

THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 4314/Mum/2017 (Assessment Year 2012-13)

ACIT, Circle-6(2)(2) Room No. 563 5 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Diligent Media Corporation Ltd. 11 th Floor, Tower 3 India Bulls Finance Centre, Senapati Bapat Marg, Elphinston Road (W), Mumbai-400 013. PAN : AACCD1338F
(Appellant)		(Respondent)

Assessee by	Shri Dalpat Shah
Department by	Shri Ajit Kumar Shrivastava
Date of Hearing	07.04.2021
Date of Pronouncement	03.06.2021

ORDER

Per Shamim Yahya (AM) :-

13. This is an appeal by the Revenue and pertains to assessment year 2012-13.

2. The grounds of appeal read as under :-

1. "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.20,90,19,879/- u/s 68 of the Act, on account of unexplained Share Premium."

2. "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.20,90,19,879/- being the amount received on account of Share Premium, without appreciating the fact that assessee, as recorded in the assessment order was unable to prove before the A. O. that the transaction in its books were true, genuine and justified."

3. The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored."

4. "The Appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."

3. Brief facts of the case are that in this case assessee is engaged in the business of publishing and printing of newspapers. The Assessing Officer noted that from the balance sheet he has found that assessee has received share premium the tune of Rs. 20,90,19,879/-. That M/s. Media Vest India P. Ltd. was a major shareholder. That the assessee company has incurred a loss of Rs. 1,80,56,17,027/-. That assessee company has consecutively incurred loss for the last six years. The Assessing Officer queried regarding the basis of computation of share premium. The assessee submitted that the same was based upon assessee's projections. The assessing officer wanted a comparison of the projections with actuals. The details were not furnished. Furthermore, apart from questioning the basis of share premium the assessing officer clearly noted that the creditworthiness of the investors has not been established. That the same was in question, and the assessee has not filed the transaction details and relevant bank account also. He noted that assessee has stated that the details referred shall be furnished shortly. But till the date of order they were not supplied. Hence the assessing officer proceeded to hold the transaction to be non-genuine and in view of assessee's evasive replies he considered the transaction to be a sham transaction. Hence he added o the same as unexplained under section 68 of the I.T. Act.

4. Against the above order assessee appealed before the ITAT.

5. Learned CIT(A) passed a very short order as under :

“It is seen that the A.O. has erred in making addition of Rs. 20,90/19,8797-u/s. 68 being the share premium on issue of Equity Shares of 30,98,009 at Rs. 10/- each fully paid on a premium of Rs. 67.46 per share to its holding company, that is, Media Vest India P. Ltd. . It is seen that the appellant has established the identity, capacity and creditworthiness of the subscriber as well as the genuineness of the said transaction. It is seen that the appellant has furnished all details along with confirmation, PAN details and bank statements. It is also seen that the A.O. has not considered that the First Proviso to Section 68 has been introduced from 1,4.2013 as per Finance Act 2012 and the appeal in this case relates to F.Y. 2011-12 relevant to A.Y. 2012-13. It is also seen that the said premium has been charged based on valuation report also, and the premium received by the appellant is capital in nature and part of the Shareholder's Equity. Therefore, the amount received by the appellant cannot be a part of the appellant's income. Reliance is

placed on the CBDT's Instruction no. 2/2015 F. No. 500/15/2014-APA-I dated 29.2.2015 wherein CBDT had accepted Hon'ble Mumbai High Court order in the Vodafone India Services Ltd. case and the following Hon'ble Supreme Court decisions and Hon'ble Mumbai High Court and Hon'ble Mumbai IT AT decisions in allowing this ground of appeal.

1. CIT Vs P. Mohanakala (2007) 161 Taxman 169 (SC)
2. CIT Vs M/s. Green Infra Limited dated 16.1.2017 of Hon'ble Mumbai High Court in ITA No. 1162 of 2014.
3. ACIT Vs M/s. Gagandeep Infrastructure P. Ltd. 2014(11) TMI 479 of Hon'ble Mumbai ITAT. .
4. DCIT Vs. M/s. Overseas Infrastructure Alliance (I) P. Ltd. (ITA No. 1470/Mum/2011) of Hon. Mumbai ITAT.

Thus, since the Hon. Jurisdictional High Court has held that share premium cannot be taxed as a trading receipt, the Ground of Appeal is allowed.”

6. Against this order the Revenue is an appeal before us.
7. We have heard both the parties and perused the records. We note that the assessing officer in this case has made the addition under section 68 of the Act by inter alia observing that assessee has not supplied the details called for which included transaction detail and bank statement. He has noted that assessee had submitted that assessee shall be supplying the necessary details as required, but till the date of his assessment order the necessary details were not supplied. The assessing officer has noted that the transaction details as well as the bank statements were not produced. The assessing officer has doubted both the veracity of the transaction as well as the creditworthiness.
7. The learned CIT(A) on the other hand has summarily accepted the assessee submission that the details have been submitted before the assessing officer. She has not at all given a finding that the details called for were submitted before the date of assessment order or not. This is clearly relevant as assessing officer has clearly noted that assessee had submitted that they shall be supplying the details called for but till the date of assessment order they were not supplied. Furthermore on the basis of the said details submitted,

learned CIT(A) has not given any finding whether the ingredients of section 68 including the creditworthiness are established.

8. She has referred that proviso to section 68 has been introduced from 1.4.2013 as per Finance Act 2012-13. There is no discussion whatsoever as to what is the significance of this observation of learned CIT(A). That has been left to the imagination of the reader of the appellate order. She has further referred to the decision of Bombay High Court in the case of Vodafone (supra) and the CBDT circular in connection with share premium falling under capital field. This decision was rendered in the case of foreign direct investment and how it is applicable to the present assessee has not at all been discussed by the learned CIT(A). As regards the decision of Bombay High Court in the case of Green Infra Ltd. (supra), Gagandeep Infrastructure P. Ltd. and others noted by the learned CIT(A), these were with reference to share premium where that creditworthiness of the receipt was not questioned. Here as detailed hereinabove the creditworthiness has been very much questioned by the assessing officer as no details were available before him. Learned CIT(A) has not at all given any categorical finding that after examination of the documents in this regard the creditworthiness of the creditors is established. Thus learned CIT(A) has grossly erred in relying upon the decisions referred by him. Furthermore learned CIT(A) has referred to decision, of honourable Supreme Court in the case of P. Mohankala (supra). How this decision helps the case of the assessee or the decision of learned CIT(A) has not at all been discussed. As a matter of fact in this decision of the honourable Supreme Court has observed that :-

“It is true that even after rejecting the explanation given by the assessee if found unacceptable, the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assessee constituted income of the previous year must receive the consideration of the authorities provided the assessee rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory. We are required to notice that Section 68 of the Act itself provides, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of the

previous year if the explanation offered by the assessee about the nature and source of such sums found credited in the books of the assessee is in the opinion of the Assessing Officer not satisfactory. Such opinion found itself constitutes a prima facie evidence against the assessee, viz., the receipt of money, and if the assessee fail to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of an income nature. In the case in hand the authorities concurrently found the explanation offered by the assessee unacceptable. The authorities upheld the opinion formed by the Assessing Officer that the explanation offered was not satisfactory. The assessee did not take the plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature. The burden in this regard was on the assessee. No such attempt has been made before any authority. All the decisions cited and referred to hereinabove are required to be appreciated and understood in the light of the law declared by this Court in Sumati Dayal (supra).”

9. Thus on the touchstone of the above decision learned CIT(A) has in fact not followed the above exposition. From the above it is obvious that learned CIT(A) has passed a very short and laconic order which does not exhibit proper application of mind. Accordingly in the interest of justice we remit the issue to the file of learned CIT(A). The learned CIT(A) is directed to consider the issue afresh and pass a proper speaking order as per law after giving the assessee proper opportunity of being heard. The learned CIT(A) will also bear in mind our observation hereinabove.

In remitting the matter to the file of the learned CIT(A), we also draw support from the order of Hon’ble Supreme Court decision in the case of *Shri Kapurchand Shrimal vs. CIT* [1981] 131 ITR 451 (SC) for the proposition that it is the duty of appellate authority to correct the errors in the order of authority below and remand the matter with or without direction unless prohibited by law.

10. In the result this appeal by the Revenue stands partly allowed for statistical purposes.

Pronounced in the open court on 3.6.2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 03/06/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai