

IN THE INCOME TAX APPELLATE TRIBUNAL “B”, BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2087/Kol/2017

(निर्धारणवर्ष / Assessment Year:2012-13)

ITO, Ward-6(1), Kolkata	Vs.	M/s DSR Impex Pvt. Ltd. 2, Lal Bazar Street, Kolkata-700001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAACD 9236 A		
(Assessee)	..	(Respondent)

Assessee by : Shri Baij Nath Singh, JCIT

Respondent by :None

सुनवाईकीतारीख/ Date of Hearing : 14/11/2019

घोषणाकीतारीख/Date of Pronouncement : 05/02/2020

आदेश / ORDER

Dr. A.L. Saini, AM:

The captioned appeal filed by the Revenue, pertaining to assessment year 2012-13, is directed against the order passed by the Commissioner of Income Tax (Appeal)-23, Kolkata in appeal no. 265/CIT(A)-23/Wd-6(1)/16-17, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the “Act”) dated 23/03/2015.

2. At the time of hearing none appeared on behalf of assessee in spite of issuance of notice for hearing more than one occasion and Ld. Departmental Representative(DR), was present for the assessee Revenue. In the absence of any appearance by the assessee, the appeal is being disposed of *ex parte qua* the assessee, after hearing Ld. DR for the Revenue on merits in terms of Rule 24 of the Income Tax Appellate, Tribunal, Rules, 1963.

3. The grounds of appeal raised by the Revenue reads as follows:

1. *That on the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting addition of Rs. 5,20,00,000/- received on account of alleged share capital and share premium u/s.68 of the I.T.Act which has been made merely on the assessee's submission.*
2. *That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in accepting the thorough investigation/enquiry made by the AO during assessment proceedings before conclusively reached at the view of alleged share capital and share premium which could not be substantiated by the assessee.*
3. *That on the facts and in the circumstances of the case the Ld. CIT(A) has erred in violating of Rule-46A of the I.T..Rules,1962 for remitting the same before the AO for further investigation and enquiry.*
4. *That on the facts and in the circumstances of the case, the Ld CIT(A) has erred in law in accepting the fact that the assessee had failed to satisfy the genuineness and authenticity of cash credit.*
5. *That on the facts and circumstances of the case, it is humbly requested to set aside the order of Ld.CIT(A) and restore back the assessment order passed by the AO.*
6. *'That the assessee craves for leave to add, delete amend or modify any ground before or at the time of appellate proceedings.*

4. Facts of the case which can be stated quite shortly are as follows: During the previous year assessee company issued shares against the debt due to the share holders companies on account of the purchases of investments. There is no receipt of cash or any money by the assessee. The fact was stated before the AO, together with the details of investments purchased against allotment of shares. The shares were so allotted to such sellers of investments, were in terms of agreement entered into by the assessee with such companies respectively. The copies of the agreement so executed with each of the shareholders were furnished before AO. The entries in the books of the assessee were passed through the journal entries only and no cash or bank transaction was recorded in the books. The extract of books of accounts with journal entries was furnished before AO. The details and particulars of journal entries are as follows:-

Date of agreement	Name of seller	Particulars of investments sold .	Amount of debts discharged by allotting equity shares	Number and amount of equity shares allotted.
30.03.2012	Alliance Dealcomm Pvt Ltd	36000 fully paid up shares of Vantage Tradelink Pvt Ltd 2000 fully paid up shares of Circle Infra Projects Pvt	Rs 90,00,000 Rs 2,00,000	4600 equity shares of assessee for Rs 92,00,000

30.03.2012	Mashaal Suppliers Pvt Ltd	44000 fully paid up shares of Koel Overseas Pvt Ltd	Rs 88,00,000	4400 equity shares of appellant for Rs 88,00,000
30.03.2012	Amarnath Vanijya Pvt Ltd	20000 fully paid up shares of Ridhi Sidhi Vintrade Pvt Ltd	Rs 80,00,000	4000 equity shares of appellant for Rs 80,00,000
30.03.2012	Jackpot Agencies Pvt Ltd	17000 fully paid up shares of Sapphire Conclave Pvt Ltd	Rs 85,00,000	4250 equity shares of appellant for Rs 85,00,000
30.03.2012	Chirag Trexim Pvt Ltd	21250 fully paid up shares of Zenith Fiscal Services Pvt Ltd	Rs 85,00,000	4250 equity shares of appellant for Rs 85,00,000
30.03.2012	Marina Dealers Pvt Ltd	2250 fully paid up shares of Surams Holdings Pvt Ltd	Rs 90,00,000	4500 equity shares of appellant for Rs 90,00,000

The assessee had duly recorded purchases of such investment and were reflected under schedule 2.5 of the annual accounts of the assessee. The corresponding entries in the books of the share holders for sale of shares to

the assessee and allotment of fresh shares of the assessee by the assessee were furnished. The AO has admitted in his order about the allotment of shares sale of investment. We refer to Para 3 page 2 of the assessment order that mentions "These share holders fund have been shown as again invested in different private limited companies. Both receiving of share application money and investing in other private limited companies have been done through chain of transactions of share allottee companies assessee company and investee companies.

However, the assessing officer rejected the contention of the assessee and made addition to the tune of Rs.5,20,00,000/-.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by the Assessing Officer observing the following:

“ 5.1. Grounds of appeal, assessment order and submissions of the A.R. were duly considered. The issue under consideration is that whether the exchange of shares or issue of shares in kind invites the provisions of u/s 68 of the Act or not.

5.2. Applicability of section 68

- 1. The assessee pleaded that there is no receipt of any sum of money, hence the credit of sum of money had not arisen in his case. He elaborated that in exchange of buying the existing investments of the parties, the debt was discharged by allotting its own fully paid up equity shares. There was no exchange of money, neither the assessee received any cash or sum of money nor the other party has shown such payment.*
- 2. The assessee further argued that in case on non-receipt of any money, the addition u/s 68 as money earned from undisclosed source is not good in law. In such case, logically there is no undisclosed income. The jurisdiction of provisions of section 68 is based on premise that the assessee had entered its own undisclosed earned income as cash credit, which had earned by evasion of Income tax.*
- 3. The Assessee further argued that the very premise of section 68 in his case has failed, as in such case, it cannot be implied that he has earned income, even otherwise taxable or not.*
- 4. In these share transaction, the addition u/s 68 of the Act as unexplained Cash Credit will not come, as the transaction is not under the preview of cash credit, as there is no cash receipt or receipt of any money or credit of any*

money. The assessee allotted its shares through journal entries only. The allotment of shares is against the discharge of such debts only.

5. The AR pleaded that the creditworthiness or capacity to invest is proved by the very nature of transactions. The investee companies had sold their own investments to the assessee. Those investments were appearing in their respective balance sheet(s), the source of such investments by investee companies was also provided and same were neither refuted nor rebutted by the AO.
6. It is true that the prima-facie evidence is receipt of money for logical steps to invoke the jurisdiction of section 68 of the Act. The Section puts the assessee under a cloud, when prima facie evidence is in place, Logically, unless any amount is credited, the necessity to offer the explanation about the source of cash credit and rebuttal by the AO of the explanation of the assessee does not arise. The Section puts the assessee under a cloud, only after the first and primary evidence of receipt of money in the books of the assessee is found. The assessee must dispel that cloud to the reasonable satisfaction of the assessing authorities. In this case, the assessee had not received or credited any money as share application, the prima evidence does not exist and in such a situation the assessee was not obliged to explain that it is not out of his undisclosed income or from the source which has evaded the tax.
7. The assessee must dispel that cloud to the reasonable satisfaction of the assessing authorities. The argument is that as the assessee had not received or credited any money as share application, the prime evidence does not exist. In a recent judgement of Hon'ble ITAT Kolkata, in case of **Wellman Wacoma Ltd. vs. DCIT** it is held that.

"In the instant case, the credit is in the form of receipt of share capital from seven share applicants. The nature of receipt towards share capital is well established from the entries passed in the respective balance sheets of the companies as share capital and investments. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. We place reliance on the decision of the **Hon'ble Apex Court in this regard in the case of Dhakeshwari Cotton Mills Ltd. vs. CIT reported in 26 ITR 775 (SC)** wherein it has been held that no addition can be made without material and on mere suspicion."

8. The assessee rely on the case law, where in Hon'ble Jurisdictional High Court **Jatia Investment Co vs CIT [1994] 206 ITR 718 (Cal)** had accepted the contention of the assessee and stated, In case there is no cash receipts, the question of cash credit does not arise.
9. The AR relied upon the Supreme Court Judgment in **CIT vs. P. Mohanakala (1995) Supp SCC 453** and in **SumitiDayal Vs CIT (SC)**. During the course of deciding about the applicability of section 68, the Apex court elaborated on the provision of Section 68, and in both cases, stated that the primary evidence is the receipt of money. Whereas, in the case of assessee, the

assessing officer, failed to establish that the assessee has received any sum of money during the year. In the cases, Maindranath Das Vs. CIT Bihar & Orissa (Patna HC) and GovindrajuMudalliar Vs. CIT, Hyderabad (SC). It was clear that if there is receipt of an amount in the accounting year, it is incumbent in the first instance upon the assessee to show that it does not bear the character of Income, if he fails to do so, the Assessing Officer may hold the same as income from disclosed source or undisclosed source. In case of Smt. Srilekha Banerjee and Others Vs. CIT (SC) it was held that if there is an entry in the accounts books of the assessee which shows the receipt of sum or conversions of high denomination notes tendered for conversion by assessee himself (last instance was peculiar to that case), it is necessary for the assessee to establish, if asked what is the source of money is and prove that it does not bear the nature of income. In all above referred cases, the prime evidence is any sum credited in books on receipts of money. Unless there is any receipt of money, no income can be stated to have been earned either form disclosed source or undisclosed source.

5(3).The AR further replaced his reliance on the various judicial pronouncements as mentioned above in the submission of the appellate wherein it has been held that share application money/share capital cannot be added u/s 68 if the identity, creditworthiness and genuiness of the applicants/shareholders are established. The addition of Rs. 5,20,00,000/- raised by the way of Share Capital & Share Premium U/s 68 of the I.T. Act 1961 is not justified in view of the facts and legal provisions that all the transaction in respect thereof are as per agreements entered with the applicant companies and the same are duly recorded in the books of the company as well as the subscriber entities which are verifiable form their financial statements filed in response to notices u/s. 133(6), all these shareholders are bodies corporate incorporated under the companies Act, 1956 and they are regularly filing their Income Tax returns and thus their identity is established beyond doubt, the A.O. had not conducted any enquiry nor bought any material on record to establish that the Share Capital were bogus and fictitious, that as the shares were allotted against consideration for purchase of equity shares held by these applicant companies. The AR argued that no transaction has taken place through bank and as such the provisions of section 63 does not apply at all, No. addition could be made u/s 68 of the I.T. Act, 1961 in the absence of evidence that the amount received by the assessee was nothing but assessee's own unaccounted money which was brought to the books in the form of share capital.

5(4). The AO placed his reliance on the various judgments as mentioned in the assessment order. However AO's action in making addition u/s 68 by relying upon the decisions are totally misplaced. The AO has drawn adverse inference on the ground that director of the shareholder companies did not appear in person in response to summons. The failure on the part of the directors of the shareholder companies to appear in person does not suggest that identity, proof and genuineness of the transaction furnish by the Assessee Company stands disproved. The facts of the cases, as cited by the AO in his order are totally different with the facts of the assessee. In those cases, as referred by the AO, the assessee had received monies by cheque/draft and allotted shares. Whereas in the case under consideration, no money was received through banking channel by the assessee. There is no cash transaction in the case of

the assessee as the shares were issued against the shares of another companies. I find that it is not a case where shares were issued on high premium and thereafter, those shares were purchased at a nominal price and there is change of management as reliance placed by the AO Bisakha Sales Pvt. Ltd. and others. The assessment order does not suggest such observation/finding by the AO. The AR during the appellate proceeding submitted that there is no change in management of the company and these shares were not purchased on nominal price. The AO has not found any defect and/or deficiency in the source of fund explained by the share applicants through their replies to the statutory summons issued u/s 131 of the Act to them. It is not in dispute that the assessee had furnished the documents relating to the share applicants before AO. It is also observed that every share applicant in their respective replies to the said summons issued u/s 131 of the Act, furnished all relevant documents. The entire details of the share applicants, proving their identity, creditworthiness and genuineness of transactions were duly provided by the assessee during the course of assessment proceedings. The AO had thus erroneously stated that identity, creditworthiness and genuineness of the transactions has not been proved the assessee.

5(5). The AO failed to appreciate the fact that there was no sum credited in the books of account of the appellate and no money was received. The assessee had allotted its shares against the discharge of debts by journal entries in books. The AO failed to verify the facts of the case. The shares were allotted against the acquisition of investments under the agreements. The copies of these documents were also filed during the appellate proceedings. I find that there is no real cash entry on the credit side of the cash book. The shares were issued against the share. It is merely a notional entry and there is no real credit in the cash book and bank account. The question of inclusion of the amount of the entry unexplained cash credit cannot arise. Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash. In other words, the transactions are mere book entries. The transactions showing the amount as received in cash or in kind and discharged were not actual case but only notional by journal entries. As far as the question of section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, allowed.

5(6). In the remand report AO examined the issues and nothing adverse was reported.

5(7) From the above, it is concluded that the assessee case does not come under preview of sec 68 and hence addition made of Rs. 5,20,00,000/- u/s 68 are deleted. Assessee gets a relief of Rs. 5,20,00,000/-.

5. Aggrieved by the order of the ld. CIT(A) the revenue is in appeal before us.

6. The Id. DR has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

7. We have heard Id. D.R. for the Revenue and perused the materials available on record. We note that the Id. CIT(A) has rightly observed that shares have been issued against the shares therefore it is nothing but barter system of issuing shares in lieu of shares. Therefore section 68 of the Act does not apply and for that we rely on the judgment of Co-ordinate Bench of ITAT Kolkata in the case of M/s Anand Enterprises Ltd. in ITA No. 1614/Kol/2016 for A.Y. 2012-13 dated 26/09/2018 wherein it was held as follows:

4.2. It would be pertinent to note that in the instant case, the Id. AO had not doubted the investment made in shares by the assessee company. There is no dispute raised by the Id. AO with regard to number of shares; value thereon invested by the assessee company. We also find that the Co-ordinate Bench decision of Pune Tribunal in the case of Kantilal and Bros. vs. ACIT reported in 52 ITD 412 (Pune Trib.) also supports the case of the assessee.

4.3. In view of the aforesaid observations, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Moreover, in the balance sheet of the assessee company in the schedule to share capital, it is very clearly mentioned by way of note that the fresh share capital was raised during the year for consideration other than cash. Hence we hold that provision of section 68 of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted which has rightly been done by the Id. CIT(A) which does not require any interference. Accordingly, grounds raised by the revenue are dismissed.

8..Respectfully following the judgment of the Co-ordinate Bench on the similar facts in the case of M/s Anand Enterprises Ltd. (supra) we note that the shares have been issued in exchange of shares therefore no any cash is involved in these transactions. Hence the provision of section 68 does not attract therefore the addition made by the Assessing Officer has rightly been deleted by the Id. CIT(A).

9. We note that during the appellate proceedings, Id CIT(A) called remand report from assessing officer. We note that in the remand report AO examined the issues and nothing adverse was reported. We note that Hon`ble High Court of Madras, in the case of Smt. **B. Jayalakshmi**, [2018] 96 taxmann.com 486 (Madras) held that where Commissioner (Appeals) on basis of remand report of Assessing Officer, allowed claim of assessee, revenue was not entitled to maintain an appeal before Tribunal against said order of Commissioner (Appeals). That being so, we decline to interfere in the order passed by the Id. CIT(A), his order on this issue, is hereby upheld and the grounds of appeal raised by the Revenue is dismissed.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 05.02.2020

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 05/02/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. ITO, Ward-6(1), Kolkata
2. M/s DSR Impex Pvt. Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

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By Order

Assistant Registrar
ITAT, Kolkata Benches