



आयकर अपीलिय अधिकरण "बी" न्यायपीठ मुंबई में
**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI**

श्री बी आर भास्करन, लेखा सदस्य एवं
श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI B R BASKARAN, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. : 5263/Mum/2011
(Assessment year: 2002-03)

The ITO -6(3)-3, R. No. 524, Aayakar Bhavan, 5 th Floor, M K Marg, Mumbai-400 020	Vs	महानगर ट्रेडिंग कंपनी प्राइवेट लिमिटेड M/s Mahanagar Trading Co. Pvt Ltd, 49-A, Shiv Smruti Chambers, Dr. A B Road, Worli, Mumbai -400 018 स्थयी लेखा सं. PAN: AADCM 0605 R
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	मिस राजेश्वरी मोटवानी Miss Rajeshwari Motwani
Respondent by	:	श्री हिमांक देसाई Shri Himank Desai

सुनवाई की तारीख /Date of Hearing : 04-05-2016

घोषणा की तारीख /Date of Pronouncement : 29-06-2016

आदेश
ORDER

श्री अमित शुक्ला, न्या स:

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the revenue against impugned order dated 10.12.2011, passed by Ld. CIT(Appeals)-12, Mumbai for the quantum of assessment passed under section 143(3) for the assessment year 2002-03. In the grounds of appeal, the revenue has raised following grounds:-

- “1 On the facts and in the circumstances of the case, Ld. CIT(A) erred in deleting the addition of Rs.10,00,000/- made by AO u/s 68 of the IT Act on account of

unexplained income in share capital without appreciating the efforts made by AO to verify the genuineness and creditworthiness of investors. AO had issued show cause duly explaining the fact that the case and therefore onus lies on assessee which failed to discharge.

2. *On the facts and in the circumstances of the case, Ld. CIT(A) erred in deleting the addition of Rs.40,00,000/- made by AO u/s 68 of the IT Act on account of unexplained premium on such shares without appreciating the efforts made by AO to verify the genuineness and creditworthiness of investor. AO had issued show cause duly explaining the fact of the case and therefore onus lies on assessee which assessee failed to discharge.*
3. *On the facts and in the circumstances of the case, Ld. CIT(A) erred in deleting the addition of Rs.10,24,556/- made by AO u/s 41(1) of the IT Act without appreciating the fact that the assessee failed to discharge its onus to prove that liability was continued to exists.*
4. *The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the assessing officer be restored.*
5. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary”.*

2. Brief facts *qua* the issue raised in ground no. 1 & 2 are that, the AO during the course of assessment proceedings noted that assessee has shown increase in share capital which had increased from Rs.50 lakhs to Rs.60 lakhs and it has also shown a new reserves and surplus of Rs.40 lakhs on account of share premium. The assessee during the year had issued 1,50,000 shares of Rs.10/- each and a premium of Rs.40/- per share aggregating to Rs.50/- per share to the following parties:-

Name of the party	Number of equity shares	Amount
Urmila Gupta (Proprietor of Amber Industries)	12000	600000
Pratinidhi Properties Pvt Ltd	55600	2780000
Podar Equipment and Appliances Pvt Ltd	14800	740000
Suchitra Investment and		

Leasing Ltd.	7600	380000
SubhTex India Pvt Ltd.	8000	400000
Mahesh Gupta HUF	2000	100000
	100000	5000000

3. As noted by the AO in the impugned assessment order, he had required the assessee to show cause and to furnish the entire details of share application credits and substantiate the increase in reserves and whether it is genuine or not. In response, the assessee failed to furnish the requisite details to the satisfaction of the AO. The details of various opportunities given by the AO to assessee has been incorporated by the AO in para 4.2 at page 2 of the assessment order. Left with no option, the AO proceeded to make independent enquiry for calling of information under section 133(6) in respect of three parties shown as sundry creditors in the books of the accounts. However, all the three letters sent to these parties were returned back by the Postal authorities with the remark "left". Further, he noted that, assessee has not furnished any details regarding increase in the share capital and that of the share premium received and also inquiry and verification undertaken by him had yielded no result. In the final opportunity given by the AO to the assessee to substantiate the entries and the credits in the books of account, the assessee submitted the details of the persons to whom the shares have been allotted and stated that these shares were allotted in lieu of purchases made from them. On the receipt of the said details, AO again proceeded to issue summons under section 131 requesting the five parties as detailed in his order to attend in person with documentary proof of share application and also to verify the genuineness of the investments in the assessee's share capital. However, none of the parties responded or attended to the AO. Again AO issued a detailed query to the assessee company requiring as to why the share application amount should not be added as income from 'undisclosed sources, as assessee has failed to substantiate. In

reply, finally the assessee filed copies of documents showing transaction from above parties, however, AO found to be unsatisfactory and incomplete and held that the genuineness and creditworthiness of the parties could not be proved. Accordingly, he disallowed Rs. 10 lakhs purported to have been received by way of share capital and premium of Rs.40/- per share which the assessee has credited in the books of the account.

4. Before the CIT(A), assessee besides filing documents filed before the AO also filed additional evidences to substantiate the case and credits. The Ld. CIT(A) sent all the documents and submissions to the AO to give his remand report. In the remand report AO again highlighted his reasons which has been incorporated by the CIT(A) in para 5.3 and 5.4, which for the sake of ready reference is reproduced herein below:-

5.3 The remand report of the AC is almost on the same lines wherein the AO has further mentioned that the evidences as filed by the appellant during the appeal proceedings does not still explain or verify the transaction in shares for the reason that

- Copy of application made for increasing the share capital to the ROC does not necessarily authenticate the increase so claimed in absence of any certificate issued by the ROC.*
- Increase shown in the balance sheet does not necessarily mean that shares consist of the shares invested with the appellant company specially in the absence of any details of the party-wise bifurcations of the total shares held.*
- In some cases the details of current assets, loans and advances gives no indication of any investments in*

shares of the appellant company being made by the company/person said to have invested in the shares.

- *Details reflecting the investments made regarding share in the appellant company have not been furnished. Mere submission of a copy of acknowledgement of return of income for A.Y. 2002-03 does not justify the appellant's claim of having adjusted shares towards its outstanding dues.*

5.4. Under the circumstances the AO has held that the appellant has failed to establish the identity and creditworthiness of the persons in respect of whom the credits have been added. It has also been held by the AO that the appellant has failed to establish the genuineness of the transaction as the requisite evidence was not filed by the appellant during the assessment proceedings or during the remand proceedings. The AO also observed that the appellant has failed to produce the concerned persons for cross examination and therefore an adverse inference regarding the credits is naturally drawn”.

5. Before the CIT(A), the assessee had stated that it had furnished following documents to prove genuineness of the share application:-

- The consideration for the above shares had not been received through bank but adjusted against the purchases made from the said parties.
- The appellant submitted details of the purchases made, opening balance, shares subscribed during the year, payment made during the year and the closing balances of the parties.

- The shares allotted were for consideration other than cash.
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- To prove that there has been allotment of shares the share application form duly signed by the respective parties giving the name and address of the applicant, number of shares applied for, mode of consideration and PAN/GIR of each party had been submitted.
- The allotment letter giving the above details along with form number 2 of ROC wherein the details of the said parties had been mentioned had also been submitted.
- The confirmation letters from the above mentioned parties had also been submitted. Along with balance sheet, profit and loss account of the parties had also been submitted.
- The appellant also submitted all the purchase invoices raised by the above 6 parties against which the consideration for equity shares had been adjusted.
- Sales/purchase of all the said parties had been produced which clearly indicated that the respective parties had sold goods to the appellant which the AO has not doubted.
- Ledger copy of the appellant and the share account in the books of the above mentioned parties had been produced which clearly showed that they had

purchased the shares of the appellant company.

- The Director of Poddar Equipment and Appliances Pvt Ltd and Suchitra Investment and Leasing Ltd had personally met the AO and explained the position.
- The appellant had also submitted Form No. 5 of ROC regarding increase in authorised share capital of the company”.

6. The assessee’s rebuttal on the remand report furnished by the AO had also been dealt with and incorporated by the CIT(A) at page 7 & 8 of the impugned order. Sum and substance of the assessee’s rebuttal had been that; i) certificate of ROC establishes the share capital was received by the assessee; ii) the Balance sheet of all the parties concerned along with the copy of ledger account corroborates the assessee’s contention that these parties have invested in share capital of assessee company and they have also filed confirmation letters to the AO; iii) regarding persons wherein Balance sheet do not indicate the investment in shares of the assessee company, assessee submitted that the shares allotted to them were sold by those persons before ending of the financial year which is verifiable from the copy of the ledger account; iv) It has also been stated by the assessee that, the AO has reopened the case of one of the party to examine the source of the investment and no adverse inference was drawn; v) the assessee had furnished all the details necessary for establishing the genuineness of the transaction; and vi) lastly, it was stated that out of the addition of Rs.50 lakhs, Rs.23,80,232/- is the credit balance brought forward from earlier years, that is, AY 2001-02 which has been adjusted against the shares issued during the course of this assessment year, therefore, to this extent no addition can made in this year. Besides this, certain decisions were also relied upon which has been illustrated at page 8 of the appellate order.

7. The Ld. CIT(A) has deleted the said additions after analysing the finding of AO, submission by the assessee and perusing the records furnished before him. Sum and substance of the Ld. CIT(A)'s finding are that:-

- (i) The assessee had submitted sufficient details to substantiate the transaction of share application and share premium and AO is not correct in disregarding the same;
- (ii) The AO has disregarded even the fact of Rs.23,80,242/- pertains to AY 2001-02 and, therefore, addition to this extent could not have been made in this assessment year because in this year, only the amount floated into share application money and this fact cannot be disputed unless purchases of the earlier year which had given rise to the said credit is not held to be non-genuine;
- (iii) On the creditworthiness, he observed that, the share increase money was not received through banking channel / transaction but pertained to the purchases made which otherwise assessee would have require to make the payment to the seller. Here in this case, instead of making payment, the assessee had allotted shares by treating the said amount as share application money. Confirmation from the parties to this extend have already been furnished;

On the aforesaid reasoning, first of all he had given relief to the extent of Rs.23,80,432/-, on the ground that, it pertains to the credits in the earlier year as the said purchase has not been established to be a bogus by the AO. For the balance amount, he held that, no specific reasons have been given by the AO as to why the same should be held as non-genuine. Accordingly, he held that the assessee has clearly established the identity, creditworthiness of the persons concerned, because the identity stands established from the fact that the purchases have not been doubted and the

creditworthiness the purchase value unless it is established that purchase value has been paid separately and the credits do not exists then this transaction cannot be doubted. Thereafter, he refers to certain case laws and deleted the said addition.

8. Before us, Ld. DR after pointing out to the profit and loss account of the assessee company, submitted that, the assessee has been incurring loss, then how the assessee can get a premium on shares that to be 4 times the share value. The Ld. AO in the course of the assessment proceedings has given ample opportunities to the assessee to substantiate its case which assessee failed to do so, which inter-alia means that prima-facie it was not a genuine transaction. In the remand proceedings also, none of the parties had appeared before the AO to confirm the transaction. Mere filing of the confirmation letters and other documents does not establish the identity as well as the genuineness of the transaction. After referring to the various reasons given by the AO in the assessment order and in the remand report he submitted that the Ld. CIT(A) has deleted the addition without even looking to the fact that these parties had never appeared before the AO despite notices to confirm the transactions. In support of his contention, he has relied upon the following decisions:-

- i) *CIT v. Ultra Modern Exports (P) Ltd.*
220 taxmann 165 (Del);
- ii) *CIT v N Tarika Properties Investment (P) Ltd.*
221 taxmann 14 (Del);
- iii) *CIT v. MAF Academy (P) Ltd.*
[2014] 361 ITR 258 (Del);
- iv) *Novodaya Castle (P) Ltd. v. CIT*
230 Taxman 268 (SC).

9. On the other hand, Ld. AR after explaining the entire facts and documents filed before the AO as well as CIT(A) submitted that, entire details and documents were furnished before the AO as

well as before the CIT(A) and also in the remand proceedings which goes to prove that the entire transaction was genuine because, *firstly*, it is undisputed fact that the consideration for share application money was by way of adjustment against the purchases made from the parties; *secondly*, the allotment of these shares were also proved by the ROC certificate and various statutory forms; *thirdly*, In the case of one of the share applicant, that is, Poddar Equipments and Appliances Pvt. Ltd., the AO had reopened the case on this specific point wherein he has accepted that the shares which was allotted to it has been sold to M/s Samparson Textiles Pvt. Ltd during March 2002 itself; *lastly*, the genuineness of the purchases made by the assessee from these parties have not been doubted. Thus, allotting the shares in view of the purchases cannot be held to be non-genuine. He, thus, strongly relied upon the order of the CIT(A).

10. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as the material relied upon before us. Before the AO, in the course of the assessment proceedings as highlighted by the AO, sufficient details could not be furnished by the assessee despite various opportunities given, except for stating that the consideration for above share application money were against the adjustment of purchases made by the assessee from the said parties. Despite several notices and summons by the AO to such parties, none of the parties responded or appeared before the AO. The details of such adjustment of purchases along with the confirmation letters from the parties though have been filed by the assessee, which are appearing from the paper book pages 22 to 35, however, before us the copies of audited Balance-sheets and assessment records of these share applicants or alleged shareholders have not been furnished before us, as has been stated to be furnished before the CIT(A), from where we can ourselves verify, whether in their respective Balance-

sheets these parties have shown or disclosed the share application money and allotment of shares as investment or not. In fact this was one of the main plea of assessee before the CIT(A) and also before the AO in the remand proceedings. However the benefit of such audited Balance-sheets is not before us, except for in the case of M/s. Poddar Equipments and Appliances Pvt. Ltd. which has been placed before us along with the assessment order. In the said case, the balance sheet does not reflect the investment however the AO has observed that perhaps it was for the reason that all these shares were sold to M/s Samparson Textiles Pvt. Ltd. during the year ending March, 2002 itself, that is, within a short span. Thus, as a matter of fact, AO in that case has not carried out any enquiry on this issue which can throw proper light on the contention of the assessee. Though all the details and documents which has been incorporated and referred by the Ld. CIT (A) do have corroborative value about the genuineness of the transaction, but once these parties have not responded to the AO at all to confirm the transactions despite various opportunities given to the parties as well as to the assessee at two stages, then it is difficult to accept the entire proposition of assessee. Further the copy of financial statements/audited Balance-sheet and status of the assessments in the cases of the share applicants has not been filed before us, barring one. Hence it is difficult to sustain the order of the CIT (A) as such, more so on the present facts, when some doubt do occur in our mind as to how a loss making company can issue a premium of Rs.40/- per share to its sundry creditors especially when none appeared before the AO to corroborate the same. As regard the contention of the assessee that some of the purchases made in the earlier have been converted into share application money this year, therefore, to this extent no addition should be made in this year, which has been accepted by ld. CIT(A) also, we find it difficult to accept when the entire factum of conversion of share application money out of purchases made by

the assessee and transaction itself in this year is contested and disputed by the department before us on the ground that the parties did not appear to confirm the same before the AO. Thus, under the facts and circumstances of the case and in the interest of justice, we feel that the matter should be restored back to the file of the AO to examine the issue afresh especially in light of, whether these persons have disclosed their investment made in the shares of assessee company in their audited Balance sheets filed along with the return of income or not and also to examine whether they have been assessed on their income-tax returns or not. In case, if in their assessment the investment has been accepted to be genuine or their return income has been accepted, then needless to say that no addition is required to be made. In case of the share applicant, M/s Poddar Equipments and Appliances Pvt Ltd also, matter should be examined by AO, as to when did they purchase the shares and when was it sold to other party. Once the allotment of shares has been shown as investments in their respective Balance sheets and their returns have accepted or assessments have been made or the parties themselves come forward before the AO to confirm, then entire details and documents which has been appreciated by the CIT(A) will corroborate the stand of the assessee. With this observation, we are remanding this issue to the file of the AO on this score to decide the issue accordingly.

11. As regards the second issue of addition of Rs.10,24,556/- made under section 41(1). This addition has been made by the AO on the ground that in response to notices issued under section 133(6), none of the parties have responded and thus he held that, the amount of Rs.10,24,556/- shown as liability in the books of account of the assessee is nothing but cessation of liability u/s 41(1). Even at the stage of remand proceedings, the AO held that the assessee could not produce the said parties for cross-

examination, despite opportunities given. The assessee's case before the CIT(A) has been that, from the balance appearing in the Balance-sheet of the assessee it can be seen that these concerns/parties are still having transaction with the assessee and there are continuing closing stock balance representing the credits from these parties. Confirmations were also filed from these parties confirming that the outstanding amount in the books of the assessee is outstanding credit against the purchases made by the assessee. In some of the cases, the assessee had made payment in some cases amount was outstanding in the ledger account. Thus, addition u/s 41(1) is unwarranted. The Ld. CIT(A) after considering the material placed before him deleted the addition made by the AO after observing and holding as under:-

After considering the submission of the appellant along with the observation of the AO, I find that the documents submitted by the appellant do speak in its favour. I find that the AO has not doubted at the identity of the creditors nor the genuineness of the transaction. The only reason for the AO has made the addition is because the said parties did not appear before the AO to verify that the credits still exist. However it is seen that the appellant has produced all documents to establish the said credits by way of confirmations, purchase bills, Income Tax Returns, balance sheet, Ledger accounts, etc. Except for Subhtex India Pvt Ltd it is seen that the earned amount also incorporate an opening balance which is say that transactions with the said parties were in progress in the earlier years also. It is not as there has been no movement of financial transaction with the concerns. Therefore, the action of observing that there is a cessation of liability without establishing the same cannot be upheld. Under the circumstances, I find that the addition made by the AO cannot be sustained and is therefore being deleted. This ground of appeal is allowed”.

12. After hearing both the parties and on perusal of the relevant material on record, we find that some of the parties are still having transaction with the assessee and have given their confirmation letters highlighting all the details and transaction undertaken with the assessee before the AO, which are appearing on pages 14 to 19 of the paper book. In the light of these confirmation letters, *prima facie*, it cannot be held that there is cessation of liability in this year. Moreover, the revenue has not rebutted the finding of the CIT(A) in as much as the said credits are duly established by way of confirmation, purchase bills, ledger accounts etc. Once that is so, then no addition on account of 41(1) can be made. The aforesaid finding of the CIT(A) appears to be factually and legally correct, accordingly, the same is affirmed and 2nd issue is thus, decided against the revenue.

13. In the result, appeal of the revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 29th June, 2016.

Sd/-
(बी आर भास्करन)
लेखा सदस्य
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(अमित शुक्ला)
न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 29th June, 2016

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
- 2) प्रत्यर्थी /The Respondent.
- 3) The CIT(A) –12, Mumbai.
- 4) The CIT–City-6, Mumbai.
- 5) विभागीय प्रतिनिधि “बी”, आयकर अपीलीय अधिकरण, मुंबई/
The D.R. “B” Bench, Mumbai.

महानगर ट्रेडिंग कंपनी प्राइवेट लिमिटेड
M/s Mahanagar Trading Co. Pvt Ltd
ITA 5263/Mum/2011

6) गार्ड फाईल \
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आदेशानुसार/By Order

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS