

आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.630/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s Bini Builders P. Ltd. 203/204, Raigad Darshan Opp. Indian Oil Colony J.P.Road, Andheri (W) Mumbai – 400 053	बनाम / Vs.	DCIT-CR 7(3) 655, 6 th Floor Aaykar Bhawan M.K.Road Mumbai – 400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AACCB-3447-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Vimal Punmiya – Ld. AR
Revenue by	:	Shri Tharian Oommen – Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	22/04/2021
घोषणा की तारीख / Date of Pronouncement	:	05/05/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2010-11 contest the order of Ld. Commissioner of Income-Tax (Appeals)-49, Mumbai [in short referred to as ‘CIT(A)’], *Appeal No.CIT(A)-49/IT-163/2017-18 dated 17/12/2018* on following grounds of appeal: -

1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the reopening the case u/s 148 which is bad in law.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the assessment order passed u/s. 143(3) of the Income Act 1961 by the Ld. Assessing Officer is against the principal of natural justice, hence bad-in-law.
3. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the passing assessment order without providing opportunity to rebut the material relied by Ld Assessing Officer during the reassessment proceedings examination which is against the principal of natural justice and hence the said order is liable to be quashed.
4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition in respect of the Share Capital and Share Premium of Rs.3,22,75,000/- as unexplained cash credit u/s. 68 of the Income Tax Act, 1961 without corroborative evidences.
5. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not permitting of business loss of Rs.25,879/-
6. On the facts and circumstances of case and in law, Ld. CIT(A) erred in confirming initiation of penalty proceeding u/s.274 r.w.s 271 (1) (c) of Income Tax Act 1961.
7. On the facts and circumstances of the case and law the Ld. CIT (A) erred in set-aside for fresh calculations of interest under section 234A, 234B and 234C of the Income Tax Act, 1961.

As evident, the assessee is aggrieved by confirmation of certain addition of unexplained cash credit u/s 68. In ground nos. 1 to 3, the assessee has challenged the validity of reassessment proceedings.

2. The Ld. AR, at the outset, submitted that the issue under consideration is squarely covered in assessee's favor by the earlier decision of Tribunal in assessee's own case for AYs 2011-12 & 2012-13, ITA Nos. 631 & 632/Mum/2019 common order dated 12/03/2020 which has subsequently been relied upon by coordinate bench in the case of assessee's sister concern namely M/s Moongipa Development & Inf. Ltd. for AYs 2009-10 & 2010-11, ITA Nos.625 & 626/Mum/2019 common order dated 04/12/2020. The copy of both the orders has been placed on record. The Ld. AR took us through the cited order as well as the facts of this year to submit that most of the investor entities are common entities who had sufficient net worth to make investment in assessee company and therefore, the additions would not be sustainable under law in the light of documentary evidences furnished by the assessee to establish

the identity of the party, their respective creditworthiness and the genuineness of the transactions as per the requirements of Section 68. The Ld. DR, though relied upon the orders of lower authorities, however, could not controvert the fact that the issue has already been adjudicated by the Tribunal in assessee's own case for earlier years.

3. We have carefully heard the rival submissions and perused relevant material on record including the order of Tribunal in assessee's own case. We have also gone through the documentary evidences furnished by the assessee to establish the fulfillment of primary ingredients of Sec.68. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

Assessment Proceedings

4.1 Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged as *builders & developers* was subjected to an assessment u/s 143(3) r.w.s. 147 on 22/12/2017 wherein the assessee was saddled with certain addition of unexplained cash credit u/s 68 for Rs.322.75 Lacs. The original return was processed u/s 143(1). However, pursuant to certain search / survey action on Lotus / Kamdhenu / Greenvalley group, the assessee's case was reopened as per due process of law in view of the fact that the assessee had received share capital / share premium of Rs.322.75 Lacs from various Kolkata based entities. The said receipts were alleged to be bogus in nature. The shares of face value of Rs.10/- each were stated to be issued at premium of Rs.90/- per share to 16 entities during the year as detailed in para 3.1.5 of the assessment order.

4.2 During the course of survey u/s 133A on 09/10/2014, Shri Rajesh Agarwal, an associate of the assessee group, in his statement under

oath u/s 131, made admission of sum of Rs.11.13 Crores as undisclosed income of the group. However, the said statement was retracted immediately on 16/10/2014 by submitting an affidavit that the statements were extracted by applying undue influence without there being any incriminating evidences on record.

4.3 The findings of search operations revealed that entities of Shri Rajesh Agarwal received unsecured loan / share application money of around 30 Crores from various Kolkata based parties. Shri Rajesh Agarwal was stated to be director of around 28 entities including that of assessee. The assessee is stated to have received total sum of Rs.322.75 Lacs from 16 entities during this year as detailed in para 3.1.5 of the assessment order. The notices issued u/s 133(6) to all these entities to confirm the transactions remained un-served / un-responded.

4.4 In the above background, summon u/s 131 were issued to Shri Rajesh Agarwal during the course of assessment proceedings and his statement was recorded on 09/12/2016 wherein Shri Rajesh Agarwal stood by the retraction affidavit. He maintained that the he was coerced by survey team to make false deposition and the conclusion that bogus share money was received by the assessee group, was merely on the basis of surmises and conjectures.

4.5 However, disregarding assessee's submissions and documentary evidences on record, Ld. AO formed an opinion that investor entities gifted money to the assessee for no apparent business purposes. The retraction was nothing but merely an after-thought. Since, the assessee could not prove the source and nature of these transactions, the monies so received by the assessee were added to its income as unexplained cash credit u/s 68 which would be chargeable to tax @30% u/s 115BBE.

Appellate Proceedings

5.1 Aggrieved, the assessee assailed the action of Ld. AO on legal grounds as well as on merits. Challenging reassessment proceedings, the assessee submitted that the assessee group had no connection with Lotus / Kamdhenu / Greenvalley group except for the fact that one Shri Bhagwanji Patel of Lotus group was one of the ex-directors in one of the group companies of the assessee viz. Axayraj Buildwell Pvt. Ltd. but Shri Bhagwanji Patel ceased to be director of Axayraj Buildwell Pvt. Ltd. in 2009. The assessee submitted that in the absence of tangible material, Ld. AO had no jurisdiction to issue notice u/s 148.

5.2 However, the legal submissions challenging reassessment proceedings could not find favor with Ld. CIT(A) who observed that no scrutiny took place u/s 143(3) and there was no scope for Ld. AO to examine the issue of share capital / share premium. The Ld. AO had authentic information by way of appraisal report of the search in the case of Lotus group and the assessee's admissions during search compelled him to take action u/s 147 / 148. The subsequent retraction would not have any relevance since the onus would be on assessee to prove that the statement was factually wrong. The Ld.AO recorded elaborate reasons after giving analysis of each of the investor entities as well as of those entities who had invested in the investor entities. Therefore, Ld. AO had sufficient reason to believe that income had escaped assessment in the hands of the assessee. Accordingly, the legal grounds challenging reassessment proceedings were dismissed. The reasons that triggered reassessment proceedings have already been extracted in para 6.0 of the impugned order and we have also perused the same.

5.3 On merits, the assessee assailed the quantum addition by way of elaborate submissions which have been extracted in para 7.1 of the impugned order. The assessee drew attention to the documents submitted by the assessee with respect to each of investor entities to establish their identity, creditworthiness and genuineness of the transactions in terms of requirements of Section 68. It was submitted that each and every shareholder confirmed the stated transactions and therefore, findings rendered by Ld.AO run contrary to the provisions of Sec. 68. The assessee maintained that by submitting these details, it had discharged the primary onus of proving the stated transactions. All the investor entities had sufficient funds to invest in the assessee company. Reliance was placed on catena of judicial pronouncements to support the said submissions. These have already been tabulated in assessee's submissions as extracted in the impugned order. Therefore, the assessee submitted that additions as made by Ld. AO were uncalled for in the light of documentary evidences furnished by the assessee.

5.4 The Ld. CIT(A), at para 7.3 of the impugned order, noted that the assessee had submitted share application form, copy of cheque, cheques deposit slips, copy of assessee's bank statement, copy of share certificates, copy of source of funds, copy of board resolution, certificate of incorporation, copy of Memorandum of Association (MOU) etc. with respect to all 16 investor entities. However, the same would not prove the genuineness of the transactions. It was observed that investor entities did not have any genuine business activity which was evident from the fact that main object of the investor entities contained all activity possible and would indicate the mala-fide intentions of the assessee. Any genuine company with a real motive of doing business would have a

concrete object to be followed. Further, there was no justification for Kolkata based entities to make investment in Mumbai based entity and that too, at a premium of Rs.90/- per share. At para 7.6, it was noted that all the entities purchased the shares of the assessee at premium of Rs.90/-per share but they exited at face value of Rs.10/- per share. Further, the retraction would not have any relevance in the light of decision of Mumbai Tribunal in Hiralal Maganlal and Co. V/s DCIT (97 TTJ 377). The case laws being relied upon by the assessee were held to be distinguishable rather reliance was placed on the decision of Hon'ble Delhi High Court in **Nova Promoters & Finlease Pvt. Ltd. 342 ITR 169** to confirm the additions. Finally, the additions were confirmed by observing as under: -

7.8 The Learned Counsel also alleged that the AO made the addition on the basis of suspicion and not evidences. This also is not correct as the AO had brought in enough evidences both direct and corroborative to come to the conclusion that the share capital and premium received by the assessee are not genuine. As could be seen from the assessment order and from the discussion made above, the Learned Counsel further alleged that the AO has no material in his possession to prove the same and that he made the addition on the basis of information from investigation wing and without any independent enquiry made by the AO. This also is incorrect as the AO had in-depth information not only about the 16 companies which have invested in the assessee company but also about the 67 companies which have invested in the said 16 companies. The AO had made exhaustive enquiry and analysis before reaching to this conclusion. The Learned Counsel has also alleged that the Third Party Unilateral Act cannot be the basis of addition but the addition, in this case, has been made not on the basis of Third Party Unilateral Act but on the basis of the assessee's own admission supported by other corroborative evidences. In the light of these facts and circumstances, the addition made by the AO is confirmed. The grounds of appeal are dismissed.

Aggrieved the assessee is in further appeal before us.

Our findings and Adjudication

6. Upon careful consideration, as rightly pointed out by Ld. AR, the issue is squarely covered in assessee's favor by the earlier decision of coordinate bench of this Tribunal in assessee's own case for AYs 2011-

12 & 2012-13, ITA Nos. 631 & 632/Mum/2019 common order dated 12/03/2020. The relevant findings of the bench were as under: -

7. We have carefully heard the arguments advanced by respective representatives and perused relevant material on record including documents placed in the paper-book. We have also deliberated on various judicial pronouncements as cited before us. We have already appreciated the settled legal position regarding addition u/s 68 as enumerated by us in the opening paragraphs. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

8.1 Upon careful consideration, the facts that emerges are that the assessee has issued 20.70 Lacs shares to as many as 11 corporate entities during the year as tabulated in para 5.3 above. As evident from documents on record, these shares were issued at face value of Rs.10/- per share. The Share Capital of the assessee increased by Rs.207 Lacs during the year under consideration. In the light of settled legal position as enumerated by us in the opening paragraphs, it is quite evident that the primary onus was on assessee to prove the fulfilment of three ingredients of Sec. 68 viz. (i) identity of the investor; (ii) creditworthiness of the investors; & (iii) genuineness of the transactions.

8.2 To demonstrate fulfillment of these ingredients, the assessee had during the course of assessment proceedings as well as appellate proceedings, furnished following broad documentary evidences with respect to all the 11 entities: -

- (i) Share Application Form
- (ii) Copy of Cheque
- (iii) Copy of Cheque Deposit Slip
- (iv) Copy of investor's Bank Statement
- (v) Copy of Share Certificate Counterfoil
- (vi) Copy of Audit Report along with financial statements of the investor entity
- (vii) Copy of ITR acknowledgement of the investor entity
- (viii) Copy of Certificate of incorporation of investor entity
- (ix) Memorandum & Articles of Association of investor entity
- (x) Company Master Data showing status as active
- (xi) Copy of Board Resolution

The assessee's own bank statement was also placed on record which would show that all the transactions have taken through banking channels. Upon careful consideration of these documents, we find that so far as the identity of the investor entities are concerned, the same stand proved by certificate of incorporation which is held to be conclusive proof of registration of a corporate entity. The creditworthiness of the entities would stand satisfied by the financial statements of the investor entities, which are also placed on record. The genuineness of the transactions would stand proved by the fact that the transactions were duly supported by share application form, share certificates, copy of board resolution and by the fact that ultimately the shares were allotted to all these entities. The assessee has tabulated the net worth of all these entities in the following manner: -

No.	Name of Investor	Amount of Share Capital invested	Share Capital of investor entity	Reserves of Investor entities	Net worth of investor entities
1	Limelight Dealcom P. Ltd.	15,00,000	16,85,000	3,01,30,806	3,18,15,806
2	Classic Commotrade P. Ltd.	5,00,000	6,51,800	2,70,49,015	2,77,00,815
3	Divy Prakash Suppliers Pvt. Ltd.	25,00,000	1,00,02,450	33,68,50,695	34,68,53,145

4	Goldy Dealcom P. Ltd.	25,00,000	7,21,000	3,04,44,166	3,11,65,166
5	Nextgen Tradecom P. Ltd.	20,00,000	57,65,000	10,76,35,000	11,34,00,000
6	Rexnox Trexim P. Ltd.	18,00,000	1,15,57,100	15,93,97,977	17,09,55,077
7	Rajlaxmi Dealcom P. Ltd.	18,00,000	60,10,000	11,22,95,755	11,83,05,755
8	Vanilla Tie-up P. Ltd.	15,00,000	13,50,000	6,12,92,898	6,26,42,898
9	Kamakhya Goods P. Ltd.	24,00,000	7,72,000	3,29,46,126	3,37,18,126
10.	Camellia Commercia P Ltd	10,00,000	8,32,280	3,58,97,644	3,67,29,924
11	Anmol Commerce P Ltd	32,00,000	1,81,03,500	28,24,38,553	30,05,42,053
	TOTAL	207,00,000	5,74,50,130	1,21,63,78,635	1,27,38,28,765

The perusal of net worth chart would reveal that all the investor entities had sufficient net worth to make stated investment in the assessee company. Upon perusal of all these documentary evidences, it could safely be concluded that the assessee had successfully discharged the onus casted upon him u/s 68 and the onus was on revenue to rebut assessee's evidences.

8.3 Proceeding further, we find that the sole basis of making impugned addition is the statement of one of the directors as recorded during the course of survey proceedings u/s 133A. However, this statement has been retracted within a span of 7 days. It is settled law that statements recorded during the course of survey proceedings would not have much evidentiary value unless the same are backed by credible evidences. This position has been settled by Hon'ble Supreme Court in the case of **CIT V/s S.Khader Khan & Sons (25 Taxmann.com 413)**. The CBDT instructions No. F.No.286/98/2013-IT (Inv. II) dated 18/12/2014 also discourages confessional statements without any credible evidences. No incriminating material is shown to have been found during the course of survey proceedings.

8.4 We also find that learned CIT(A) has gone by irrelevant considerations to confirm the impugned additions. The object clause of the investor entities would have no relevance vis-à-vis proposed additions in the hands of the assessee u/s 68. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmises.

8.5 The Ld. DR has relied upon the case of Hon'ble Supreme Court in **Sumati Dayal Vs CIT (80 Taxman 89) & Durga Prasad More (82 ITR 540 26/08/1971)**. No doubt that the revenue authorities were not required to put blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the documents produced before them. However, we find that no such inquiries have been made by the authorities except for the allegations that the share capital was bogus in nature. Nothing was brought on record that to substantiate the fact that the assessee's unaccounted money was routed in the books in the garb of share capital.

8.6 The entirety of facts and circumstances as enumerated hereinabove do not convince us to concur with the stand of Ld. CIT(A). The impugned additions, in our considered opinion, could not be sustained under law in the light of binding judicial pronouncements as enumerated by us in the opening paragraphs. Therefore, we delete the same. Consequently, the set-off of losses, as allowable under law, would be available to the assessee. Ground Nos. 4 stand allowed. Ground No.5 stand

allowed for statistical purposes. Ground Nos. 6 to 8, being consequential in nature, would not require any specific adjudication on our part.

8.7 So far as the legal grounds are concerned, we find that the original return was processed u/s 143(1) and the only requirement in law to trigger assessment was that Ld. AO certain reasons to believe that certain income escaped assessment in the hands of the assessee. We find that Ld. AO was clinched with tangible information from investigation wing which suggested possible escapement of income in the hands of the assessee. In our opinion, nothing more was required at this stage since Ld. AO had sufficient reasons to form such a belief. Therefore, we do not find much substance in assessee's legal grounds. Ground Nos. 1 to 3 stand dismissed.

8.8 The appeal stands partly allowed in terms of our above order.

This decision has subsequently been followed by another coordinate bench of the Tribunal in the case of assessee's sister concern namely M/s Moongipa Development & Inf. Ltd. for AYs 2009-10 & 2010-11, ITA Nos.625 & 626/Mum/2019 common order dated 04/12/2020 on identical facts and circumstances.

7. We find that facts in this year are quite identical to the facts of earlier years. In fact, Ld. AR has demonstrated that 13 entities out of the 16 entities are common entities as dealt with by the Tribunal in the captioned appeals as is evident from the following tabulation: -

No.	Name of Investor entity	BBPL* 2011-12 & 2012-13	MDIL** 2009-10	MDIL** 2010-11
1.	Anmol Commerce P.Ltd.	Yes	Yes	
2.	Rexnox Trexim P. Ltd.	Yes	Yes	
3.	SSA Motor Finance P.Ltd.		Yes	
4.	Priyamvada Finvest P.Ltd.		Yes	
5.	Motocab Finance P Ltd		Yes	
6.	Camellia Commercial Pvt. Ltd.	Yes		
7.	Cherry Tieup P.Ltd.			Yes
8.	Deepa Holding P.Ltd.		Yes	Yes
9.	Hill View Hire Purchase P.Ltd.		Yes	
10.	Mandyati Dealcom P.Ltd.		Yes	
11.	Nextgen Tradecom P Ltd	Yes	Yes	
12.	Vanilla Tie Up P.Ltd.	Yes		
13.	Kamakhya Goods P.Ltd.	Yes	Yes	

*BBPL	-	Assessee (M/s Bini Builders Pvt. Ltd.)
**MDIL	-	sister concern of assessee (M/s Moongipa Dev. & Inf. Ltd.)

Regarding remaining 3 entities i.e. (i) M/s Gorsia Marine Equipment Pvt. Ltd.; (ii) M/s Sitaram Investment Pvt. Ltd.; (iii) M/s Marudhar Suppliers Pvt. Ltd., we find that the assessee had furnished similar sufficient documentary evidences as follows: -

- (i) Share Application Form
- (ii) Copy of Cheque
- (iii) Copy of Cheque Deposit Slip
- (iv) Copy of investor's Bank Statement
- (v) Copy of Share Certificate Counterfoil
- (vi) Copy of source of funds certificate
- (vii) Copy of Audit Report along with financial statements of the investor entity
- (viii) Copy of ITR acknowledgement of the investor entity
- (ix) Copy of PAN Card
- (x) Copy of Certificate of incorporation of investor entity
- (xi) Memorandum & Articles of Association of investor entity
- (xi) Company Master Data showing status as active
- (xii) Copy of Board Resolution
- (xiv) Copy of RBI certificate of registration

Upon perusal of these documents, it could be said that the primary onus as casted on the assessee in terms of the requirement of Section 68, was duly fulfilled and the onus was on revenue to controvert the evidences furnished by the assessee. However, we find that nothing has been brought on record by the revenue to substantiate the fact that the assessee's unaccounted money was routed in the books in the garb of share capital. It is trite law that no addition could be made merely on the basis of allegation, suspicion, conjectures or surmises. Upon perusal of assessee's written submissions as placed on record, another pertinent fact to be noted is that all the 16 investor entities has sufficient net worth (shares capital + reserves & surplus) to make investment in the assessee and the percentage of investment made by them in the assessee company is merely in the range of 0.47% to 5.45% of their respective net worth.

8. Hence, on the facts and circumstances of the case and respectfully following the earlier view of Tribunal in assessee's own case, we delete the impugned additions. Consequently, the set-off of losses, as allowable under law, would be available to the assessee. We order so. The Ld. AO is directed to re-compute assessee's income in terms of our above order.

9. Ground Nos. 1 to 3 stands dismissed since no infirmity could be found in Ld. AO's action in reopening the case of the assessee. The stand of Ld. CIT(A), in this regard, stands confirmed. Ground No. 4 stand allowed. Ground No.5 stands allowed for statistical purposes. Ground Nos. 6 & 7 are merely consequential in nature and thereof, would not require any specific adjudication on our part.

10. The appeal stands partly allowed in terms of our above order.

Order pronounced on 05/05/2021

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05/05/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**