

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-1286/Del/2014
(Assessment Year: 2010-11)**

ITO
Ward 5(3),
New Delhi.

vs

KNS Realtors Pvt. Ltd.
(M/s KMS Realtors P. Ltd.)
517-A, Narrain Manzil,
23, Barakhamba Road,
Connaught Place,
New Delhi.
PAN No. AADCK4476G

**Revenue by Shri C.P. Singh, Sr. DR
Assessee by Shri Somil Agarwal, Adv.**

**Date of Hearing 14.08.2020
Date of Pronouncement 24 .08.2020**

ORDER

PER K. NARSIMHA CHARY, J.M.

Aggrieved by the order dated 9/12/2013 in Appeal No. 139/2013-14, passed by the learned Commissioner of Income Tax (Appeals)-VIII, New Delhi ("Ld. CIT(A)") in the matter of M/s KNS Realtors Private Limited ("the assessee"), for the assessment year 2010-11, Revenue preferred this appeal contending that the deletion of the addition of Rs. 4, 86, 45, 500/- made by the learned Assessing Officer under section 68 of the Income Tax Act, 1961 (for short "the Act") is bad under facts and in law.

2. Brief facts of the case as could be culled out from the record are that the assessee is a company said to have been engaged in the business of promotion, construction and development; that they have filed their return of income for the assessment year 2010-11 declaring a loss of Rs. 73, 016/- as on 29/3/2011; that during the scrutiny, learned Assessing Officer noticed that the assessee company received share application money to the tune of Rs. 4, 86, 45, 500/- and issued shares having face value of Rs. 10/- at a premium of Rs. 475/- per share from three entities, namely, M/s, KamakhyaBuildcon Pvt. Ltd to the tune of Rs. 92, 15, 000/-; M/s Amethyst Developers Pvt. Ltd to the tune of Rs. 1, 94, 00, 000/- and M/s Muskan Buildtech Private Limited to the tune of Rs. 2, 00, 30, 500/-; that in order to verify the genuineness of the transaction, and the credit worthiness of these entities, learned Assessing Officer conducted enquiries by issuance of notices under section 133(6) of the Act and summons under section 131 of the Act and also required the assessee to produce the documents; that the summons issued to the parties were returned unserved, but the parties replied in response to the notices issued under section 133(6) of the Act; and that the Ld. AR of the assessee assured the learned Assessing Officer on 25/3/2013 that if time was granted the Directors of the investor companies will be produced, but since it was a time barring assessment, learned Assessing Officer proceeded with the matter and concluded the assessment.

3. It could further be seen from the record that the assessee produced confirmation letters, details of sources from the respective investors, copies of the audited balance sheets, bank the details, copies of their ITR and explained before the learned Assessing Officer that the assessee

company was taking up projects in UK on healthcare through its group company and it would yield very high returns on investments, and therefore, the said companies invested the amounts with the use premium.

4. Learned Assessing Officer, however, was not satisfied with the evidences placed by the assessee on record. Learned Assessing Officer noticed that the assessee company had not carried out any business during the year under consideration nor in the preceding year too, and for that matter the assessee did not possess any special assets which would justify the issue of share at such use premium. Further, on verification of the bank statements of the share applicants and the details of the credit entries, Id. Assessing Officer noticed that there were some cash transactions, in other accounts where from the monies were coming to the share applicants accounts, before the share applicants invested the share capital with the assessee, and, therefore, the learned Assessing Officer doubted the genuineness of the transaction and the credit worthiness of the share applicants. Consequently, the learned Assessing Officer thought it necessary to examine the persons connected with the share applicant companies. Though the Ld. AR undertook to produce the Directors of the investor companies, there was not much time available at the disposal of the learned Assessing Officer, and since it is a time barring assessment, compelling him to proceed with the matter with the material available on record. In these circumstances, learned Assessing Officer recorded a finding that the credit worthiness of the share applicants and the genuineness of the transaction was not proved. Learned Assessing Officer therefore, held that the assessee company had

routed some of its funds to bring the share capital into the assessee company, such share application money be added to the income of the assessee and on this premise he added a sum of Rs. 4, 86, 45, 500/- under section 68 of the Act. Learned Assessing Officer also made an addition of Rs. 56, 471/- on account of the amount paid as ROC Sh. for increase in authorised share capital.

5. Assessee preferred appeal before the Ld. CIT(A). Ld. CIT(A) held that since no business activities are carried out by the assessee company and the assessee company could not earn any income from any of its source of income or any business activities carried by it, the share application money brought by the above investor companies cannot be considered as assessee's own money earned by it by any source and, therefore, the provisions of section 68 of the Act cannot be invoked as far as share application money brought by these entities. He further held that merely because the investor companies did not respond to the summons issued or that the assessee failed to produce these parties, it cannot be a ground to make addition in the hands of the assessee company and more particularly when the assessee company had yet to start its business. According to the Ld. CIT(A), the investor companies are being assessed to tax and therefore, the learned Assessing Officer could have made necessary enquiries from their respective Assessing Officers. In respect of the cash deposits in the bank accounts of the investor companies, it is the observation of the Ld. CIT(A) that such an aspect has to be verified in the hands of the investor companies and on that ground no addition could be made in the hands of the assessee. Ld. CIT(A), therefore, directed the deletion of the addition made to the tune of Rs.

4, 86,45,500/- by the learned Assessing Officer under section 68 of the Act. Ground relating to the addition of Rs. 56,471/- was not pressed by the assessee before the Ld. CIT(A) and the Ld. CIT(A), therefore, dismissed such a ground is not pressed.

6. It is the submission of the Ld. DR that the Ld. CIT(A) while deciding the appeal in favour of the assessee ignored the findings of the learned Assessing Officer which were the outcome of extensive enquiry and investigation in respect of the investor companies; that the Ld. CIT(A) did not take into account the fact that not even the primary onus of proving the credit worthiness of the investors and genuineness of transaction was not at all discharged by the assessee, but simply placed reliance on the decisions which are favourable to the assessee. Ld. DR further argued that there is no justification of logic for the issuance of shares at a premium of Rs. 475/- per share by the assessee company in the absence of any proven track record of the assessee or the assets of any net worth; that the assessee did not discharge the primary onus of proving the identity, creditworthiness and genuineness of the transaction despite ample opportunities given during the course of assessment proceedings; that though the learned Authorised Representative of the assessee promised to bring the Directors of the investor companies if time is granted, no such steps were taken even during the proceedings before the Ld. CIT(A) and the Ld. CIT(A) ignored this fact and the necessity of verifying the facts and circumstances through the Directors of the investor companies; the important factor that though the summons issued under section 131 of the Act returned unserved with the endorsement of the postal department that "house remained locked and

left without any address”, the assessee managed to get so many documents like bank statements, Balance Sheet, confirmation letters etc. but failed to produce the relevant persons.

7. It is the further submission of the Ld. DR that for the relevant assessment years the income of the investor companies was either loss or negligible as could be gathered the returns of income and in respect of the M/s Amethyst Developers Pvt. Ltd one Mr Chandan Chaurasi was the Director as per the return of income but the share application shows the Director as Mr Shailendra Kumar Dwivedi, in respect of M/s Muskon Buildtech Pvt. Ltd Jaikishan was the director as per the return of income, but as per share application and confirmation letter it was one Jeet Ram whereas SK Dwivedi was shown to be the Director in respect of M/s Kamakhya Buildcon Pvt. Ltd also. He further submitted that the factor which missed the attention of the Ld. CIT(A) is that there are cash deposits in the bank statements of the investor companies.

8. He submitted that the decisions of the Hon’ble Apex Court in the case of PCIT vs. NRA Iron and Steel (P) Ltd (2019) for 12 ITR 161 (SC) and the decisions of the Hon’ble jurisdictional High Court in the cases of PCIT vs. NDR Promoters Pvt. Ltd. (2019) 410 ITR 379 (Delhi), CIT vs. NR Portfolio Private Limited (2014) 42 taxmann.com 339 (Delhi), CIT vs. Nova Promoters & Finance (P) Ltd. 18 taxmann.com 217 etc., are applicable to the facts of the case.

9. Per contra, Ld. AR placed reliance on the order of the Ld. CIT(A) and argued that even according to the learned Assessing Officer no business activity was carried on by the assessee in the assessment year

under consideration or in the immediately preceding assessment year and, therefore, there is no possibility of the assessee earning such amount from any of the sources of income to be brought back into the business of the assessee. He further argued that when the assessee submitted all the relevant documents, it is for the assessing officer to make enquiries before shifting the burden to the assessee and the Ld. CIT(A) rightly considered the circumstances in their proper perspective to reach a conclusion that the addition made by the assessing officer under section 68 of the Act is not sustainable. He also placed reliance on the decision reported in CIT vs. Jalan Hard Coke Ltd (2018) 95 taxmann.com 330 in support of his argument that the addition made to the income of the assessee under section 68 of the Act in respect of the amount received as share capital on the ground that the assessee failed to produce the share applicants, is unsustainable and the assessee cannot be taxed to find out the person who had applied as shareholder. He further reiterated his reliance on the decisions relied upon by the Ld. CIT(A).

10. We have gone through the record in the light of the submissions made on either side. Assessee filed the return of income on 29/3/2011 declaring a loss of Rs. 73, 016/-. On verification of the financials of the investor companies and also the bank statements, learned Assessing Officer found that the returned income of M/s Muskan Buildtech Pvt. Ltd for the assessment year 2009-10 was Rs. 4,947/- and for the assessment year 2010-11 was Rs. 48, 539/-; that in respect of the Kamakhya Buildcon Pvt. Ltd there was a loss of Rs. 11,209/- for the assessment year 2009-10 and Rs. 18, 960/- for the assessment year 2010-11; whereas in respect of M/s Amethyst Developers Pvt. Ltd it was nil for the assessment year

2009-10 and loss of Rs. 22,499/- for the assessment year 2010-11. Further, there is no rebuttal to the observations of the learned Assessing Officer that there was no justification for the issue of shares at a huge premium of Rs. 475/- per share since the assessee company had not carried on any business from the date of its inception and it also did not have any such special assets which could justify the issue of shares at such huge premium or that there were certain cash transactions immediately before the investment by the investor companies in their bank accounts.

11. All these things created a doubt in the mind of the learned Assessing Officer. Learned Assessing officer, therefore, issued notice under section 133(6) of the Act to the investor companies in the addresses provided by the assessee, but none appeared on their behalf on the dates of hearing. The assessee, however, despite the fact of the notices are sent to the share applicants returned unserved, managed to secure the documents such as their income tax returns as well as bank account particulars etc. Both the learned Assessing Officer and the Ld. CIT(A) noted in the orders that on 25/3/2013 the Ld. AR volunteered to produce the Directors of the investor companies if at least one week's time is granted. It does not seem from the impugned order that before the Ld. CIT(A) any such proposal was made to produce the Directors of the investor companies.

12. When huge amounts are invested in the assessee company, the summons and notice under section 131 of the Act and section 133(6) of the Act issued to the investor companies as per the addresses furnished by the assessee were returned unserved stating that such companies are

not to be found in such addresses, and the assessee managed to obtain the document evidence from the investors to be produced before the learned Assessing Officer, it cannot be said that assessee has no contact with them or that the assessee cannot produce them before the learned Assessing Officer. As a matter of fact, record reveals that on 25/3/2013 the Ld. AR volunteered to produce the Directors of the investor company if one week's time is granted. However, no such attempt was made before the Ld. CIT(A) and the Ld. CIT(A) also did not think it proper to take this aspect to its logical conclusion.

13. Ld. CIT(A) went by the premise that no business activities were carried out by the assessee till date and, therefore, the assessee company could not have and any income from any of its sources of income on any business activities carried by it so as to route the same to their own business to the content of the investor companies. Such a logic is untenable in view of the decision of the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation private limited (1986) 159 ITR 78 (SC) wherein the Hon'ble Court observed that under the 1922 Act, where a large amount of cash was found credited on the very 1st day of the accounting year, and considering the extent of the business, it was not possible that the assessee and a profit of that amount in one-day, the amount could not be assessed the as the income of their on the 1st day on which it was credited in the books; that under section 68 of the Act, in such cases, the unexplained cash credit might be assessed as the income of the accounting year for which the books or maintained. Under such circumstances, the addition cannot be simply brush aside on the ground

that since there could not be any income from any known sources of the assessee, there is no possibility of applying section 68 of the Act.

14. In the circumstances, it is imperative for the learned Assessing Officer to reach a just conclusion by appreciating all the facts and circumstances of the case, and, if necessary, by resorting to the proceedings under section 131 and 133(6) of the Act. Learned Assessing Officer thought that issuance of shares of Rs. 10/- at a premium of Rs. 475/- must be on justifiable grounds, which according to him are conspicuously absent, in this case. He recorded the fact that since the assessee company had not started any business from the date of its inception and did not have any assets of considerable net worth, the genuineness of the transaction has to be tested from the point of view of the investor company, and, therefore, he thought it necessary to secure the presence of the Directors of the investor company for verification of their creditworthiness and genuineness of the transaction. Assessee furnishing the addresses of such investor companies to which the summons or notice under section 131 of the Act and section 133(6) of the Act were issued, but returned with the endorsement that such entities were not to be found in such addresses.

15. Assessee does not plead that after investing the huge amounts in crores of rupees, the investors disappeared into thin air. Assessee could managed to get the documentary evidence from the investors relating to their financial capacity and bank statements etc. Further, assessee volunteered to produce the Directors of the investor companies before the learned Assessing Officer, but did not propose any such move before the Ld. CIT(A). Even before us also no such proposal was made. It is,

therefore, clear that the whereabouts of the investor companies are within the knowledge of the assessee. When such entities are not to be found in the addresses furnished by the assessee, it is incumbent upon the assessee to produce them before the learned Assessing Officer to prove their creditworthiness and genuineness of the transaction. Burden stands shifted to the assessee.

16. In the circumstances, as approved in the decisions of the Hon'ble Apex Court in the case of PCIT vs. NRA Iron and Steel (P) Ltd (2019) for 12 ITR 161 (SC) and the decisions of the Hon'ble jurisdictional High Court in the cases of PCIT vs. NDR Promoters Pvt. Ltd. (2019) 410 ITR 379 (Delhi), CIT vs. NR Portfolio Private Limited (2014) 42 taxmann.com 339 (Delhi), CIT vs. Nova Promoters &Finlease (P) Ltd. 18 taxmann.com 217 etc.it is legitimate for the learned Assessing Officer to make investigation into the issues like - whether the two parties are related or known to each other, or mode by which parties approached each other? whether the transaction is entered into through written documentation to protect investment? whether the investor was an angel investor? what is the quantum of money invested? how the party believed the creditworthiness of the recipient? what is the object and purpose of payment/investment? whether the share applicant is in existence and an independent entity? how the financial capacity of the share applicant to invest funds is proved? how the source of funds from which the high share premium was invested is dealt with by the assessee? why the investor companies had applied for shares of the Assessee Company at a high premium? in case the field enquiry conducted by the AO revealed that the investor companies were found to be non-existent, and the onus

to establish the identity of the investor companies, was not discharged by the assessee? whether the assessee discharged their legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO? whether the assessee discharged the onus to establish the credit worthiness of the investor companies? did the assessee do anything more than mere mention of the income tax file number of an investor to discharge the onus under Section 68 of the Act? did the assessee do anything more than mere filing all the primary evidence in discharge of their onus to prove the identity of the investee? etc.

17. When the learned Assessing Officer felt it necessary to look at the things beyond the pale of papers, it is incumbent upon the assessee to cooperate with the learned Assessing Officer in dispelling the doubts, which the circumstances raised in the mind of the learned Assessing Officer. The way of acquaintance of these share applicant entities with the affairs of the assessee company, the facts that motivated these entities to purchase the shares of the assessee company at a huge premium, particularly when the assessee did not commence the business and does not possess any assets of considerable net worth, the measures of security for such investment obtained by such entities, the modus operandi of the agreement between the assessee and such entities - all these things will have to be get clarified, not by papers, but by examination of the persons who run and manage these entities.

18. Orders of the authorities below reveal that the assessee has not complied with the requirements of the learned Assessing Officer in the exercise of forming satisfaction as to the creditworthiness of the share applicants or the genuineness of the transaction. Mere paperwork by the

assessee does not take the authorities anywhere, when the learned Assessing Officer suspected the real existence of the entities that applied and paid for share application and share premium and insisted that a higher degree of proof is required in that respect.

19. In the circumstances of the case, in view of the decisions of the Hon'ble Apex Court in the case of PCIT vs. NRA Iron and Steel (P) Ltd (2019) for 12 ITR 161 (SC) and the decisions of the Hon'ble jurisdictional High Court in the cases of PCIT vs. NDR Promoters Pvt. Ltd. (2019) 410 ITR 379 (Delhi), CIT vs. NR Portfolio Private Limited (2014) 42 taxmann.com 339 (Delhi), CIT vs. Nova Promoters & Finance (P) Ltd. 18 taxmann.com 217 etc. we are of the considered opinion that the action of the learned Assessing Officer was legal and the inference drawn by him that the assessee had routed their own money in the books of accounts through the conduit of investor companies is justified. On this premise, we agree with the Revenue and while setting aside the impugned order, restore the addition made by the learned Assessing Officer under section 68 of the Act. Consequently, we allow the appeal of the Revenue.

20. In the result, appeal of the Revenue is allowed.

Order pronounced in the open court on 24th August, 2020

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 24.08.2020

*Kavita Arora

Sd/-

(K. NARSIMHA CHARY)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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Date of dictation	21.08.2020
Date on which the typed draft is placed before the dictating Member	21.08.2020
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	