

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' 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.: 710/Kol/2019
Assessment Year: 2012-13**

***Toplink Developers Consultancy Pvt. Ltd.....Appellant
[PAN: AADCT 5284 F]***

Vs.

ITO, Ward-3(3), Kolkata.....Respondent

Appearances by:

Sh. Siddharth Agarwal, Adv., appeared on behalf of the Assessee.

Sh. P.P. Barman, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : November 21st, 2022

Date of pronouncing the order : December 20th, 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 Commissioner of Income Tax (Appeals)-1, Kolkata [in

short ld. "CIT(A)"] dated 08.03.2019 which is arising out of the assessment order framed u/s 143(3) of the Act dated 26.03.2015.

2. The assessee has raised the following grounds of appeal:

"1) That the Ld. CIT (Appeals) was grossly erred in confirming the addition of Rs. 1,44,00,000/- made by Ld. Assessing Officer as unexplained income.

2) That order of Ld. CIT (Appeals) confirming the addition of Rs. 1,44,00,000/- made by Ld. A.O. as unexplained income is highly arbitrary, unjustified and unwarranted to the facts of the case.

3) That Ld. CIT (Appeals) failed to consider the submission of appellant in objective manner when appellant has fulfilled all the criterion required U/s 68 of the Act.

4) We may add, alter, amend, modify or withdraw any grounds of appeal on or before the date of hearing."

3. Brief facts of the case are that the assessee is a private limited company. Income of Rs.1,518/- declared e-return filed for AY 2012-13. The case selected for scrutiny through CASS followed by serving of notices u/s 143(2) and 142(1) of the Act. The assessee submitted various details as called for by the ld. AO. During the year, share capital and premium of Rs.1,44,00,000/- was received. The ld. AO doubted the creditworthiness of the investor companies and genuineness of the transactions as to how investments were made at a huge premium when the applicant did not have their profit-making apparatus to invest. Ld. AO not satisfied with the replies filed by the assessee, placed reliance on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Durga Prasad More 82 ITR 540* and in the case of *Sumati Dayal vs. CIT 214 ITR 801* and observed that it was beyond the human probability that investor companies having no regular finance, were able to invest

a huge amount that too at a huge share premium to the capital of the assessee company and accordingly entire amount received on account of issue of share along with share premium was added back as unexplained cash credit making an addition of Rs.1,44,00,000/- u/s 68 of the Act. Income assessed at Rs.1,44,01,518/-.

4. Aggrieved, assessee preferred appeal before Id. CIT(A). During the course of appellate proceedings, it was stated that the directors of the assessee company as well as subscribing companies had appeared before the Id. AO and the statement had been recorded which confirms the contribution to the share capital with premium. Though, Id. CIT(A) accepted that the directors had appeared before the AO and confirmed the alleged transaction but still referring to the judgment on Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron & Steel Pvt. Ltd.* confirmed the findings of the Id. AO observing as follows:

“10. However, I may state here that as and when addition u/s. 68 of the Income-tax Act, 1961 is made, before that the identity of the subscribing company, genuineness of the transactions and the creditworthiness of the assessee company has to be observed closely before coming to any conclusion. This has been the position of the Supreme Court in a recent decision of Principal Commissioner of Income Tax Vs. NRA Iron & Steel Pvt. Ltd. arising SLP (Civil) No. 29855 of 2018.

11. This is also the position taken by the Delhi High Court in N.R. Portfolio (P) Ltd. (2014) 264 CTR 0258 and Nova Promoters & Finlease (P) Ltd. 252 CTR 187 (Delhi). There can be no doubt that the identity of the subscribing companies as well as the assessee company had been established. However, it is crucial to see whether the subscriber or even the assessee company had enough creditworthiness and whether the genuineness of the transactions had been established. I have observed that the assessee company had filed a Return of

Income of Rs.1518/-. Thus, even if the share capital was genuine, the assessee could not have charged a hefty premium. On the other hand, the Return of Income filed of M/s. Prayas Tie Up Pvt. Ltd. for the same assessment year. With such a paltry income, it cannot be stated that how hefty premium was charged.

12. It is meaningless to say that as per settled law, the initial onus is on the assessee to establish by cogent evidence, the genuineness of the transactions and creditworthiness of the investors u/s. 68 of the Income-tax Act, 1961. This is the position taken by the Hon'ble Supreme Court in Para 8.2 of its NRA Iron & Steel Pvt. Ltd. (supra). To reiterate the contribution by Queen Tie Up Pvt. Ltd. was Rs.95,04,000/- over the share capital. Similarly in Emblem Trade Link Pvt. Ltd., the contribution was Rs.43,20,000/- over the share capital. Going by the Accounts submitted by the assessee during the course of hearing before the ld. A.O., it is crystal clear that the contribution made by the two companies was a paltry amount. It does not prove the creditworthiness of the shareholders. Nor does it prove the genuineness of the share transactions. In the decision of the Delhi High Court in N.R. Portfolio (P) Ltd. (2014) 264 CTR 0258, these issues of genuineness and creditworthiness has been dealt at length.

13. In view of the above, I consider that the assessee has not been able to prove the genuineness and creditworthiness of the share subscribers. He has failed in proving the same. I am afraid that the contribution to share capital with premium is not appropriate. Nor has been genuineness of the transactions. The assessee has failed miserably in proving the genuineness of the transactions and creditworthiness of the share subscribers.”

5. Aggrieved, the assessee is now in appeal before this Tribunal.

6. The ld. counsel for the assessee referred to the detailed submissions filed before the lower authorities and also took us through various details and documents filed in the paper-book which includes the audited financial statement of both the subscribing companies, certified copy of statement recorded u/s 131 of the Act of Sri Raushan Agarwal and Sri Prateek Agarwal. It was also submitted that when the directors of the assessee

company and shareholder companies had appeared and deposed before the ld. AO, he still before completing the assessment, completely ignored the same and rather erred in mentioning that no directors appeared. It shows complete mechanical manner at the end of both the lower authorities and total disregard of the facts of the case and evidence collected during assessment proceedings and consequent non-application of mind. It is also stated that identity of the subscriber has been successfully proved as they are regularly assessed to tax and having PAN and genuineness of the transaction is proved from the bank statement of the shareholders, as well as the source of the funds of the shareholders. Creditworthiness of the shareholders is proved from the bank account, audited accounts and sufficient bank balance in their account at the time of issuing cheques for investment in the equity shares of the assessee company. Further, it was submitted that facts of the case of the assessee are distinguishable from the facts in the case of *Sumati Dayal (supra)* and *Durga Prasad More (supra)*. Reliance was placed on plethora of judgments referred in the written submission filed before the ld. CIT(A) and further reliance was placed on the decision of this Tribunal in the case of *ITO vs. Cygnus Developers Pvt. Ltd. ITA No.282/Kol/2012* dated 02.03.2016 and in the case of *DCIT vs. Zimkele Commoddeal Pvt. Ltd. ITA No.959/Kol/2011* dated 24.08.2016.

7. On the other hand, Ld. Departmental Representative vehemently argued supporting the order of ld. CIT(A) and also relied on the judgment in the case of *PCIT(Central)-1, Kolkata vs. NRA Iron & Steel Pvt. Ltd. 412 ITR 161*.

8. We have heard the rival contentions and perused the records placed before us and carefully gone through the judgment referred in both the sides. The addition u/s 68 of the Act at Rs.1,44,00,000/- is under challenge before us. It was made by the A.O by alleging that the assessee failed to explain the source of share capital and share premium of Rs.1,44,00,000/- received during the year which was subsequently confirmed by the Id. CIT(A).

9. It is noticed that against the issue of 39,600 equity share and 18,000 equity share to M/s Queen Tie Up Pvt. Ltd. and Emblem Trade Link Pvt. Ltd. assessee received amount of Rs.99,00,000/- (share capital of Rs.3,96,000/- and share premium of Rs.95,04,000/-) and received amount of Rs.45,00,000/- (share capital of Rs.1,80,000/- and share premium of Rs.43,20,000/-) respectively. Certain undisputed facts which were placed by the assessee before the Id. CIT(A) vide their submission dated 28.07.2017 and the same being placed before us are mentioned below [as submitted before the Id. CIT(A)]:

“OUR SUBMISSION BEFORE YOUR HONOUR

Ld. Assessing Officer was grossly erred in adding Rs.1,44,00,000/- to the total income ignoring the material evidence furnished before him.

9.1) Even directors of assessee company and shareholders company were appeared and deposed before Ld. A.O.

Ld. A.O. however while completing the assessment, completely ignored the same. Rather mentioning that no director were appeared.

It shows Complete mechanical manner and total disregards of the facts of the case and evidence collected during assessment and consequent non-application of mind by Ld. A.O.

9.2) Appellant company during the year raised share capital from two Private Limited Company being:

a) Queen Tie Up Pvt. Ltd.

b) Emblem Trade Link Pvt. Ltd.

9.3) It is fact that in order to satisfy the requirement of section 68, which applies to receipt of money for subscription of Share Capital also, one need to establish

a) Identity of the shareholders.

b) Genuineness of the transaction.

c) Creditworthiness of the shareholders to subscriber for such share capital.

9.4) In respect of shareholder Queen Tie up Pvt. Ltd. we submit that:-

a) Said Company was incorporated on 28.02.2008.

b) It is regularly assessed to tax under PAN - AAACQ 1691G.

c) Net worth of the company as on 31.03.2011 were Rs. 1565.42 lac and as on 31.03.2012 were Rs. 1566.09 lac.

d) It subscribed to 39,600 Equity Shares of the company and have paid Rs. 99,00,000/- as under :-

Date	Amount	Cheque	Bank
10.05.11	45,00,000	406457	ICICI Bank
12.10.11	17,00,000/-	408639	ICICI Bank
12.10.11	37,00,000/-	408640	ICICI Bank

e) It has duly responded to the notice issued U/s 133(6) by Ld. A.O. and filed the reply enclosing therewith all requisite documents like copy of Share Application, I.T. Acknowledgement for E-ITR filed, Audited accounts for relevant year, relevant bank account, certificate in respect of sources of the monies received in bank, resolution authorizing the share subscription.

f) Further director of the assessee company also appeared before Ld. AO. And his statement was recorded.

g) Looking to the bank statement of the company it could be gathered that:-

- while making payment of Rs. 45.00 lac on 10.05.2011, it was having bank balance of Rs. 2,19,83,455/- and throughout May 2011 it was having lowest balance of Rs. 24.82 lacs.

- while making the subsequent payment of Rs. 54.00 lac on 12.10.2011, it was having bank balance of Rs. 85,45,758/- These shows the creditworthiness of the Share Applicant Company.

h) A Certificate as to the sources of payment from the shareholder company was submitted.

Further we are submitting the bank statement, LT. Acknowledgement and Balance Sheet of sources of source companies for your kind perusal.

i) All these document sufficiently establishes that:

i) Identity of the shareholder - As payee is regular I.T. Assessee having his PAN.

ii) Genuineness of the transaction: From the bank statement of shareholder as well as bank statement of sources of the shareholder.

iii) Creditworthiness of the Shareholder:- From their bank account, Annual Audited Accounts and other documents submitted as well as of their sources.

j) Further it is clear that there is no adverse report or findings from the Investigation Wing about the Shareholder Companies.

ALL THESE ESTABLISHES THAT amount received from shareholders Queens Tie up Pvt. Ltd. should be treated as explained and invocation of sec 68 on said sum is unwarranted.

9.5) In respect of shareholder Emblem Trade Link Pvt. Ltd., we submit that:-

a) Said Company was incorporated on 18.02.2008.

b) It is regularly assessed to tax under PAN - AABCE 9161 A.

c) Net worth of the company as on 31.03.2011 were Rs. 1420.38 lac and as on 31.03.2012 were Rs. 11420.38 lac.

d) It subscribed to 18000, Equity Shares of the company and have paid Rs. 45,00,000/- as under :-

Date	Amount	Cheque	Bank
10.05.11	45,00,000/-	406497	ICICI Bank

e) It has duly responded to the notice issued U/s 133(6) by Ld. A.O. and filed the reply enclosing therewith all requisite documents like copy of Share Application, I.T. Acknowledgement for E-ITR filed, Audited accounts for relevant year, relevant bank account, certificate in respect of sources of the monies received in bank, resolution authorizing the share subscription.

f) Further director of the assessee company also appeared before Ld. A.O. and his statement was recorded.

g) Looking to the bank statement of the company it could be gathered that:-

- while making payment of Rs. 45.00 lac on 10.05.2011, it was having bank balance of Rs. 1,82,09,393.32 and throughout May 2011 it was having healthy bank balance.

h) A Certificate as to the sources of payment from the shareholder company was submitted.

Further we are submitting the bank statement, I.T. Acknowledgement and Balance Sheet of sources of source companies for your kind perusal.

i) All these document sufficiently establishes that:

i) Identity of the shareholder:- As payee is regular I.T. Assessee having his PAN.

ii) Genuineness of the transaction: - From the bank statement of shareholder as well as bank statement of sources of the shareholder.

iii) Creditworthiness of the Shareholder- From their bank account, Annual Audited Accounts and other documents submitted as well as their sources.

j) Further it is clear that there is no adverse report or findings from the Investigation Wing about the Shareholder Companies.

ALL THESE ESTABLISHES THAT amount received from shareholders Emblem Trade Link Pvt. Ltd. should be treated as explained and invocation of sec 68 on said sum is unwarranted.”

10. From perusal of the above details, which are also placed before us in the paper-book and the fact narrated includes the details filed by the assessee i.e. bank account, income tax return, audited balance sheet of the investor companies at the time of subscribing to the equity shares of the assessee company and the sufficient availability of funds during the year and most importantly the statements of the directors of the assessee company as well as investor companies have been recorded by the AO, wherein, the said transaction has been confirmed to have been carried out between the investor companies and the assessee company. In similar type of cases which we are adjudicating, the only basis of addition u/s 68 of the Act for unexplained share capital and share premium is the non-appearance of directors personally before the ld. AO. However, in the instant case, even this aspect has also been taken care of and directors of assessee and investor companies has not only filed complete details showing financial strength of the investor companies, sufficient funds available to make the investment but had also confirmed the transaction before the ld. AO that the investor companies in all their business prudence has decided in the board meeting to invest in the equity share capital of the assessee company at a premium. Thus, all the limbs of section 68 as normally accepted by the revenue and judicial authorities required to be fulfilled about the identity and creditworthiness of the share subscriber and

genuineness of the transaction has been successfully proved in the instant case.

11. Further, we notice that Ld. D/R has heavily relied on the judgment of the Hon'ble Supreme Court in the case of *NRA Iron and Steel (P) Ltd. (supra)*, we find that the Hon'ble Supreme Court in para 8.2 of the said decision has made the following observations:

“8.2 As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer CIT v. Precision Finance (P.) Ltd. [1995] 82 Taxman 31/[1994] 208 ITR 465 (Cal.):

Proof of Identity of the creditors;

Capacity of creditors to advance money; and

Genuineness of transaction

This Court in the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.”

11.1. Further, in para 9 of the said decision, the Hon'ble Supreme Court has observed as under:

“9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness.”

11.2. Thereafter the Hon’ble Supreme Court summed up the principles which emerged after deliberating upon various case laws as under:

“11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.”

11.3. The Hon’ble Supreme court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound to conduct an independent enquiry to verify the same. However, as noted above,

the ld. AO in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee having furnished all the details and documents before the Assessing Officer and the ld. AO has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifted upon the ld. AO to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, the aforesaid decision of the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron and Steel Pvt. Ltd. (supra)*, in our humble view, is not applicable to the facts and circumstances of the case in hand.

12. We also observe that as per the proviso inserted in section 68 of the Act by Finance Act 2012 that the assessee company receiving share capital and share premium are required to prove the source of source to the satisfaction of the ld. AO has been inserted w.e.f. 01.04.2013 and the same is not applicable in the case of assessee for assessment year 2012-13 and since the assessee has filed sufficient details to our satisfaction to prove the identity, genuineness and creditworthiness of the transaction, we fail to find any infirmity in the findings of the ld. CIT(A) deleting

the said alleged addition. Our view is further supported by 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 AO u/s 68 in respect of share application monies

received by the assesseees 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 AOs 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) DCIT vs. Rohini Builders 127 Taxman 523 observed that the assessee had discharged its onus of proving the identity of creditors by giving their complete addresses, permanent accounts number and copies of assessment orders. It was further observed that the assessee had also proved capacity of creditors by showing that amounts were received by account payee cheques. The High Court held that only on the ground that some of the creditors could not be served with notice u/s 131 or they failed to appear before Assessing Officer the loans could not be treated as non-genuine and therefore upheld the order of the Tribunal deleting the addition u/s 68 of the I.T. Act 1961.

v) 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."

13. Therefore, respectfully following the judicial precedents and in the light of the facts and circumstances of the case, we are of the considered view that no addition was called for u/s 68 of the

Act for the alleged sum of the share capital and premium of Rs.1,44,00,000/- received during the year. Thus, the finding of the ld. CIT(A) is reversed and grounds of the appeal raised by the assessee are allowed.

14. In the result, the appeal of the assessee is allowed.

Kolkata, the 20th December, 2022.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 20.12.2022

RS, Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Toplink Developers Consultancy Pvt. Ltd., G-501, City Centre, Block-DC, 5th Floor, Kolkata-700064.**
- 2. ITO, Ward-6(1), Kolkata.**
3. CIT(A)-1, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata