedient. It shall be open to the assessee to adduce such evidences as may be considered necessary to the satisfaction of the AO towards nature

and source of credits under controversy in terms of Section 68 of the Act.

11. We thus set aside the appellate order passed by the CIT(A) on the issue and remit the matter back to the file of the AO for reconsideration of the whole issue in an orderly manner in accordance with law and without any fetters after granting proper opportunity of hearing to the assessee.

12. In the result, the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the open Court on 19th April, 2024.

Sd/-	Sd/-
[SAKTIJIT DEY]	**[PRADIP KUMAR KEDIA]**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

DATED: **April, 2024**
Prabhat