

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK 'SMC'
BENCH, CUTTACK****BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER****ITA No.249/CTK/2016**
Assessment Year : 2008-09

M/s. UJtkal Plaster Pvt Ltd., C/O. Jagannath Saw Mill, Cuttack Road, Bhubaneswar.	Vs.	ITO, Ward-1(3), Bhubaneswar.
PAN/GIR No.		
(Appellant)	..	(Respondent)

Assessee by : Shri K.K.Bal, AR

Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 02 /02/ 2017**Date of Pronouncement : 02/02/ 2017****ORDER**

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar, dated 31.3.2016, for the assessment year 2008-09.

2. In Ground Nos.2,3 & 4 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming the action of the Assessing Officer in disallowing expenses of Rs.1,67,295/- under the head "transportation charges" by invoking the provisions of section 40(a)(ia) of the Act.

3. I have heard the rival submissions and perused the orders of lower authorities and materials available on record. The brief facts of the case

are that the Assessing Officer observed from the profit and loss account that the assessee had debited Rs.3,12,252/- towards carriage inward expenses. The Assessing Officer required the assessee to furnish details of such expenses. The assessee produced copy of ledger account and a statement with bills & vouchers. The Assessing Officer found from the ledges that out of total expenditure of Rs.3,12,252/-, M/s. O. P. Roadlines was paid a sum of Rs.1,38,425/- on 12.1.2008 and another sum of Rs.28,870/- on 28.3.2008 totaling to Rs.1,67,295/- towards transportation charges on which no tax was deducted at source as per the requirement of section 194C. Therefore, the Assessing Officer disallowed Rs.1,67,252/- u/s.40(a)(ia) of the Act.

4. On appeal, the CIT(A) confirmed the action of the Assessing Officer relying on the decisions of Hon'ble Calcutta High Court in the case of CIT vs. Crescement Export Syndicate & Others (2013) 33 Taxman.com 250 and the Hon'ble Gujarat High Court in the case of CIT vs. Sikndarkhan N.Tunvar (2013) 33 Taxman.com 133 and keeping in view Circular of the CBDT No.10/DV/2013 in F.No.279(D.V/Mis/M-61/2012-ITJ(Vol.III) dt.16.12.2013.

5. The A.R. of the assessee relied on the decision of Hon'ble Allahabad High Court in the case of CIT vs. Victor Shipping Services (P) Ltd., (2013) 357 ITR 642(All), wherein, it has been held that for disallowing expenses from business and profession on the ground that tax has not been deducted at source, the amount should be payable and not it has been paid by the

end of the year. He further submitted that the SLP filed against the judgment of Hon'ble Allahabad High Court has been dismissed by the Hon'ble Supreme Court vide judgment dated 2.7.2014 in CC No.(s) 8068/2014. He submitted that where there are contrary decisions of Hon'ble High Courts on an issue and none of which is Hon'ble Jurisdictional High court, then the decision in favour of the assessee should be followed in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd., 88 ITR 192 (SC).

6. Ld D.R. supported the orders of lower authorities.

7. I find force in the submission of the AR of the assessee that Hon'ble Allahabad High Court in the case of CIT vs. Victor Shipping Services (P) Ltd., (2013) 357 ITR 642(All has held that for disallowing expenses from business and profession on the ground that tax has not been deducted at source, the amount should be payable and not it has been paid by the end of the year. The decision of Hon'ble Allahabad High Court has been affirmed by the Hon'ble Supreme Court vide judgment dated 2.7.2014 in CC No.(s) 8068/2014. Ld A.R. submitted that the assessee has made payments of Rs.1,67,252/- to M/s. O.P. Roadlines and no amount was outstanding and payable. Therefore, in view of the decision of Hon'ble Allahabad High Court in the case of Victor Shipping Services (P) Ltd (supra), no disallowance u/s.40(a)(ia) was warranted in the case of the assessee.

8. In the facts and circumstances of the case, I find that there is no amounting outstanding and payable at the end of the year. Therefore, I

set aside the orders of lower authorities and respectfully following the decision of the Hon'ble Allahabad High Court in the case of CIT vs. Victor Shipping Services (P) Ltd(supra) delete the disallowance of Rs.1,67,252/- made u/s.40(a)(ia) of the Act. Thus, this ground of appeal of the assessee is allowed.

9. In Ground No.5 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming the addition of Rs.29,40,000/- u/s.68 of the Act.

10. I have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the Assessing Officer found from the balance sheet that the assessee has shown receipt of share application money of Rs.29,40,000/- during the year. The assessee was asked to furnish the details of share applicants and their sources of investments. The assessee furnished the list of the following share applicants from whom share application money was received.

Sl. No.	Name	Date of introduction	Amount	Mode of payment
1.	Chandulal Patel	13.02.2008	5,00,000	Cheque
2.	Chanda Devi Jajodia	26.03.2008	2,50,000	Cash
3.	Pranab Kishore Pattanaik	10.04.2007	2,40,000	Cash
4.	Tarun Kumar Jajodia	25.03.2008	5,00,000	Cheque
5.	Kiran Jajodia	26.03.2008	2,50,000	Cheque
6.	Navin Bajoria	20.04.2007	2,50,000	Cash
7.	Mina Patel	25.04.2007	4,00,000	Cash
8.	Subhasis Pani	30.04.2007	2,50,000	Cash
	Total		29,40,000	

11. The Assessing Officer asked the assessee to furnish copies of income tax returns of the above persons, copies of bank statements relating to the accounts maintained by them in banks and also produce them for personal examination. Since the assessee failed to comply with the above requirements, the Assessing Officer made an addition of Rs.29,40,000/- u/s.68 of the Act by treating the above share application money received from above persons as not genuine.

12. On appeal before the CIT(A), the assessee filed written submission alongwith copies of documents including copies of income tax returns of 8 persons, who had allegedly contributed share application money. The CIT(A) called for a remand report and the Assessing Officer in his report dated 28.3.2016 stated as under:

“With regard to the contention of the assessee, it is to state that summons were issued on dated 13.12.2010 and 16.12.2010 to the followings:

Sl. No.	Name of the share holder	Date of introduction	Amount (Rs.)	Mode Payment	Date summon	Date of Despatch	Nature compliance
1	Chandulal Patel	13-02-2008	500000	Cheque	16-12-2010	By hand on same day	No personal deposition. I. T. Return for A. Y. 2007-08 Shows income at Rs. 105259/-
2	Smt. Chanda Devi Jajodia	26-03-2008	250000	Cash	16-12-2010	14-12-2010 Speed Post	Failed to depose
3	Pranab Kishore Pattnaik	14-04-2007	240000	Cash	No summon	No summons	Deposed but income is commensurate with the Share application money

4	Tarun Kumar Jajodia	25-03-2008	500000	Cash	13-12-2010	14-12-2010 Speed Post	Failed to depose
c	Kiran Jajodia	26-03-2008	250000	Cheque	13-12-2010	14-12-2010 Speed Post	Failed to depose
6	Navin Bajoria	20-04-2007	250000	Cheque	13-12-2010	14-12-2010 Speed Post	Failed to depose
7	Smt. Mina Patel	25-04-2007	400000	Cheque	16-12-2010	By hand same day	Failed to depose
8	Subhasis Pani	30-04-2007	250000	Cheque	13-12-2010	14-12-2010 Speed Post	Failed to depose

As the assessee has failed to prove the creditworthiness of the share applicants till the date of assessment order, the assessing officer had no option to treat the entire sum of Rs.29,40,000/- as unexplained cash credit u/s. 68 of the I. T. Act.

It submitted that as could be observed from para 3 above the summons were duly served on the parties concerned well before the date of hearing i.e. 21-12-2010 and as noted by the A.O. at page 5 of the assessment order that after considering all the compliances made to the summons issued the above seven share applicants (except Pranab Kishore Pattnaik) had not ostensible source of income to invest in the assessee-company towards share application money totaling to Rs.29,40,000/-. It is therefore for the kind consideration that the A.O. had accepted the identity of the parties and that they only do not have the credit worthiness to advance the amount stated to have been made by them, Therefore the contention of the assessee that there was no opportunity to establish the genuineness of the creditors as the summons issued on 13-12-2010 fixing hearing on 21-12-2010 were served only on 28-12-2010 is devoid of merit. It is also submitted that the confirmation letters filed on the date of passing of the assessment order on 28-12-2010 has been considered and reckoned."

13. The CIT(A) confirmed the action of the Assessing Officer by observing as under:

"3.2 I have considered the mater threadbare and gone through the facts on record including the written submission of the assessee and the remand report of the AO. In the course of appeal hearing, the assessee had furnished copies of I. T. returns of all the share applicants. The total incomes as disclosed by these persons in their IT. returns for a few years prior to the alleged investment are as under;

<u>Name of the person</u>	<u>Asst.Year</u>	<u>Total income in the return</u>
Chandulal Patel	2005-06	Rs.1,47,888/-
	2006-07	Rs.1,86,979/-
	2007-08	Rs.1,05,259/-
	2008-09	Rs.1,22,670/-
Chanda Devi Jajodia	2005-06	Rs.98,540/-
	2007-08	Rs.1,26,560/-
	2008-09	Rs.1,41,570/-
Pranab Kishore Pattnaik	2007-08	Rs.95,865/-
	2008-09	Rs.1,11,723/-
Tarun Kumar Jajodia	2006-07	Rs.1,10,244/-
	2007-08	Rs.1,51,300/-
	2008-09	Rs.1,30,943/-
Kiran Jajodia	2005-06	Rs.98,040/-
	2007-08	Rs.1,21,250/-
	2008-09	Rs.1,38,190/-
Navin Bajoria	2006-07	Rs.1,05,643/-
	2007-08	Rs.1,05,850/-
	2008-09	Rs.98,364/-
Mina Patel	2006-07	Rs.1,13,709/-
	2007-08	Rs.1,23,930/-
	2008-09	Rs.1,36,634/-
Subhasis Pani	2005-06	Rs.67,000/-
	2008-09	Rs.1,11,600

A look at the returns of income of the above persons makes it abundantly clear that they do not have the creditworthiness to investment in the form of share application money. The income disclosed by them appears to be not even enough to meet their personal and domestic expenses. The returns of many of them also appear clearly to be capital build-up returns. The AO in the assessment order has discussed about the creditworthiness of one the investors viz. Sri Pranab Kishore Pattanaik and has concluded that he cannot be said to have saved as high an amount of Rs.2,00,000/- from a small monthly income of Rs.8,000/- to Rs.10,000/-. I fully agree with the AO in this regard. Since the creditworthiness of the investors have not been proved and except Sri Pattanaik, nobody else was produced for examination before the AO even though specifically asked, it is to be held that the above investors did not have the capacity to invest in the form of share application money as claimed by the assessee. In this regard, the decision of the Hon'ble ITAT, Delhi Bench in the case of DCIT v. Smt. Phoolwati Devi (2009) 314 ITR(AT) 1 may be relied upon. Accordingly, the addition of Rs.29,40,000/- u/s.68 is held to be in order and confirmed."

14. Ld A.R. of the assessee has filed before me copies of summons issued u/s.131 of the Act dated 13.12.2010 to Smt. Chanda Devi Jajodia, dated 16.12.2010 to Smt. Mina Patel, dated 13.12.2010 to Smt. Kiran Jajodia and dated 13.12.2010 to Sri Tarun Kumar Jajodia.

15. He also filed Xerox copies of envelope in which summons were posted to the above share applicants. He pointed out that even though summons were dated 13.12.2010 and 16.12.2010, they were actually posted on 24.12.2010 requiring the assessee to be present on 20.12.2010 in respect of Smt. Kiran Jajodia and on 21.12.2010 in respect of other share applicants, which was impossible. Hence, it was his submission that the claim of the Assessing Officer as well as the CIT(A) that the share applicants did not appear before him and depose of having invested in the share capital of the assessee company is not correct on the facts of the case. He further pointed out from the order of the CIT(A) that the CIT(A) has mentioned as quoted above that the Remand Report of the Assessing officer on 28.3.2016 that summons issued on 13.12.2010 and 16.12.2010 were duly served on 21.12.2010. Even if it is assumed, I fail to appreciate how a summon served on 21.12.2010 can be complied by a person on a date prior to the date of service on 20.12.2012. Thus, no adverse inference against the assessee can be drawn on the basis of above alleged non-compliance which was factually impossible to comply with. Therefore, I find that the assessee has discharged his initial burden by filing the PAN Nos. and copy of income tax returns of the share applicants, which establish the identity of the share applicants beyond any shadow of doubt. Thereafter, the department could not bring any positive material on record to show that either the share applicants have not actually advanced the share application money in question or they could not have advanced the same. The CIT(A) has drawn an adverse inference regarding creditworthiness of the share applicants merely on the basis of suspicion alone. It was not the case of the assessee that the share applicants had advanced the money out of the income of the year alone and no positive material has been brought on record to show that share applicants could not have any other source like his

capital i.e. saving of earlier years or receipt from any other person from which the applicant could not have advanced the share application in question.

16. Ld A.R. of the assessee relied on the decision of Hon'ble Delhi High Court in the case of Pr. Commissioner of Income Tax vs. Jatin Investment Pvt Ltd. in ITA Nos.43/2016 and 44/2016 order dated 18.1.2017, wherein, the Hon'ble High Court has held as under:

5.4 The appellant has adduced the documentary evidences in support of the transaction in question. The identity of the purchasers of the shares was established as it was borne on the record of the Income Tax Department. The purchasers have PAN card as well. Turning to the shares which were sold by the appellant as per its version, there is no evidence or material to even suggest, as pointed out as on behalf of the appellant, that the cheques directly or indirectly emanated from the assessee so that it could be said that the assessee's own money was brought back in the guise of sale proceeds of the shares. Though, the purchasers of the shares could not be examined by the AO, since they were existing on the file of the Income Tax Department and their Income Tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective AOs having jurisdiction over them which has not been done by him."

17. He submitted that the facts being identical, respectfully following the same, the addition should be deleted.

18. The D.R. relied on the orders of lower authorities.

19. I find from the above quoted decision of Hon'ble Delhi High Court that share applicants identity was established as it was borne on the record of the income tax department. Though the share applicants could not be examined by the Assessing Officer since they were existing on the file of the Income Tax Department and their income tax details were made available to the Assessing officer, it was equally the duty of the Assessing

Officer to have taken steps to verify their assessment records and if necessary to also have them examined by the respective Assessing Officer having jurisdiction over them which has not been done by the Assessing Officer.

20. I find that the Hon'ble Calcutta High Court in CIT vs. Nishan Indo Commerce Ltd (2014) 101 DTR 413 (Cal) has held that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds. It was held that Tribunal was justified in deleting addition in the hands of the assessee company.

21. The Hon'ble Allahabad High Court in CIT vs. Som Tobacco India Ltd., 2014 222 Taxman 58 (Mag) (All) held that the assessee has discharged the onus by furnishing the name and address and Permanent Account Number of the share applicants and if the Assessing Officer was having any doubt he could have issued summons to the persons who were claimed to be assessed to income tax and was having permanent account number.

22. I am alive to the fact that the assessment year involved in the present case is assessment year 2008-09 which is prior to the amendment made in section 68 w.e.f. 1.4.2013. In the pre-amended provision of the law in case of share application money, it is settled position that once the assessee establishes the identity of the share applicants then even if the share application money is received by the assessee company from alleged bogus

shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company. The above view was settled by the Hon'ble Supreme Court in the case of **COMMISSIONER OF INCOME TAX vs. LOVELY EXPORTS (P) LTD. (2008) 216 CTR 0195**. I, therefore, set aside the orders of lower authorities and delete the addition of Rs.29,40,000/- and allow this ground of appeal of the assessee.

23. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 02/02/2017 in the presence of parties.

Sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 02/02/2017

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : M/s. UJtkal Plaster Pvt Ltd.,
C/O. Jagannath Saw Mill, Cuttack Road,
Bhubaneswar
2. The Respondent. ITO Ward-1(3),
Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar.
4. Pr.CIT-1, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack