

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

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.369/Kol/2019
Assessment Year: 2012-13

M/s MK and SK Medicare Pvt. Ltd.....Appellant
12, London Street, 5th Floor,
Flat No.-5B, Kolkata-700064
[PAN: AAFCM8868A]

vs.

ITO, Ward-7(1), Kolkata..... Respondent

Appearances by:

Shri Ankit Jalan, Adv., appeared on behalf of the appellant.

Smt. Ranu Biswas, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : January 20, 2023

Date of pronouncing the order : April 06, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा/ Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 15.01.2019 of the Commissioner of Income Tax (Appeals)-3, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee in this appeal has taken the following grounds of appeal:

"1. For that on the facts and in the circumstances of the case, the impugned appellate order confirming the order passed by the Ld. A.O. is unjustified, perverse, arbitrary and bad in law.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was vehemently wrong and unjustified in confirming the addition made by the Ld. A.O. amounting to Rs.1,65,00,000/- u/s. 68 of the Income Tax Act, 1961 without finding any infirmity in the submission

made by the appellant in regard to nature and source of cash credit. The addition is uncalled for and should be deleted.

3. For that on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was vehemently wrong and incorrect in not considering the facts of the case and the submission made by the appellant before the Ld. A.O. and was quite unjustified in confirming the addition of the share capital and share premium amounting to Rs 1,65,00,000/- by treating it as unexplained income u/s 68 of the Income Tax Act, 1961. Relief Claimed: The addition to the tune of Rs 1,65,00,000/- is liable to be deleted.

4. Without prejudice to above, the Ld. CIT(Appeals) was grossly incorrect and bad in law in confirming the addition made by the Ld. A.O. by invoking the proviso to section 68 of the Income Tax Act, 1961, even when the same was not applicable for the relevant Assessment Year. The addition to the tune of Rs.1,65,00,000/- is unjustified and liable to be deleted.

5. That the appellant craves leave to add/alter, modify, amend, delete and/or withdraw any or all of the grounds of appeal.”

3. The brief facts of the case are that the case of the assessee was selected for scrutiny on the issue of large share premium received. The Assessing Officer further noted that the assessee had issued shares of face value of Rs.10/- at a premium of Rs.90/-, whereas, the assessee company had nil business income during the year. The Assessing Officer issued notices u/s 143(2) and 142(1) along with questionnaire. However, there was no compliance on the part of the assessee. The Assessing Officer issued notice u/s 131 of the Act to the director of the assessee company for recording of statement to enquire into real facts behind the raise of share capital of the assessee company and also asked to assessee to furnish the following details:

“1. Address proof of your company. Please produce any utility bill like electricity bill, water bill etc. as evidence.

2. Net Worth of the company for the A.Y. 2012-13.

- 3. Documentary evidence of source of investment in share.*
 - 4. The bank statement of your company alongwith books of accounts for F.Y. 2011-12 i.e. for A. Y. 2012-13.*
 - 5. Your photo identity and residential proof.*
 - 6. Your income tax return alongwith P/L account & Balance Sheet and bank statements for the A.Y. 2012-13.*
 - 7. Fund flow during the year.*
 - 8. A copy of memorandum and article of association.*
 - 9. Copy of annual return of the company filed before ROC for F.Y. 2011-12 onwards.*
 - 10. If there is any change in Directorship from the relevant previous year, then you are requested to come along with the previous Director, along with all the documents, as referred above of the then Director.*
 - 11. Please also produce evidences to prove identity, genuineness and creditworthiness of share applicants for the relevant F.Y."*
4. Since there was no compliance to the notices issued, the Assessing Officer issued final show cause notice on 26.02.2015, the contents of the letter are reproduced as under:
- "1) During the year, your share-capital increased by Rs.16,50,000/- and share premium by Rs. 1,48,50,000/-, totalling Rs. 1,65,00,000/-.*
- 2) Notice u/s 143(2) & 142(1) were issued and duly served to you. But, there was no compliance.*
- 3) Summons u/s 131 of I. T. Act was issued to director & share-holders of the company. But, none of those were appeared before the undersigned. You are hereby given the last & final opportunity to show cause why Rs.1,65,00,000/- shall not be added to your Total Income u/s 68 of Income Tax Act 1961."*
- The aforesaid information must reach the undersigned on 04/03/2015 at 11.15 A.M. Again, there was no compliance by the assessee company."*
5. Since there was no compliance to the information sought by the Assessing Officer, the Assessing Officer, considering the facts on the file and applying certain judicial decisions, held that the assessee had

failed to prove the identity and creditworthiness of the share subscriber and genuineness of the transaction including the justification of high premium received by the assessee during the year. He, therefore, made the impugned addition of share capital along with share premium amounting to Rs.1,65,00,000/- holding the same as unexplained income of the assessee by passing ex parte order/best judgment assessment order u/s 144 of the Act.

6. Being aggrieved by the above order of the Assessing Officer, the assessee preferred appeal before the CIT(A). Before the ld. CIT(A), the assessee claimed that shares have been issued to M/s Gajbadan Tie Up Pvt. Ltd. However, the ld. CIT(A) inter alia noted as under:

“The financials and the credentials and the business performance of the company who has subscribed to the share capital and premium of the appellate company are discussed as follows:

“1. M/s. Gajbadan Tie Up Private Limited.

i. The company has shown revenue from operations during the financial year 2011-12 of Rs.NIL/-. The company has shown other income during the previous year of Rs. 2,04,658/-.

ii. The company has also not shown any core activity or business to justify subscription of shares at a substantial premium. The company has shown expenses at Rs. 1,62,077/-. The total income as per computation of income is Rs. 63,100/-. The extent of operation does not justify the capacity of this company to pay such huge share premium.

It is therefore observed that the company that has subscribed to the shares of Assessee Company on substantial premium does not have the capacity or the financial standing to do so. During the course of assessment proceedings the identity, capacity and the genuineness of the transaction has not been established by the appellant. Therefore, on preponderance of probabilities the contention of the assessee company regarding share capital and premium cannot be accepted.

It is perused from the financials above that the share capital subscribing company does not have any financial credibility. The audited profit and loss account has been analysed, in detail, as discussed above. The

company has not reported any substantial income as per their Income Tax Returns. The Hon'ble Ahmedabad Tribunal in the case of MAP Steels (India) Pvt. Ltd in ITA. No: 411/AHD/2015 has discussed the ingredients of a Shell Company as follows:

"Securities Act Rule 405 and Exchange Act Rule 126-2 define a Shell Company as a company, other than an asset-backed issuer, with no or nominal operations; and either:

- no or nominal assets;*
- assets consisting of cash and cash equivalents; or*
- assets consisting of any amount of cash and cash equivalents and normal other assets."*

It is observed from the perusal of the audited accounts that the above company is showing the characteristics of a shell company."

7. The ld. CIT(A) thereafter while relying upon various case laws upheld the addition made by the Assessing Officer. Being aggrieved by the said order of the CIT(A), the assessee has come in appeal before us.

8. We have heard the rival contentions and gone through the records. At the outset, the ld. counsel for the assessee has submitted that the observation of the Assessing Officer that there was no compliance on the part of the assessee, was not correct. He, in this respect, has invited our attention to para 2.1 of the assessment order, wherein, the Assessing Officer has mentioned as "*from the details filed*". The relevant para 2.1., is reproduced as under

*"2.1 It is apparent **from the details filed** that the assessee company had issued shares of face value Rs.10 at a premium of Rs.90/-. During the period under scrutiny, the assessee company had business income Nil. However, the assessee issued shares of face value of Rs.10/- each with a premium of Rs.90/-."*

Further, the ld. counsel has filed written submission as well as addressed this Tribunal orally. The sum and substance of the written submissions and oral submissions is as under:

(i) There is only one share applicant and not too many share applicants.

- (ii) The shares of face value of Rs. 10/- per share was issued at a premium of Rs. 90/- per share only and not at astronomical figures of Rs. 990/- or 1990/- or others.
- (iii) The share applicant is a group company of the appellant company.
- (iv) The share applicant has not issued any shares in the year under consideration at premium.
- (v) The appellant company has not invested the amount received in any other companies in the year under consideration.
- (vi) The director of the appellant company is a renowned doctor and not a layman as in other shell companies.
- (vii) The appellant company is having turnover of Rs.15,67,19,802/- as compared to other shell companies who have negligible amount of turnover.
- (viii) That even the turnover of the investor company was about 12,00,000/-.
- (ix) That the source of the funds of the investor company was by sale proceeds of the share sold.
- (x) That the own funds of the share applicant company were more than 15 crores at the time of opening balance of the year under consideration.
- (xi) That the assessee company was not a new company, it was established in the year 2009.

(xii) That the director of the assessee company was appeared before the Assessing Officer but he was not examined by the Assessing Officer.

10. The ld. DR, on the other hand, has submitted that the investor company had source of investment from sale of its investment in various private limited companies. It is not proved on the file that the above source was from sale of shares of genuine companies. That the source of the source was not verified.

11. We have considered the rival contentions and gone through the record. We find that the Assessing Officer has categorically mentioned in the assessment order that notices u/s 143(2) and 142(1) were issued and duly served upon the assessee, but there was no compliance. The Assessing Officer has also mentioned that the assessee was required to furnish the various details as noted above but there was no mention in the assessment order that such details were ever filed by the assessee before the Assessing Officer. Though as pointed out by the ld. counsel, some details might have been filed by the assessee before the Assessing Officer but as noted by the Assessing Officer, all the requisite details as called for by the Assessing Officer have not been filed. Notice issued u/s 131 of the Act along with questionnaire have not been complied with. Even, there is no discussion in the impugned order of the CIT(A) regarding the aforesaid points raised by the assessee. There was no submission of the assessee before any of the lower authorities that the subscribing company was a group company of the assessee. Though, it has been contended before us that the source of the investor company was from sale proceeds of shares, however, no such details have been filed before any of the lower authorities. Moreover, the case was selected for scrutiny of large share premium and the assessee has not justified

about the same by way of either submission or furnishing requisite details. In our view, the entire issue is required to be examined afresh at the end of the Assessing Officer. We, accordingly, set aside the impugned order of the CIT(A) and restore the issue to the file of the Assessing Officer for de novo assessment. Needless to say that the Assessing Officer will give adequate opportunity to the assessee to present its case and thereafter to pass a speaking assessment order.

12. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Kolkata, the 6th April, 2023.

Sd/-
[गिरीश अग्रवाल /Girish Agrawal]
लेखा सदस्य/Accountant Member

Sd/-
[संजय गर्ग/Sanjay Garg]
न्यायिक सदस्य/Judicial Member

Dated: 06.04.2023.

RS

Copy of the order forwarded to:

1. M/s MK and SK Medicare Pvt. Ltd
2. ITO, Ward-7(1), Kolkata
3. CIT
(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches