

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA NO. 5323/DEL/2015
AY 2012-13

DCIT, CIRCLE 4(2),
NEW DELHI

(APPELLANT)

VS. BHAIJEE COMMODITIES PVT. LTD.
AG-402, SHALIMAR BAGH,
NEW DELHI
(PAN: AAACB8905G)

(RESPONDENT)

Department by : Sh. N.K. Bansal, Sr. DR.
Assessee by : Sh. R.S. Singhvi, Adv. &
Sh. Satyajeet Goyal, Adv.

ORDER

PER H.S. SIDHU, JM

The Revenue has filed this appeal against the order dated 29.5.2015 of the Ld. CIT(A)-2, New Delhi in respect of assessment year 2012-13 on the following grounds:-

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 6,00,00,000/- made u/s. 68 of the Act on account of share capital.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has deleted the additions u/s. 68 without appreciating the fact that the assessee failed to

prove the creditworthiness of the share holders who have invested in the company.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowances u/s. 14A with Rule 8D of the Act amounting to Rs. 1,76,513/-.

4. The appellant craves leave for reserving the right to amend, modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

2. The brief facts of the case are that assessee filed its return of income declaring Rs.42,48,000/- on 07.09.2012. The case of the assessee was selected for scrutiny under CASS and a notice u/s. 143(2) of the Income Tax Act, 1961 (in short "Act") dated 06.8.2013 was issued. Questionnaire dated 08.5.2014 was issued to the assessee alongwith the notice u/s. 142(1) of the Act. In response to the notice, the AR of the assessee attended the proceedings. AO observed that on perusal of the Balance Sheet for the year under consideration, it was noted that the assessee company had received a total amount of Rs. 6,00,00,000/- on account of issue of share capital of Rs. 60,00,000/- and share premium of Rs. 5,40,00,000/-. Accordingly, the AO vide order sheet entry dated 29.12.2014, has asked from the assessee's AR to justify the receipt of share capital and share premium money during AY 2012-13 alongwith identity, genuineness of transaction and creditworthiness of the

subscribers of company's share. The assessee vide letter dated 29.12.2014 submitted that during the year under consideration the assessee had raised its paid up capital by Rs. 60.00 lacs and submitted the return filed with ROC copy of share application by subscriber, Board Resolution of said Company and copy of confirmation of transaction from subscriber company. AO observed that the assessee company had issued shares to two CO.'s namely Manav Realities Pvt. Ltd. and Gaji Sales Pvt. Ltd. Accordingly, notices u/s. 133(6) of the Act has been issued to the following two companies from whom share capital and share premium had been received vide notice dated 3.2.2015. However, no reply was received from the subscribers. Again notice u/s. 133(6) of the Act was issued on 16.2.2015 to furnish some details by 25.2.2015 and AR was also informed to produce the parties vide hearing dated 18.2.2015. The notices u/s. 133(6) of the Act to the aforesaid companies returned unserved. Further summons dated 21.1.2015 u/s. 131 of the Act issued to the Directors of the assessee company for personal deposition on 30.1.2015 also remained uncomplied with. The AO observed that one of the Directors of the assessee company, Sh. Satish Kumar Gupta, who appeared was not completely aware of the details of transactions with these companies. Further, the other Director Sh. Naval Kishor Gupta did not appear in response to summons u/s. 131 of the Act. AO observed that the assessee was not cooperative and has not been able to establish the genuineness of the share capital. The AO has also made reference to the decisions of the Hon'ble Delhi High Court in the case of NR Portfolio Pvt.

Ltd., Nova Promoters and Finlease Pvt. Ltd. and Nipun Builders and Developers Pvt. Ltd. and made the addition of Rs. 6,00,00,000/- u/s. 68 of the Act vide order dated 25.3.2015 and also held that the expenses related to exempt income are to be disallowed u/s. 14A in accordance with Rule 8D of the I.T. Rules and accordingly, made the addition of Rs. 1,76,513/- u/s. 14A of the Act and completed the assessment at Rs. 6,44,24,510/- u/s. 143(3) of the Act. Against the assessment order, the Assessee appealed before the Ld. CIT(A), who vide his impugned order dated 29.5.2015 has allowed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), Revenue is in appeal before the Tribunal.

3. Ld. Sr. DR relied upon the order of the AO and reiterated the contents raised in the grounds of appeal. He submitted that Ld. CIT(A) has wrongly deleted the addition u/s. 68 of the Act without appreciating the fact that the assessee failed to prove the creditworthiness of the shareholders who have invested in the Company. He further submitted that one of the Directors of the assessee company, Sh. Satish Kumar Gupta, who appeared was not completely aware of the details of transactions with these companies. It was further submitted that the other Director Sh. Naval Kishor Gupta did not appear in response to summons u/s. 131 of the Act. He further stated that assessee was not cooperative and has not been able to establish the genuineness of the share capital. Therefore, the AO has made a reference to the decisions of the Hon'ble Delhi High Court in the case of NR Portfoloi Pvt. Ltd., Nova Promoters and Finlease Pvt. Ltd. and Nipun Builders and Developers Pvt. Ltd. and rightly

made the addition of Rs. 6,00,00,000/- u/s. 68 of the Act, which does not need any interference and accordingly requested to cancel the Ld. CIT(A) order on this issue and allow the ground raised by the Revenue. He further submitted that during the assessment proceedings, it was observed that during the year, the assessee company has shown investment in equity instruments of Rs. 5,26,81,405/- and vide order sheet entry dated 29.12.2014, the AR of the assessee company was asked to justify applicability of Section 14A r.w.r. 8D and in response to the same assessee company vide letter dated 13.1.2014 has submitted that the assessee company made investment in shares amounting to Rs. 5.27 crores and the company had not earned any dividend income during the year, hence, the provisions of section 14A are not applicable on the Co. He stated that AO by placing various case laws and the CBDT Instructions, has rightly held that the expenses related to exempt income are to be disallowed u/s. 14A in accordance with Rule 8D of the I.T. Rules and hence, rightly made the addition of Rs. 1,76,513/- u/s. 14A of the Act. In view of above, he requested to cancel the order of the Ld. CIT(A) on the issues in dispute and ground raised by the Revenue may be allowed.

4. On the other hand, Ld. Counsel for the assessee relied upon the order of the Id. CIT(A) and stated that he has passed a well reasoned order, which does not need any interference on our part. In his support, he filed a Paper Book containing pages 1-13 in which he has attached the copy of letter providing certified copies of assessment records from DCIT,

Circle 4(2); Documents in respect of M/s Manav Realities Pvt. Ltd – copy of notice u/s. 133(6) dated 3.2.2015, copy of reply submitted on 24.2.2015, copy of account of the assessee in the books of M/s Manav Realities Pvt. Ltd, Letter from the assessee intimating the allotment of shares, copy of share certificate issued by M/s Bahijee Commodities (P) Ltd.; documents in respect of M/s Gaji Sales Pvt. Ltd: copy of notice u/s., 133(6) dated 3.2.2015, copy of reply submitted on 27.2.2015, copy of account of the assessee in the books of M/s Gaji Sales (P) Ltd., copy of share certificate issued by M/s Bhaijee Commodities (P) Ltd.; Bank statement of Manav Realities P. Ltd. He also placed reliance on the CBDT Instructions dated 7.11.2014 and on the following decisions:-

- ITAT, A Bench, New Delhi decision dated 22.3.2017 in the case of AIRADS Ltd. vs. ACIT in ITA No. 4676/Del/2014 (AY 2011-12)
- Hon'ble Supreme Court of India decision dated 18.2.2019 in the case of Pr. CIT vs. Chain House International (P) Ltd. (2019) 103 taxmann.com 435 (SC).
- Hon'ble Bombay High Court decision dated 26.3.2019 in the case of Pr. CIT vs. Aditya Birla Telecom Ltd. in ITA no. 1502 of 2016.
- ITAT, B Bench, New Delhi decision dated 24.5.2019 in the case of ITO vs. Computer Home

Information Plus Pvt. Ltd. in ITA No. 5680/Del/2016 (AY 2012-13)

- ITAT, A Bench, New Delhi decision dated 31.5.2019 in the case of ITO vs. Ambika Metalchem Impex P. Ltd. in ITA no. 1676/Mum/2017 (AY 2009-10).

5. We have heard both the parties and perused the records especially the orders of the revenue authorities; Paper Book filed by the Assessee's AR as well as the case laws cited by the parties. As regards ground no. 1 & 2 which are relating to deletion of addition of Rs.6,00,00,000/- u/s. 68 of the Act on account of share capital is concerned, we note that the Assessing Officer issued notices u/s 133(6) of the Act to the share applicants on 16.02.2015 which were returned un-served and even in response to summons u/s 131 of the Act, the shareholder companies had not appeared for personal deposition. The AO observed that one of the Directors of the assessee company, Shri Satish Kumar Gupta, who appeared was not completely aware of the details of transactions with these companies. Further, the other Director Shri Naval Kishor Gupta did not appear in response to summons u/s 131 of the Act. According to the AO, the assessee was not cooperative and has not been able to establish the genuineness of the share capital. The AO has also made reference to decisions of the Hon'ble Delhi High Court in the cases at NR Portfolio Pvt Nora Promoters and Finlease Ltd. and Nipun Builders and Developers Pvt

Ltd. in support of the addition u/s 68 made by him. It is noted that in when the case of the assessee was selected for scrutiny, the AO called upon the assessee to furnish necessary details and evidences to establish the genuineness of share capital. The main grievance of the AO was on account of the fact that the shareholders had not complied with notices u/s 133(6) of the Act. However, the assessee placed on record copies of replies to notices u/s 133(6) of the Act (certified by the A.O.) alongwith bank statements and PANs of the parties and as such, the AO proceeded on wrong assumption of facts. It is further noticed that in the case under reference, there is no indication of adverse information or material either from the Investigation Wing or from any other source. It is also noted that as per MCA record, both these companies are active companies. Therefore, there can be no dispute about the identity of the shareholders. Further, on the basis of the bank statements and PANs of the share applicants, the AO should have carried out further enquiry and investigation, in case she was not convinced with or having suspicions regarding the evidences filed by the assessee. Regarding reliance placed on decisions of the Hon'ble Delhi High Court, the assessee has rightly clarified that all these judgments were based on adverse information resulting from investigation carried out by the AO and the Investigation Wing.

5.1 We find that the Hon'ble Delhi High Court in the case of CIT vs. Gangeshwari Metal (P) Ltd. (2013) 214 Taxman 423 (Delhi) (HC) has dealt

the similar issue and distinguished the case law of Nova Promoters and Finlease (P) Ltd. as under:-

"As can be seen from the above extract, two types of cases have been indicated One in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts, merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect Investigation made by the Investigation Wing of the department clearly showed that was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs. 1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs. 1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in of the parties mentioned in

the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs. 55,50,000/-. The assessee has further tried to explain the source of this amount of Rs. 55,50,000/- by furnishing copies of share application money, balance sheets etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation Wing of the Department. As such entries of Rs. 55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under section 271(1)© are being initiated separately.

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on

the part of the Assessing Officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under Section 68 of the Income Tax Act 1961.

Consequently, the question is answered in the negative.

The decision of the Tribunal is correct in law.”

5.2 We further find that the Hon'ble Delhi High Court in the case of CIT vs Oasis Hotel Pvt. Ltd. (2011) 198 Taxman 247 (Delhi) dated 31.1.2011 has dealt with the exactly similar issue of share application money at length and after examining the various judgments has settled certain parameters to decide the similar issue which is in hand. After analyzing the provisions of the Companies Act, Section 68 of the Act and the judgments delivered in the cases of CIT vs. Divine Leasing and Finance Ltd. 299 ITR 268 (Del.); CIT vs. Sophia Finance Ltd. (1994) 205 ITR 98 (Del.) (FB) and CIT vs. Dolphin Canpack Ltd. 283 ITR 190 CIT vs. Lovely Exports Pvt. Ltd. 16 CTR 195, it was rightly held that the initial burden is upon the assessee to explain the nature and source of share application money received by it. The Court further observed that in case the investor, shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the Assessing Officer proves his identity. If the creditor / subscriber is a company then the details in the form of resolution or PAN identity, etc can be furnished. As regards the genuineness of the transaction to be demonstrated, the Court

held that by showing that the assessee had in fact received money from the said shareholder and the money came from the corpus of that very shareholder the genuineness was duly established. The Division Bench also held that when the money is renewed by cheque and is transacted through banking or other undisputable channel, the genuineness of the transaction would be proved. Other documents showing the genuineness of transaction could be copies of the shareholders register, share application forms share transfer renter, etc. As far as creditworthiness or the financial strength of the creditor or subscriber is s concerned, that can be proved by producing bank statement of the creditor / subscribers showing that it had sufficient balance its account to enable it to subscribe to the share capital. Once these documents are produced the assessee would have satisfactorily discharged the onus placed upon him. Thereafter it is for the Assessing Officer to scrutinize the same and in case he has any doubt about the veracity of these documents, to probe the matter further. However, to discredit the documents produced by the assessee on the cannot go into the realm of suspicion. After analyzing the above facts, the Court referred to the judgment of the Hon'ble High Court in the case of CIT vs. Creative World Telefilms Ltd. (2011) 15 taxmann.com 183 (Bom.) and held that once the documents like PAN or bank account details were given by the assessee, the onus shifts upon the assessing officer and it is upto him to reach the shareholders and the assessing officer cannot burden the assessee merely on the ground that summons issued to the investors were returned. Thereafter the Court referred to the judgment of

the Hon'ble Delhi High Court in the case of CIT vs. Value Capital Services (P) Ltd. 307 ITR 334 (Delhi) whereby it was observed that additional burden was on the department to show that even if the applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee to enable it to be treated as the undisclosed income of the assessee. After laying down the above principles, the Court dismissed the appeal filed by the Revenue where the applicants were companies despite the fact that the Assessing Officer had received information from the Investigation Wing whereby it was found that these investor companies were engaged in the business of providing accommodation entries.

5.3 On the anvil of the above judgment to the facts of this case, it is seen that the assessee has filed sufficient documents e.g. Permanent Account Numbers, bank statements, etc. to establish the identities and creditworthiness of the two share applicants. The copies of the bank statements of the share subscribers wherein the transactions are reflected as well as the fact that they are assessed to income tax establish the creditworthiness of the parties concerned while the genuineness of the transaction is borne out by the fact that the transactions were through banking channels. On going through the assessment order, it is seen that the assessing officer has not been able to rebut or find any discrepancy about the documents submitted by the assessee. If that be the case, the Assessing Officer cannot make addition under Section 68 in the hands of the appellant company. The assessee company has been able to prove its

case and in case the assessee has failed to produce the shareholders, as held by the jurisdictional High Court in the case cited above, the Assessing Officer cannot shift the burden on the assessee company. In case the Assessing Officer had any doubt about the shareholders, nothing stopped him from taking appropriate action or proceeding against these shareholders. It is a case where the assessee has been able to meet the requirements to justify its case. If the notices issued by the A.O. to the share subscribers were not complied with or came back unserved, this could not be held against the assessee, which had discharged the initial onus which lay upon it by proving the identity of the share applicants and the genuineness of the transactions. This principle has been laid down in the case of C.I.T. vs. Orissa Corporation Pvt. Ltd., [1986] 159ITR 78 (SC), wherein it was held as follows:-

"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the

so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises. "

5.4 We note that as held by the Hon'ble Delhi High Court in the case of CIT vs. Value Capital Services Pvt. Ltd. in ITA No.348/2008, that *"there is an additional burden cast on the revenue to prove that the investment made by the share applicants actually emanated from the coffers of the assessee, so that the amount was to be treated as undisclosed income. As observed by the Ld. CIT(A), in the present case, the AO did not bring anything on record to the effect that the investment made by the share applicant had come actually from the coffers of the assessee company only."*

5.5 We further note that the Hon'ble Supreme Court of India in the case of Pr. CIT vs. Chain House International (P) Ltd. (2019) 103 taxmann.com 435 (SC) vide its decision dated 18.2.2019 has observed that *"once genuineness, creditworthiness and identity of investors are established, no addition could be made as cash credit on ground that shares were issued at excess premium."*

6. In view of above, the addition is not warranted, hence, the Ld. CIT(A) has rightly directed the Assessing Officer to delete the addition of Rs. 6 crores made by the AO on account of share capital, which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 1 & 2 raised by the Revenue. The judicial decisions relied upon by the Ld. Sr. DR have also been duly considered, which have already been relied upon by the Assessing Officer in his assessment order. In our considered view, we do not find any parity in the facts of the decisions relied upon by the Ld. Sr. DR of the Department with the peculiar facts of the case in hand.

7. As regards ground no. 3 which is relating to deletion of addition of Rs. 1,76,513/- made u/s. 14A of the Act read with Rule 8D of the I.T. Rules is concerned, we note that during the year, the assessee company has shown investment in equity instruments of Rs. 5,26,81,405/- and vide order sheet entry dated 29.12.2014, the AR of the assessee company was asked to justify applicability of Section 14A r.w.r. 8D and in response to the same assessee company vide letter dated 13.1.2014 has submitted that the assessee company made investment in shares amounting to Rs. 5.27 crores and the company had not earned any dividend income during the year, hence, the provisions of section 14A are not applicable on the Co. However, AO by placing various case laws and the CBDT Instructions, has held that the expenses related to exempt income are to be disallowed u/s. 14A in accordance with Rule 8D of the I.T. Rules and made the addition of Rs. 1,76,513/- u/s. 14A of the Act. For the sake of

convenience, we are reproducing relevant portion of Section 14A as under:-

Section 14A

- (1) For the purpose of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.*
- (2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*
- (3)*

7.1 In our considered opinion, before invoking the provisions of Section 14A, the Assessing Officer has first of all to record his or her dissatisfaction with the claim of the assessee as regards the expenditure shown (or not shown at all) by the assessee in relation to income which

does not form part of the total income. However, in the assessment order, no such dissatisfaction has been recorded and the AO has mechanically applied Section 14A/Rule 8D to make the disallowance, which is not sustainable in the eyes of law. Therefore, addition in dispute is not warranted, hence, Ld. CIT(A) has rightly directed the Assessing Officer to delete the addition of Rs. 1,76,513/- u/s. 14A of the Act r.w.r. 8D, which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 3 raised by the Revenue. The judicial decisions relied upon by the Ld. Sr. DR have also been duly considered, which have already been relied upon by the Assessing Officer in his assessment order. In our considered view, we do not find any parity in the facts of the decisions relied upon by the Ld. Sr. DR of the Department with the peculiar facts of the case in hand.

8. In the result, the Appeal of the Revenue stands dismissed.

Order pronounced on 13/06/2019.

Sd/-
[B.R.R. KUMAR]
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

SR BHATNAGAR

Date: 13/06/2019

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches