

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

ITA No. 2490/Mum/2017
(Assessment Year: 2009-10)

Dy. CIT, Circle – 13(1)(2), 2 nd Floor, Room No. 218, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. Pipal Tree Ventures Pvt. Ltd. 108/109, Mehta Industrial Estate, I.B. Patel Road, Next to Swati Studio, Goregaon, Mumbai -400 063
PAN/GIR No. AAACP 4464 E		
(Appellant)	:	(Respondent)
Appellant by	:	Shri Uodal Raj Singh
Respondent by	:	Shri Krish Desai
Date of Hearing	:	20.10.2020
Date of Pronouncement	:	01.01.2021

ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-21, Mumbai ('Id.CIT(A) for short) dated 30.01.2017 and pertains to the assessment year (A.Y.) 2009-10.

2. The grounds of appeal read as under:

1. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in admitting fresh evidence in violation of Rule 46A of I.T. Income Tax Act, 1961, 1961.
2. Without prejudice to the admission of fresh evidence, whether the opportunity granted by the Id. CIT(A) to the Assessing Officer as described in para 6.3 of his order dated 30.01.2017, can be considered sufficient, and if not, whether the order needs to be set aside to meet the substantial cause of justice.
3. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs.3,75,00,000/- made u/s. 68 of I. T. Act, 1961 without appreciating the fact that the assessee failed to discharge primary onus cast upon it u/s. 68 during the course of assessment proceedings and the facts could not be investigated in appellate proceedings.
4. Whether on the facts and in the circumstances of the case and in law, other subscribers such as B. Seenaiyah & Co. and Kanwaldeep Investment Co. P. Ltd. being found acceptable as genuine by the A.O. has nay relevance to the genuineness of subscription of shares by M/s. KMC Construction Ltd.
5. The appellant prays that the order of the Id. CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

3. Brief facts of the case are that the return of income was filed on 30.09.2009, showing total income at Rs. Nil and claiming carrying forward loss of Rs.2,00,21,489/-. The return of income was processed u/s,143(1) of the Income Tax Act, 1961 and scrutiny assessment u/s. 143(3) was carried out. Information was received from the CCIT (CCA), Mumbai that the assessee has issued shares on premium, and that the premium amount received works out to Rs.65/- per share. On observation of the past performance of the assessee company, the Assessing Officer held that it did not justify such a huge premium and the purported transactions were not genuine. The assessment was reopened by issue of notice u/s. 148 of the Act on 28.03.2014. During the assessment proceedings, the Assessing Officer observed that earning per share was loss of Rs. (-) 18.56 as compared to Rs.(-) 0.18 per share for AY 2008-09. Despite a negative earning per share the shares were issued at the premium of Rs.65/- per share. Thus, the transaction of issue of share on premium was not genuine and income had escaped assessment.

4. The A.O. noted that it was observed from the balance sheet, that the assessee had issued equity shares at a premium and also preference shares. It was perused from the details filed during the course of reassessment proceedings that assessee company has issued Preference Shares (CCPS) and shares at premium to one concern namely KMC Construction Limited. The total amount received from this entity during the year under consideration was Rs,3,75,00,000/- , by way of preferential allotment and equity allotment. The Assessing Officer issued notice u/s.133(6) to M/s. KMC Construction Limited at the address provided by the assessee company to verify the genuineness of transaction. The said notice was returned unserved by the Postal Authorities. The Assessing Officer informed the assessee regarding the non-service of the notice u/s. 133(6) and also called upon the assessee to submit the financials of KMC Constructions Limited and prove the identity, genuineness and creditworthiness of the party. However, no evidence was filed to prove the identity, genuineness and creditworthiness of the party. The Assessing Officer applied Section 68 of the I.T. Income Tax Act, 1961 and was of the opinion that the amount of Rs.3,75,00,000/- was unexplained cash credit liable to be added to the income of the assessee.

5. The Assessing Officer placed reliance upon several tribunal decisions. Thereafter, he concluded as under:

5.9. Therefore, after the application of the test of human probabilities, it is clearly inferred that the whole transaction is a pre-structured transaction and a colourable device used by the assessee only for the purpose of introducing huge amount of undisclosed income of the assessee company under the grab of share application money.

Applicability of Section 68 of the Income-tax Act, 1961, 1961:

5.10 After establishing that the assessee's claim of receipt of 'share capital, share premium and CCPS Rs.3,75,00,000/- from KMC Constructions Limited is a sham claim and that this transaction was not a genuine transaction, the issue which remain to be decided is about the nature of this receipt of Rs.3,75,00,000/- which the assessee has received during the relevant previous year and its taxability in the hands of the assessee.

5.11 The law is well settled, that the onus of proving the source of a sum of money found to have been received by an assessee is on him. Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that this income is from any particular source – Roshan Di Hatti vs. CIT [1977] 107 ITR 937 (SC)/Kale Khan Mohammad Hanif vs. CIT [1963] 50 ITR 1 (SC).

5.12 When any sum is found to be credited in the books of accounts of an assessee who offers no explanation of the nature and source of the cash credit or if the explanation offered is not found satisfactory or reasonable, the money may be charged to tax as the assessee's income from undisclosed sources. It is not necessary for the Income Tax Officer to locate the exact source of the credits.

5.13 This view finds full support in the case of CIT Vs Deviprasad Khandelwal and Co Ltd. (81 ITR 460) wherein the Hon'ble Bombay High Court had observed as under:

"Section 68 of the Act, itself provides that where an sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as 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 formed itself constitutes a prime facie evidence against rebut the said evidence the same can be used against the assessee by holding that it was a receipt of money, and if the assessee fails to rebut the said evidence the same can be used against the assessee 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 (1995) Supp 2SCC 453."

5.14 Reliance is also placed on the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs P Mohankala 291 ITR 278. In this case the Hon'ble Apex Court has held that "the money may have been received by bank cheques and was paid through the process of banking transaction but that itself has no evidence. The Apex Court also held that Section 68 of the Act itself provides where any sum is found credited in the books of

the assessee in 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 formed itself constitutes a prima facie evidence against the assessee viz receipt of money and if the assessee fails to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of income in nature."

5.15 Reliance in this regard is placed on the recent judgment of the jurisdictional Bombay High Court dated Feb., 22, 2012 in the case of Major Metals Ltd. Vs UOI {writ Petition No.397 of 2011.} In this case after discussing judgments in the case of M/s Lovely Exports, CIT v Oasis Hospitalities Pvt, Ltd. Etc. relied upon by the assessee, it was held that the amount shown to have received as share application money has to be taxed as income of the assessee company from undisclosed sources in accordance with the provisions of section 68 of the Income-tax Act, 1961.

5.16 This view is again reiterated by the jurisdictional Mumbai Tribunal in the decision dated 10th August, 2012 in the case of DCIT CC-45 vs. M/s. Pratiksha Mercantile Ltd. (ITA No. 2096/Mum/2011)(ITAT Mumbai Bench "C").

5.17 The cumulative conclusion, in the light of the facts of the case discussed above, when distilled through the judicial rulings referred to above, and also considering the fact that the reply has not been received from KMC Constructions Limited nor any financials of the said company are submitted by the assessee company, is that the assessee claim of receipt of sum totaling to Rs.3,75,00,000/-, received in the form of application money for Compulsory Convertible Preference Shares (CCPS) is not genuine and represents income of the assessee from undisclosed sources brought under the garb of receipts by way of share cash credits in the books of the assessee and added accordingly to the total income u/s. 68 of the Income Tax Act, 1961. Therefore, penalty proceedings u/s. 271(1)(c) of the I. T. Act are hereby initiated for furnishing of inaccurate particulars leading to concealment of income.

6. Against the above order, the assessee appealed before the Id. CIT(A), challenging both the validity of reopening as well as merits of addition.

7. As regards the validity of reopening, the Id. CIT(A) rejected the assessee's contentions and held as under:

6.4 I have considered the facts on record and submissions carefully. The information regarding shares issued at premium not commensurate with the negative earning of the appellant company was appraised by the Assessing Officer and he formed his reason to believe that income had escaped assessment. It is certainly unusual that any investor would subscribe to shares of a loss making company that too at a premium. It is trite law that at the stage of issue of notice u/s. 148 the Assessing Officer should have credible reasons for formation of belief that income has escaped assessment. The sufficiency of the reasons and escapement of income is not required to be proved at this stage. The assessee gets a chance to rebut the view of the Assessing Officer in the re-assessment proceedings. Thus it is held that the reopening of assessment is valid and grounds challenging the same are dismissed.

8. As regards the merits of the addition, the Id. CIT(A) noted the assessee challenges that proper opportunity was not provided by the A.O. The assessee also filed additional evidence under Rule 46(1)(A) comprising bank statement, annual report of KMC Construction Ltd and confirmation from it.

9. The Id. CIT(A) noted that the additional evidences were forwarded to the A.O. for verification and comment vide his letter dated 03.06.2016 calling for report by 17.06.2016. The Id. CIT(A) noted that in response the A.O. merely stated that in the assessment proceedings the assessee was confronted with the fact that notice u/s.133(6) could not be served on M/s. KMC Construction Limited at the address given by the assessee and assessee was asked to prove the identity, genuineness and creditworthiness of party. It was then stated that as per rule 46A of the I.T. Rules 1962 provides that the Appellant shall not be entitled to produce before the CIT(A), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the A.O. The Id. CIT(A) noted that there was no verification and comments on merits of the additional evidences filed by the assessee. He further noted that vide letter dated 27.06.2016, the assessee filed copy of the letter written to A.O. requesting for copy of the order sheet of the assessment proceedings. It was informed that the same had not been provided by the A.O.. The A.O. was further directed to furnish comments on merits also of the additional evidence filed by the assessee latest by 25.01.2017. No report on merits has been received from the A.O.. Case records were requisitioned from the A.O. vide this office letter dated 24.01.2017. The case records were not provided by the A.O..

10. Thereafter, the Id. CIT(A) observed that now as regards the merits of the addition u/s 68, the appellant has pointed out that two other share applicants had also subscribed to the preference shares at premium for an amount of Rs.50 lacs and Rs.3 lacs respectively, which have been accepted by the assessing officer. By this observation, the Id. CIT(A) opined that the addition based on the issue of shares being issued at premium of Rs.3.75 crores done by the A.O. certainly becomes weak in these facts. He, thereafter observed that the assessee has filed confirmation, audited accounts and bank statement in respect of KMC Construction Ltd. to claim that identity, credit worthiness and genuineness is

proved. Copy of share subscription agreement between KMC Constructions Ltd. B. Seenaiiah & Co., Kanwaldeep Investment Co. P. Ltd. and appellant company and promoters dated 14.2.2008 has been filed. That this sets out the plans of the Appellant company, the milestones for allotment of shares, the plan to go for an IPO at a later stage, and conversion schedule in various scenarios. A perusal of the balance sheet and profit and loss account of KMC Constructions Ltd. shows that it had a profit before tax of Rs 59.16 crores for FY 2008-09. That this Hyderabad based company is engaged in Highway Constructions. That the investment in the appellant company is clearly reflected in the Schedule of investments in the Balance Sheet. It has confirmed the investments in the appellant company. That from details called, it is seen that this company continues to hold shares in the appellant company as on date.

11. Hence, the Id. CIT(A) observed that based on the documents furnished, it is seen that the identity and creditworthiness of the investor and the genuineness of the transaction is established. Hence, the Id. CIT(A) held that the addition u/s. 68 of Rs.375,00,000/- is deleted.

12. Against the above order, the Revenue is in appeal before us.

13. We have heard both the parties and perused the records. Learned departmental representative submitted that Id. CIT(A) has not at all provided adequate opportunity to the assessing officer. He submitted that assessee has accepted huge amount of share premium without any justification. He submitted that no detail about the financials or confirmation from the share applicant was submitted before the assessing officer. In fact, there was no response to the assessing officer's notice u/s.133(6) by the above said party, as postal authorities returned the notice unserved. The Id. DR submitted that the identity genuineness creditworthiness of the said share applicant was not at all before the assessing officer. He submitted that Id. CIT(A) has admitted additional evidences. That he has not considered the adverse remark of the assessing officer. That he has not given adequate opportunity to the assessing officer. He further submitted that Id. CIT(A) have totally erred in referring that since share application with premium from other companies

for much smaller amount have been accepted by the assessing officer, the present share application should also have been accepted.

14. On the other hand, the Id. Counsel of the assessee relied upon the orders of the learned CIT appeals. He submitted that assessee has given the necessary details before the learned CIT appeals. That the learned CIT appeal has examined the same and founder share application money with premium to be in order. Learned counsel of the assessee submitted various proposition and the catena of case laws in support of the order of the learned CIT appeals.

15. Upon careful consideration we find that assessee has accepted share application and share premium of Rs.3.75 crores from KMC construction Ltd. The shares were partly paid at FV of Rs.7.50 and premium of Rs.67.50. The assessee has not produced any document in support of the identity, creditworthiness and genuineness of the transaction for the assessing officer. In fact assessing officer's notice issued under section 133(6) on the concerned party has remained unresponded. The postal authorities could not serve the said notice on this given address. The assessing officer has also drawn adverse inference on the ground that assessee company had negative earning per share of Rs.(-)18.56 which was negative at Rs.(-)0.18 for the earlier assessment year. Hence assessing officer was of the opinion that assessee company did not command such high share premium. Coupled with the fact that there was no information about the identity creditworthiness and genuineness of the party and the transaction assessing officer has treated the transaction as unexplained credit.

16. The learned CIT appeals had accepted the assessee's contention that assessing officer has not provided proper opportunity to the assessee. In this regard, except for the statement of the assessee there is nothing on record to suggest that assessing officer has not provided the necessary opportunity. The Id. CIT(A) has accepted the additional evidences. He has observed that assessing officer has not provided his comments despite the matter being remanded to him. In this regard from the observation of the Id. CIT(A) reproduced in para 9 above it is amply evident that assessing officer was not given adequate time. Furthermore, in the additional evidence noted by the Id. CIT(A), which

was said to have been remanded to the A.O. for comments, there is only mention of bank statement, annual report of KMC and confirmation from it. However, in his order, the Id. CIT(A) has also referred and relied that the copy of share subscription agreement between KMC Constructions Ltd. B. Seenaiiah & Co., Kanwaldeep Investment Co. P. Ltd. and appellant company and promoters dated 14.2.2008 has been filed. From this, he opined that this sets out the plans of the Appellant company, the milestones for allotment of shares, the plan to go for an IPO at a later stage, and conversion schedule in various scenarios. This agreement was not remanded to the A.O. as evident from the order of Id. CIT(A). Hence, clearly the Id. CIT(A) has erred in admitting that said document in violation of Rule 46A.

It is settled law that rule of natural justice are applicable equally to both the parties. Learned CIT appeals had committed an error in not giving the assessing officer proper opportunity to go through the additional evidences and offer his comments. After accepting the additional evidences, the learned CIT appeals has summarily held that from the examination thereof he finds that the share applicant company has sufficient profit and there is confirmation on record. In this regard, there is no reference to the detailed financials of the company in the order of the learned CIT appeals. It is not at all clear that the CIT appeal has examined the sources of fund of the assessee company properly. There is nothing on record to rule out that the amount of share premium granted to the company having a very poor financial record was not out of circuitous route of rotation of share capital with premium. It is also not the case that the CIT appeals had himself examined the issue that assessing officer is doubting the very identity of the company when there was no service of notice u/s.133(6) at the given address. There is no detail as to what was the authorized capital. Whether the assessee company was authorized to raise the said amount of share capital. In this view of the matter since the assessing officer has not been provided adequate opportunity to go through the additional evidences, the examination of the Id. CIT(A) is wholly inadequate. Accordingly, in the interest of justice, we remit the issue to the file of assessing officer. Assessing officer is directed to examine the veracity of the additional documents being submitted by the assessee before the learned CIT appeals.

17. The assessing officer shall also keep our observations hereinabove in mind. The assessing officer shall also examine as to how the share premium account of the assessee in this regard has been dealt with. As the Hon'ble Supreme Court in the case of *Bharat Fire & General Insurance Co. vs. CIT* (53 ITR 108) has observed that but for section 78 of the Companies Income Tax Act, 1961 share premium was profits available. The Hon'ble Apex Court in *CIT vs. Allahabad Bank Ltd.* (73 ITR 745) has held that after Companies Income Tax Act, 1961, 1956 share premium cannot be used for purpose other than 78(2).

18. As regards the various propositions and the case laws canvassed by the learned counsel of the assessee, the same shall be applicable after the factual verification of the documents claimed to have been submitted before the learned CIT appeals. The assessing officer shall consider the same after giving proper opportunity to the assessee of being heard.

19. In the result, this appeal by the revenue stands allowed for statistical purposes.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board on 01.01.2021

Sd/-

(Ram Lal Negi)
Judicial Member

Mumbai; Dated : 01.01.2021

Roshani, Sr. PS

Copy of the Order forwarded to :

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

Sd/-

(Shamim Yahya)
Accountant Member

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai