

आयकर अपीलीय अधिकरण
कोलकाता 'सी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

डॉ. मनीष बोराड, लेखा सदस्य

एवं

श्री संजय शर्मा, न्यायिक सदस्य

के समक्ष

Before

DR. MANISH BORAD, ACCOUNTANT MEMBER

&

SONJOY SARMA, JUDICIAL MEMBER

I.T.A. No.: 1938/Kol/2018

Assessment Year: 2012-13

Dharmvir Merchandise Pvt. Ltd.....Appellant
[PAN: AABCD 0854 H]

Vs.

ITO, Ward-6(1), Kolkata.....Respondent

Appearances by:

Sh. S.K. Tulsiyan, Adv. &

Smt. Puja Somani, CA, appeared on behalf of the Assessee.

Smt. Ranu Biswas, Addl. CIT (D/R), appeared on behalf of the Revenue.

Date of concluding the hearing : November 23rd, 2022

Date of pronouncing the order : December 13th, 2022

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short "AY") 2012-13 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the

“Act”) by Id. Commissioner of Income-tax (Appeals)-23, Kolkata [in short Id. “CIT(A)”] dated 01.03.2017 which is arising out of the assessment order framed u/s 143(3) of the Act dated 16.03.2015.

2. The assessee is in appeal before this Tribunal raising the following grounds:

“1. That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong and unjustified in confirming the action of Assessing Officer who determined the amount of fresh share capital introduced including the premium amounting to Rs. 1,40,00,000/- as unexplained cash credit as provided in Section 68 of Income Tax Act, 1961.

2. That the appellant craves leave to add, alter, adduce or amend and ground or grounds on or before the date on hearing of the appeal.”

3. Brief facts of the case as culled out from the records are that the assessee is a private limited company engaged in the business. Income of Rs. 1,79,701/- declared in the e-return filed for AY 2012-13 on 22.09.2012. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. During the course of assessment proceedings Id. AO noticed that during the year the assessee has issued share capital of Rs. 5,60,000/- and also received share premium of Rs. 1,34,40,000/- . The assessee was asked to explain the source of alleged sum. Complete details were filed by the assessee. Thereafter, Id. AO issued summons to the Directors u/s 131 of the Act to which the Directors duly complied and filed their replies in the office of Id. AO. Ld. AO was still not satisfied and without pointing out any defect in the details filed by the assessee only stressed upon the personal appearance of the Directors and since the Directors of the

assessee company as well as the investor company did not appear before ld. AO, he, applying the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd.* in *ITA No. 1493/Kol/2013* confirmed the addition at Rs.1.40 Cr u/s 68 of the Act and assessed the income at Rs. 1,38,20,300/-.

4. Aggrieved, the assessee preferred appeal before ld. CIT(A) but due to non-appearance on the given date of hearing, ld. CIT(A) dismissed the appeal confirming the addition made by ld. AO.

5. Aggrieved, the assessee is now in appeal before this Tribunal. Ld. Counsel for the assessee submitted that complete details with evidences explaining the share application money received during the year were filed before ld. AO. Directors of the assessee company as well as of the share subscriber companies have also filed complete details as asked for by ld. AO. All the evidences to prove the identity and creditworthiness of the share subscribers and the genuineness of the transaction have been filed before ld. AO and the assessee has discharged the primary onus casted upon him. Ld. AO made addition only for the reason that the Directors of the assessee and the investing share subscriber companies have not appeared personally before him. Further, it was submitted that after perusing the documents filed before ld. AO, observations of ld. AO are that the company is in the initial years of operation, investors are basically investment companies and their income tax return shows a nominal income/loss and no business activity and also the investor companies received share premium with huge share capital with huge premium which was in turn invested in

the assessee company and similar other companies as well. Ld. Counsel for the assessee submitted that ld. AO has not doubted the identity of these share applicant companies. Ld. AO has made addition merely relying on the case of *Bisakha Sales Pvt. Ltd. (supra)* but the same is not applicable in the case of the assessee since it is distinguishable on facts. It was submitted that in the case of *Bisakha Sales Pvt. Ltd. (supra)* Hon'ble ITAT did not go into the merits of the case and it was a case of the order passed u/s 263 of the Act against which the assessee came in appeal before Hon'ble Tribunal. However, the instant case is not of Section 263 of the Act, and detailed proceedings carried out u/s 143(3) of the Act wherein complete details were filed and proper enquiries were conducted. Therefore, the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd. (supra)* is not applicable.

6. Reliance was, however, placed on the judgment of Hon'ble Supreme Court of India in the case of *CIT vs. Orissa Corporation Pvt. Ltd. (1986) 159 ITR 0078 (SC)* in support of the contention that before discrediting the documents filed by the share applicant companies, the Department ought to have exercised its plenary powers and conduct independent enquiries with these share applicant companies and collect material evidences against the assessee and such outright rejection of the evidences by the Revenue is totally contrary to the law. Reliance was also placed on the judgment of Hon'ble Gujarat High Court in the case of *Dy. CIT vs. Rohini Builders [2002] 256 ITR 360* wherein Hon'ble Court held that merely because the summons issued to some of the creditors could not be served or they failed to attend before ld. AO, cannot

be a ground to treat the loans taken by the assessee from these creditors as non-genuine.

7. Reliance was further placed on the following decisions:

i) Ami Industries (India) Pvt. Ltd. (ITA 1231 of 2017)

ii) CIT vs. Leonard Commercial (P) Ltd. ITAT No. 114 of 2011

iii) ACIT vs. Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 0680 (Bom.)

iv) Vodafone India Services Pvt. Ltd. vs. UOI and Others (Writ Petition No. 871 of 2014)

v) Omar Salay Mohamed Sait vs. CIT [1959] 37 ITR 288 (SC)

vi) Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 151 (SC)

vii) Satyam Smertex (P.) Ltd. vs. DCIT [2020] 117 taxmann.com 93 (Kolkata-Trib.)

viii) ITO vs. Axisline Investment Consultants (P.) Ltd. [2019] 108 taxmann.com 276 (Kolkata-Trib.)

ix) Tradelink Carrying (P.) Ltd. vs. ITO [2020] 113 taxmann.com 520 (Kolkata-Trib.)

8. On the other hand, ld. D/R vehemently argued supporting the order of ld. AO & ld. CIT(A) and stated that when the summons were issued u/s 131 of the Act, Directors of the assessee company and share subscriber company should have appeared personally before ld. AO so that necessary details and investigations could have been carried out so as to understand the *modus operandi* of investing such huge amount in the equity share capital of the assessee company.

9. We have heard rival contentions and perused the records placed before us. Addition u/s 68 of the Act for unexplained share

capital and share premium of Rs. 1.40 Cr is in challenge before us. We notice that the assessee company issued fresh share capital during the year of face value of Rs. 10/- and premium of Rs. 240/- per share and received 1.40 Cr from following three companies:

Sr No.	Name of the Share Applicant	Amount Received
1	Everlike Projects Pvt Ltd	50,00,000/-
2	Mahashakti Vintrade Pvt Ltd	50,00,000/-
3	Satyam Plywood Merchandise Pvt Ltd	40,00,000/-
	TOTAL	1,40,00,000/-

10. After the case being selected for scrutiny, ld. AO asked the assessee to explain the source of above referred sum of share capital and share application money. In response, the assessee submitted the following documents:

- i. Party Wise details of share capital raised during the year,*
- ii. Form 2, Form 5 filed with ROC,*
- iii. Memorandum and Article of Association,*
- iv. Bank Statement for the year,*
- v. Share Application Form,*
- vi. Form 18 in support of registered office address of the company,*
- vii. Audited accounts for the year,*
- viii. Relevant Bank Statement for the year,*
- ix. Form 18 in support of registered office address of these companies.*

11. Thereafter, summons were issued to the Directors of the share subscriber companies as well as the Directors of the assessee company which were duly served upon the respective

persons and the details as called for were filed which included the following:

- i. Photo Identity and Address Proof,*
- ii. Narration of all debit and credit entries in relevant Bank statements,*
- iii. Copies of all relevant ROC returns,*
- iv. Sources of funds and utilisation of funds,*
- v. Evidence of creditworthiness along with Income Tax Returns filed and*
- vi. Copies of Audited Accounts and Tax Audit Report for the relevant AY.*

12. We further, notice that ld. AO has not pointed out any defect and not questioned the correctness of any of the documents filed by the assessee company, share subscriber companies as well as the Directors. The only ground for making the addition is that the Directors of the assessee company as well as the investor companies have not appeared personally before ld. AO in compliance to the summons issued u/s 131 of the Act and applying the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd. (supra)*.

13. So far as reliance placed by ld. AO on the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd. (supra)* is concerned, we fail to find any merit as the facts of *Bisakha Sales Pvt. Ltd. (supra)* are distinguishable from the facts of the present case. Firstly for the reason that the case of *Bisakha Sales Pvt. Ltd. (supra)* was in connection of the revisionary order passed by ld.

CIT(A) u/s 263 of the Act where it was alleged that ld. AO has not made proper enquiries with regard to the transaction of share application money received by the company, which however, is not the fact of the instant case where the issue relates to assessment proceedings carried out u/s 143(3) of the Act and complete and detailed enquiry has been conducted by ld. AO. In the assessment order, ld. AO has not brought any adverse material which could have remotely suggested that the unaccounted income of the assessee was brought in disguise of the share capital. Therefore, the decision of *Bisakha Sales Pvt. Ltd. (supra)* is not applicable on the present case.

14. So far as merits of the case are concerned, we find that the assessee has successfully discharged its onus by filing complete details of the share subscriber companies including their bank statement, audited financial statements, Form no. 18 in support of registered office address, source and utilization of funds, copies of ITRs, copies of all relevant company returns. Even the photo identity, address proof of the Directors of the assessee company and the subscriber companies have been filed directly by these Directors to ld. AO. On the basis of these facts undoubtedly the assessee has successfully discharged the onus which lay upon it by producing all the evidences for proving the identity and creditworthiness of the investors and the genuineness of the transaction. Merely non-appearance of the Directors cannot be a basis for treating the share application money as unexplained or non-genuine. We find support from the judgment of Hon'ble

Gujarat High Court in the case of *Rohini Builders (supra)* relying on the judgment of Hon'ble Apex Court in the case of *Orissa Corporation Pvt. Ltd. (supra)* (relevant extract:

“Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.”

15. Our view is supported by *Tradelink Carrying (P.) Ltd. vs ITO* pronounced on 20.12.2019 reported in [2020] 113 taxmann.com 520 (Kolkata-Trib.), wherein the Hon'ble jurisdictional ITAT held that:

“34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the, Assessing Officer, we hold that an addition cannot be sustained merely based

on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to allow the appeal of the assessee.

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore we delete the addition of Rs 5,60,000/- and consequently the appeal of assessee is allowed.

36. In the result, the appeal of the assessee is allowed.”

16. Similar view also taken in the case of *Satyam Smertex (P.) Ltd vs DCIT* reported in [2020] 117 taxmann.com (Kolkata - Trib.) pronounced on 29-05-2020 where the Hon'ble jurisdictional ITAT held that:

“30. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source, it shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. the PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record, including that of the directors and share holders of share subscribing entities

as discussed supra. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO and confirmed by Ld. CIT(A) are based on conjectures and surmises, so their impugned action cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do allow the appeal of assessee and direct deletion of addition of Rs 16 cr under section 68 of the Act.”

17. From the above decision, we note that it has been held again and again by the jurisdictional ITAT, Kolkata that in a case, where the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, the onus shifts on ld. AO to disprove the documents furnished by assessee so as to draw adverse view and in the absence of any investigation, much less gathering of evidence by ld. AO, additions cannot be sustained merely based on inferences drawn by circumstance or made on surmises and conjectures.

18. Therefore, after going through the various details and documents placed before us, we find that assessee has successfully discharged primary onus casted upon it to explain the source of alleged share capital and share premium. Ld. AO did not find any fault or any shortcoming in the compliances made by the appellant company. It is also an evident fact that the only basis for making the alleged addition by ld. AO was non-appearance of the Directors of the share allotted company but as claimed by ld. Counsel for the assessee, the time allowed for compliance was too short and the assessee filed all the confirmations in respect of such

share subscribers which were not doubted by ld. AO. Facts are brought to our notice out of the eight shareholders five have been assessed for the same assessment year u/s 143(3) of the Act and complete details of their financials and bank transactions have been examined by ld. AO in the scrutiny proceedings. This is also an admitted fact that each of the shareholders were duly served notice u/s 133(6) of the Act which is sufficient to prove the identity of such shareholders. As far as the genuineness of the transaction is concerned, the same have taken place through banking channel which is traceable from the origin to the destination of such payments and further confirmed from the documents furnished before us. All these transactions are duly recorded in the respective balance sheets of the shareholder companies. Creditworthiness of the transaction is also proved from the fact that all the shareholder companies were having more than sufficient share capital and reserve and surplus fund for giving share application money. Even otherwise ld. AO has not made the addition for charging of higher share premium and has made the addition of unexplained cash credit but still charging of share premium is a commercial decision and the same can be challenged only with sufficient documentary evidence. It thus brings to a conclusion that since the assessee filed complete details of identity and creditworthiness of the share subscribers and genuineness of the transaction before ld. AO, the onus shifted to ld. AO to disprove the material placed before him and without doing so the additions made by ld. AO are based on conjectures and surmises and the impugned additions cannot be

justified and therefore, the impugned action of ld. AO cannot be held to be justified.

19. Our view is further supported by following judicial pronouncements:

“i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

ii) PCIT vs. Chain House International (P) Ltd. 98 taxmann.com 47 wherein Madhya Pradesh High Court held that “The question raised by the revenue in regard to issuing the share at a premium is purely a question of fact. It is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe to shares at such a premium or not and moreover the section 68 does not envisages any law on share premium it only requirement is to identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants which same has been discharged by the respondent authority and the HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--58-- (ITA No.112/2018 & Other connected matters) same has been accepted by the appellate authorities thus, the same cannot be reconsidered in these appeals as it is a pure question of fact.” SLP preferred by revenue was dismissed by Hon’ble Supreme Court and the same is reported in 103 taxmann.com 435(SC).

iii) CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009] dated 23.12.2011 wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assessee as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were 'entry operators' and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However, in the assessments made the A.Os had not brought on record any material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78 where the Court held that "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 number was 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 credit-worthy 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 any further. In the premises, if the Tribunal came to the conclusion that the assessee had 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."

20. We, therefore, respectfully following the judgments referred herein above by the Hon'ble Courts and also considering the facts and circumstances of the case, are of the considered view that since the assessee has placed sufficient documents and materials on record to prove the identity and creditworthiness of the shareholders and the genuineness of the transaction of receiving share capital and share premium, invoking the provisions of

Section 68 of the Act was not justified in the instant case. We, therefore, reverse the finding of the CIT(A) and delete the addition of Rs. Rs.1.40 Cr made u/s 68 of the Act and allow all the grounds raised by the assessee.

21. In the result, the appeal filed by the assessee is allowed.

Kolkata, the 13th December, 2022.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 13.12.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Dharmvir Merchandise Pvt. Ltd., 18, Rabindra Sarani, 9th Floor, Kolkata-700 001.**
- 2. ITO, Ward-6(1), Kolkata.**
3. CIT(A)-23, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata