

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 3849/Del/2016
(Assessment Year: 2009-10)

ITO, Ward-10(1), New Delhi	Vs.	Garg Alumino Pvt. Ltd, B-79, New Moti Nagar, New Delhi PAN: AAACY1003G
(Appellant)		(Respondent)

Revenue by :	Shri Gaurav Pundir, Sr. DR
Assessee by:	None
Date of Hearing	27/7/2021
Date of pronouncement	27/07/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the Id AO against the order of the Id CIT(A)-4, New Delhi dated 29.04.2016 for Assessment Year 2009-10. The Id AO has raised the solitary ground of appeal that the Id CIT(A) has incorrectly deleted the addition u/s 68 of the Act of Rs. 3 crores where the Assessee has failed to produce the parties before the Id AO and further deletion of Rs. 3 lakhs on account of commission for obtaining the accommodation entries. This is the solitary issues in this appeal.
2. This appeal is listed on 16.04.2019, 25.04.2019, 02.07.2019, where at the of specific request of the Id AR of the Assessee the appeals were adjourned. On 31.10.2019, 04.02.2020, 06.02.2020, 22.12.2020, 11.03.2021, 15.05.2021 despite notice none appeared on behalf of the Assessee. On this date also i.e. 27.07.2021 despite service of notice to the Assessee none appeared on behalf of the Assessee. The bench on 13.05.2021 has given specific direction to the registry to issue notice with RPAD to the Assessee, however, on 27.07.2021 none appeared on behalf of the Assessee. In view of this the appeal are decided on the

merits of the case in absence of Assessee as per information available on record.

3. The Id DR supported the order of the Id AO and stated that the Id CIT(A) has deleted the addition without any cogent reason.
4. We have carefully considered the rival contentions of the Id DR and perused the orders of the lower authorities. The Assessee is a company who filed its return of income on 30.09.2009 declared a loss of Rs. 58,42,335/-. During the course of search of Mr. SK Jain in respect of taking accommodation entry the name of the Assessee figures as one of the beneficiary as bogus transaction. A sum of Rs. 3 crores was found to be credited in the bank account of the Assessee with respect to 10 different parties. Based on this notice u/s 148 was issued on 06.08.2013 and notice u/s 143(2) was served on the Assessee on 24.02.2015. During the course of assessment proceedings the Id AO examined the claim of the assessee and information submitted. In para No. 4 he held that the Assessee has not furnished share application form and copy of the balance sheet etc. He also referred to issue of notice u/s 133(6) to the Act to various companies and the replies were showing meager income. The Assessee was asked to produce on 03.03.2015 and 05.03.2015 the parties who invested in the Assessee company to prove the genuineness of the transaction. The Assessee has shown its inability to produce. The Id AO further summons to the parties but none appeared. On the request of the Assessee the Inspector of the AO accompanied to record the statement of the Principal Officer. However, later on the Id AR back tracked and express his inability in this regard. The Id AO thereafter dealt the whole issue and made an addition of Rs. 3 crores in the hands of the Assessee as under:-

"4. On perusal of the various details furnished by the assessee vide its letter dated 05.12.2014 it is observed that the assessee has received share application money amounting to Rs.3,00,00,000/- from M/s. Mega Top Promoters Pvt. Ltd., M/s. AD Fin Capital Services Pvt. Ltd., M/s. Virgin Capital Services Pvt. Ltd. M/s. Euro Asia Mercantile Pvt. Ltd. M/s. Shalini Holdings Limited A M/s. Hum Turn Marketing Pvt. Ltd. and in support of it the assessee has furnished along with letter dated 05.12.2014, Names, PANs and amount of share application money received from these entities.

Vide letter dated 23.12.2014 copies of confirmations, Copy of acknowledgement of return A Bank statement of the companies from whom the share application money received by the assessee company. No other details like share application forms, copy of balance sheet etc were filed by the assessee.

The assessee although has filed some details i.e. share application form, copy of balance sheet bank statement in support of transactions it entered during the year, which cannot be relied upon as the same are taken by the assessee from the companies who provides entries at the time of such transactions. ^/^

5. Information were also obtained by issuing notice u/s 133(6) of the Income tax Act to all above mentioned concerns. On perusal of the replies received in response to notices issued under section 133(6) it is noticed that all the investee companies are paper companies returning meager income in the year under consideration. The bank statements also reflect that the funds are crediting in their bank accounts from undisclosed sources and getting transferred on the very same days. Moreover, there is no normal business transactions reflected in the bank statements of any of the investee companies. After examining all such details it was required on the part of the assesseees to prove the acid test with regard to and statutory notices u/s 143(2) A 142(1), upon change of jurisdiction, dated 24.02.2015 were issued and duly served on the assessee. In response to notices issued from time to time Shri Sanjay Sehgal CA/AR of the assessee appeared furnished required details. The other necessary details as regard to share capital A share premium received from the above said companies during the financial year 2007-08 have been filed and the case was discussed with the AR of the assessee.

4. On perusal of the various details furnished by the assessee vide its letter dated 05.12.2014 it is observed that the assessee has received share application money amounting to Rs.3,00,00,000/- from M/s. Mega Top Promoters Pvt. Ltd., M/s. AD Fin Capital Services Pvt. Ltd., M/s. Virgin Capital Services Pvt. Ltd. M/s. Euro Asia Mercantile Pvt. Ltd. M/s. Shalini Holdings Limited A M/s. Hum Turn Marketing Pvt. Ltd. and in support of it the assessee has furnished along with letter dated 05.12.2014, Names, PANs and amount of share application money received from these entities. Vide letter dated 23.12.2014 copies of confirmations, Copy of acknowledgement of return A Bank statement of the companies from whom the share application money received by the assessee company. No other details like share application forms, copy of balance sheet etc were filed by the assessee.

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5. Information were also obtained by issuing notice u/s 133(6) of the Income tax Act to all above mentioned concerns. On perusal of the replies received in response to notices issued under section 133(6) it is noticed that all the investee companies are paper companies returning meagre income in the year under consideration. The bank statements also reflect that the funds are crediting in their bank accounts from undisclosed sources and getting transferred on the very same days. Moreover, there is no normal business transactions reflected in the bank statements of any of the investee companies. After examining all such details it was required on the part of the assesseees to prove the acid test with regard to genuineness of the transactions and hence, the assessee was asked vide order sheet entry dated 03/03/2015 & 05/03/2015 to produce the principal officers of the investee companies so that the genuineness of the transactions could be examined, However, the AR of the assessee showed his inability to produce any of the principal officer of the investee companies. Under these circumstances summon were also issued to the investee companies so that the genuineness of the transactions could be examined. However, in response to summons none-attended for personal disposition. During the course of assessment proceedings it was also proposed to the AR, while discussing the case that the inspector of the ward could also accompany the AR to record the statement of any principal officer at the premises of the investor of the Investor company. However, the AR again showed his inability in this regard. Now it is matter of surprise and pertinent to mention here that how the companies which are claimed to have invested such a huge amount in the assessee company could evade/refuse to attend the legal assessment proceedings going on in the case of the assessee company.

5.1 It has been judicially established that the primary onus is on the assessee to prove the identity, creditworthiness and genuineness of transactions in respect of cash credits in its books of account. Identity of the party does not simply mean its existence. The identity should be seen in perspective that it has got a standing in the particular line of activity. Identity is defined in the new shorter oxford dictionary as " The condition or fact of a person or thing being that specified unique person or thing" The person has to have some sign of identification other than merely on paper. These signs could be the place of work, staff members, actual transactions, recognition in the eye of public, sign board, premises anything which can prove that some actual activity is going on. Having PAN or assessment particular is merely a response to the applications and returns filed. These types of identity are merely on paper. The authority allotting PAN or processing the return of income seldom verify the actual identity of the person. These tools are being employed intentionally for the purpose of proving existence, however actual identity of the business and its genuineness do not automatically get proved by these passive

documents when in fact no actual and active business is being carried out.

Hon'ble High Court has held in its decision dated 08.11.2012 [disposing ITA No.497 of 2010] in the case of CIT Vs Youth Construction (P) ltd. reported in 44 Taxman 364. In this court the Hon'ble Court has held that merely by filing confirmation letters, etc. identity, creditworthiness and genuineness of the applicants cannot be established.

5.2 The creditworthiness essentially means capacity in financial dealings or capacity to pay. The creditworthiness of a person is something that is assessed by somebody while giving loan to the said person on arm's length basis. The bank assesses the creditworthiness of the person while allowing it loan. The creditworthiness is reflected in the balance sheet of the person and also in the profit making capacity. Can it be said that the bank will give loan of the same amount the entry operators who are receiving money in its account. The entry operators are certainly not receiving the money in its account as sale consideration or as part of actual business activity. The nature of deposits in its accounts can never be explained except by the truth that these amounts represent the money of the beneficiary routed through it. The argument that the money has come through banking channel hence the same is genuine is farce in itself. The beneficiary has to have the money in its account through normal banking channel. This is the entire reason for getting the entry. Can the beneficiary deposit its unaccounted cash in its bank account? The whole purpose of money laundering is getting money through the banking channel and ironically the same is being used as a tool to satisfy the genuineness of the transaction. The persons who are giving cheques/drafts through banking channel have no standing of their own. They do not have their own profit making apparatus other than by earning commission on such illegal activity. They do not manufacture or produce anything. They do not render any services other than its services for laundering of money. Their bank account reflects their creditworthiness. The moneys that come to its account by way of cash or by way of other similar accounts seldom rest for a day. It immediately finds its destination. The source of money is not explainable by the entry operators. However the beneficiary, who enjoys the benefit of such money ever after, does not ever give back any dividend or any share in profit or interest to the entry operators. The volume of transactions undertaken is not visible in their balance sheet/ P&L account. They are only available in the bank statements in a definite pattern. Profit motive in the entire transaction of the entry operators is conspicuously absent. They give the money to the beneficiary and never bother to ask for the fit of providing so much money to the beneficiary. In case of share capital, in most of the cases, subsequently the shares are purchased back at nominal amount otherwise the shares keep on lying in the name of the entry operators. But in fact no profit is

received from having invested so much ever in all cases including the present case. This in itself reflects that the transactions are not genuine. Any person who would invest his own money or forward a loan would certainly seek return in any form. The inherent capacity of money to earn is forgone without any consideration. These facts clearly show that the transaction is not genuine. It is most important to note that the assessee is enjoying the benefit of the said money without any associated financial burden in the same manner as if it is its own tax paid money.

5.3 The contention that the company was incorporated and hence its identity is established cannot be accepted. In appropriate cases, law permits looking beyond the corporate veil. The corporate veil can be lifted or pierced where the only actual activity the alleged corporate entity is found to be engaged in is evading the obligations imposed by law, more particularly in tax matters to see whether the entire facade has been put up to evade payment of taxes.

5.4 Truly, this menace should not be allowed to be perpetuated on technical grounds. The substance of the transaction which is apparent to everybody must not be ignored in the favour of the charade created by the masterminds in the interest of public at large.

5.5 There are any number of decisions of the Apex Court and various other courts including the celebrated judgment of the Apex Court in the case of McDowell & Co Limited 154 ITR148 on the issue of using dubious means by the assessee for tax evasion. Various other decisions on superiority of substance over form have been in the public domain. These decisions undisputedly conclude that adopting of dubious means for resorting tax evasion is clearly not permissible. Present case is classic example of utilization of dubious means for the purpose of evasion, which should not be allowed to be perpetuated.

5.6 The Hon'ble High Court has held in CIT Vs. Precision Finance Pvt. Ltd. (1994) 208, ITR 405 that "it is not sufficient for an assessee to disclose that credits in their books had been received through banking channels, the identity as well as the creditworthiness of the creditors must nevertheless be proved. In an another case the division bench of Calcutta High Court in the case of Bharati Pvt. Ltd. Vs. CIT W.B.(1978) 111 ITR 991 have been that mere filing of confirmation letter the assessee did not discharge the onus that lay on the assessee.

5.7 In the above backdrop the assessee was required to produce the person alongwith their books of account to verify its claim of. The assessee failed to discharge its onus. In such cases the source and nature of transactions need to be proved beyond doubt. The assessee has miserably failed to do so. Since the assessee was well aware about the fact of bogus credits in its books, he has chosen not to subject itself to the investigation/inquiry conducted by the department.

5.8 All the facts discussed above prove that the credits of Rs. 3,00,00,000/- are directly hit by section 68 of the I.T. Act. The onus is on the assessee to prove the genuineness of the transactions and creditworthiness of the person who has given credit to the assessee. The assessee has failed to discharge its onus. The assessee has also failed in submitting the details of the credits in its books. Merely filing some papers in supports of its transactions cannot be termed as genuine transactions. In the light of above discussion Rs. 3,00,00,000/- is added to the income of the assessee as unexplained credits appearing in the books of assessee."

5. Consequently the assessment order was passed on 18.03.2015.
6. The Assessee preferred an appeal before the Id CIT(A) who passed an order on 29.04.2016 deleting the above addition as per page No. 26 to 29 of his order as under:-

"I have gone through the facts of the case, grounds of appeal, observations of the Assessing officer in the assessment order dated 18.03.2015, written submissions and paper book of the appellant company and case laws relied upon by the appellant and considered them. On perusal of the assessment record for the assessment year, it is seen that the appellant has furnished all the relevant details pertaining to the share capital and share premium that were called for by the Assessing Officer, and in response to the aforesaid notice, appellant furnished various details pertaining to the share capital and share premium from 7 companies. The evidences furnished by the assessee during the course of the assessment proceedings are as under:

- I. Copy of share application
- ii. Confirmation
- iii. Copy of acknowledgement of return of income.
- iv. Copy of PAN
- V. Copy of bank statement
- vi. Auditors report and balance sheet

From the perusal of the aforesaid, it is evident that the assessee has produced complete documentary evidence to establish the identity and creditworthiness of the shareholder and genuineness of the transaction. All the shareholders are identifiable companies and are duly assessed to tax. From the perusal of the annual accounts of those companies, it is also apparent that all the shareholder companies have sufficient reserve and surplus to invest in the shares of the appellant company and hence assessee has discharged its onus cast under section 68 of the Act. Further in the order of assessment, it has been stated that AO has issued notices under section 133(6) of the Act and it has been observed that all

the shareholders have filed the requisite details in such circumstances, identity of the shareholder cannot be doubted further since they have not denied the investment made in the appellant company and on the contrary have confirmed the investment, as such, appellant has discharged its burden u/s 68 of the Act. Apart therefrom, all the summons issued u/s 131 of the Act have also been duly served on all the investor companies. As such, on account of the independent enquiry conducted by the AO, no adverse information came to suggest that either the shareholders are nonexistent companies or they don't have capacity to invest or any of the shareholder denied the investment made in the appellant company. On the contrary, all the shareholders duly confirmed the investment made in the appellant company.

In the present case, section 68 is applicable to the share application money and share premium received by the appellant to the extent of discharging its onus regarding the nature and source thereof, to the satisfaction of the assessing officer. It involves three incidents namely:

- (i) Proof regarding the identity of the share applicants.*
- (ii) Their creditworthiness to purchase the shares*
- (iii) The genuineness of the transaction as a whole.*

In the instant case, infact all the aforesaid three limbs are satisfied as in response to independent enquiry made by the AO, i.e. in response to notices issued u/s 133(6), all the shareholders have filed their replies and has confirmed the investment made in assessee company. Further, from the perusal of the balance sheets of such companies it has been found that such companies have sufficient reserve and surplus and investment has been made by account payee cheques as such creditworthiness cannot be disputed. .As such, share capital received by the assessee cannot be held to be not genuine.

That the Apex Court in the case of CIT vs. Lovely Export 216 CTR 195 has held that if the share application money is received by the assessee company is from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen the individual assessments of share applicants and addition cannot be made in the hands of the assessee. The AR of the appellant has relied on various other case laws of the Hon'ble Jurisdictional High Court, and other High Courts and Hon'ble Tribunal on this issue which are not reiterated here as they are embedded in the written submission furnished by the appellant company. Respectfully following the aforesaid judgments relied upon by the appellant on this issue, I hold that the appellant has discharged its onus cast upon it as per the provisions of section 68 of the IT Act, 1961. Thus the action of the assessing officer in making the impugned addition is unwarranted and unjustified.

To sum up, from the material on record I find that the appellant company had discharged its onus as provided in the provisions of section 68 of the IT Act, 1961. Therefore, the action of the Assessing officer in treating the share application money received by the appellant during the year under consideration as unexplained is not justified. Accordingly, the addition of Rs. 3,00,00,000/- made by the Assessing Officer u/s 68 of the IT Act is deleted.”

7. We find that there is no reference in the order of Id CIT(A) that how he has dealt the requirement of the Id AO of personal examination of the investor which the Assessee has reportedly failed to produce before the Id AO. The Id CIT(A) has categorically mentioned that on account of independent enquiry, no adverse information came to the knowledge of the share holders that those are non-existent or do not have any capacity. He merely deleted the addition on the basis of the confirmation. He ignored the finding of the Id AO that there were a search in case of Shri S. K. Jain, where he confirmed that these accommodation entries and the assessee is one of the beneficiary therefore the genuineness of the transaction was completely shrouded. To examine the genuineness, the Id AO made several attempts for examination of the share holder which the Assessee either expressed inability or completely thwarted the investigation of the Id AO. The Id CIT(A) did not address this issue at all. There were no reference or finding in the order of the Id CIT(A) wherein, in para No. 5.7 of the assessment order the Id AO categorically asked the Assessee to produce the person along with their books. The onus u/s 68 is always swinging from Assessee to AO and AO to Assessee. In this case, now the onus rests with the assessee to produce the depositors before the Id AO who have invested in the share capital of the company. Assessee failed to do so. The assessee is a private limited company and therefore, it could not have given share subscription to the public at large. It has issued shares to the private parties which are known to the assessee only. It is not the case of the public limited company where the non production of the share holder could not have visualized in isolation against the Assessee. The law has been laid down in such cases by the Hon'ble Supreme Court in case of NRA Iron and Steel Ltd [2019] 103

taxmann.com 48 (SC)/[2019] 262 Taxman 74 (SC)/[2019] 412 ITR 161 (SC) and Hon'ble Delhi High Court in case of NDR Promoters Ltd [2019] 102 taxmann.com 182 (Delhi)/[2019] 261 Taxman 270 (Delhi)/[2019] 410 ITR 379 (Delhi). As the Id CIT(A) has failed to answer the several observation of the Id AO as stated above, we set aside the both the grounds of appeal of the Id AO back to the file of Id CIT(A) with a direction to the Assessee to produce the share holders before him, which either Id CIT(A) may examine himself or direct the Id AO to examine them and decide the issue afresh after giving proper opportunity of hearing to the Assessee considering the above two judgments of the Hon'ble Supreme Court and Hon'ble Delhi High Court. In view of this, the appeal of the Id AO/revenue is allowed for statistical purposes.

Order pronounced in the open court on conclusion of hearing on 27/07/2021.

-Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 27/07/2021
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi