IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3788/Mum./2019
(Assessment Year : 2010–11)

Income Tax Officer
Ward–12(1)(1), Mumbai ..... Appellant

v/s

M/s. Albatross Share Registry Pvt. Ltd.
4F2, Court Chambers, 35, New Marine Lines
Mumbai 400 020 PAN – AAACA9004H .....Respondent

Cross Objection no.143/Mum./2021
(Arising out of ITA no.3788/Mum./2019)
(Assessment Year : 2010–11)

M/s. Albatross Share Registry Pvt. Ltd.
4F2, Court Chambers, 35, New Marine Lines
Mumbai 400 020 PAN – AAACA9004H ..... Cross Objector
(Original Respondent)

v/s

Income Tax Officer
Ward–12(1)(1), Mumbai .....Respondent
(Original Appellant)

Assessee by : Shri N.R. Agrawal
Revenue by : Smt Shailja Rai

Date of Hearing – 28/03/2023	Date of Order – 23/06/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal by the Revenue and cross objection by the assessee have been filed challenging the impugned order dated 29/03/2019, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned

Commissioner of Income Tax (Appeals)−20, Mumbai, [*"learned CIT(A)"*], for the assessment year 2010−11.

ITA no.3788/Mum./2019
Revenue's Appeal – A.Y. 2010−11

2. In its appeal, the Revenue has raised the following grounds:−

> *"1. Whether on the facts and circumstances of the case and in law, the Learned CIT(A) was justified in deleting the addition of Rs.21,21,90,000/- made by the AO as unexplained cash credits u/s. 68 of the I.T. Act without appreciating the fact that assessee failed to establish the genuineness and creditworthiness of the investing companies.*
>
> *2. Whether on the facts and circumstances of the case and in law, the Learned CIT(A) is erred in deleting the addition of Rs.21,21,90,000/- made u/s. 68 of the I.T. Act. by following judgment of M/s. Lovely Exports without appreciating the fact that the case of Lovely Exports is distinguishable from the facts of this case and the assessee did not discharge the onus cast on it u/s 68 of the I.T. Act.*
>
> *3. The appellant prays that the order of the Ld. CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.*
>
> *4. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

3. The only grievance of the Revenue in its appeal is against the deletion of addition made under section 68 of the Act on account of the share application money received by the assessee.

4. The brief facts of the case as emanating from the record are: The assessee is engaged in the business of dealing in shares and securities as investment and trading. For the year under consideration, the assessee filed its return of income on 27/09/2010 declaring a total income of Rs.22,362. The return filed by the assessee was processed under section 143(1) of the Act. On the basis of the details filed by the assessee during the scrutiny assessment

proceedings for the assessment year 2013-14, it was observed that the assessee has raised share capital by way of the issue of shares at a high premium which doesn't commensurate with its financial position during the year under consideration. Accordingly, proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued on 24/03/2017 for the year under consideration. In response to the aforesaid notice, the assessee vide letter dated 30/03/2017 requested to treat the return original filed on 27/09/2010 as a return filed in response to the notice issued under section 148 of the Act. The assessee also sought the reasons for reopening the assessment, which was duly provided to the assessee along with notice issued under section 143(2) of the Act. The assessee vide letter dated 28/07/2017 filed its objections against the proceedings initiated under section 147 of the Act. The said objections were disposed off vide order dated 07/08/2017. During the proceedings under section 147 of the Act, the assessee submitted the list of 17 companies along with their name, address, PAN, number of shares, and the amount received. Pursuant thereto notices under section 133(6) of the Act were issued to these companies to verify their genuineness, creditworthiness, and identity. But the notice issued to 5 companies was returned unserved by the postal authorities. On perusal of details/documents, the Assessing Officer ("*AO*") observed that 17 companies that have paid share application money have no genuineness and creditworthiness to invest in the equity shares of the assessee. It was further observed that 17 companies have very meagre income with respect to their turnover. Accordingly, the AO asked the assessee to explain why the entire share premium with capital received from 17 companies be not added under

section 68 of the Act, as the assessee has failed to prove the genuineness and creditworthiness of the investor companies. In response thereto, the assessee submitted that these companies have share capital and reserves in the balance sheets, which run into crores. The assessee also submitted a detailed chart of the net worth of these shareholders. The assessee also submitted that it made sure that all the shareholders file their reply to the notice issued under section 133(6) of the Act with documentary evidence.

5. The AO vide order dated 20/12/2017 passed under section 143(3) read with section 147 of the Act did not agree with the submissions of the assessee and held that all the 17 companies have huge transactions in the balance sheets but hardly any income was derived by these companies from its business activities. The AO also held that there is a very systematically arranged business ventures and all the funds are routed through proper banking channels. However, the basic element of these companies, i.e. earning profit or income is missing and thus these companies have hardly shown any income in their return. The AO further held that perusal of the financials of all the companies shows that practically no tax was paid and there were huge sundry creditors and advances in relation to purchases shown in the respective books of accounts. Accordingly, the AO held that these attributes are peculiar to the concern engaged in issuing accommodation entries. The AO also noted that the assessee has received a premium per share of Rs.490 as per the net worth of the assessee as on 31/03/2009, however, the assessee has a total share capital of Rs.6 lakhs with no reserve and surplus, and the profit before tax of Rs.1812 for the assessment year 2009-10. The AO also observed that

out of the share application money received during the year, the assessee has made an investment of Rs.12,40,22,000 and the balance amount of Rs.19,97,00,000 in the bank account, which was subsequently used for investment in equity shares and advancing loans. Further, the share capital of the assessee of Rs.48,33,800 with the reserves and surplus of Rs.20,74,56,200, received from the above 17 companies during the year remained the same till the assessment year 2017-18. The AO also held that the assessee has failed to reply if the investor company did not receive the notice under section 133(6) of the Act then how they file a reply thereto. It was also held that the assessee has a net worth of Rs.6 lakhs as on 31/03/2009, whereas it received share application money of Rs.21,21,90,000 for 4,24,380 equity shares of Rs.10 each at a premium of Rs.490 per share, which no prudent investor would pay. Accordingly, the AO treated the entire share application money from 17 companies as unexplained cash credit and added the same to the income of the assessee under section 68 of the Act.

6. The learned CIT(A), vide impugned order, deleted the aforesaid addition by observing as under:-

> *"4.4.3 I find that the appellant furnished the names and PAN of subscribers, the balance sheets of subscribers. There is also no dispute that the appellant received those sums from the payees. I also find from the assessment order that the appellant had furnished the copy of acknowledgment of return, balance sheet, profit and loss account, copy of PAN card, and ledger of share application money of the subscribers. The AO, however, refused to accept that any person would have actually subscribed to the shares in such high rates when the intrinsic value of the shares was only Rs. 10/- per share. The AO held that what was apparent was not real. He alleged that the purported investors had been used by the appellant for introduction of capital into its books in the garb of share application and the whole transaction is only a colourable device used by appellant to make the transaction appear genuine. He did not find the explanation of the appellant satisfactory.*

4.4.4 I find that the facts of this case are covered by the decision of the Hon'ble Supreme Court in the case of Lovely Exports [2008] 216 CTR 195 (SC). In that case the Hon'ble Supreme Court, while dismissing the SLP of the Revenue observed as under:

> *"If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the assessee company."*

4.4.5 In my view, the AO erred in not following the decision of the Hon'ble R Supreme Court. The AO has relied on the decision in the case of Vodafone International Holdings B.V. (supra). I find that the decision was in the context of transaction between related parties.

4.4.6 The AO has stated that the transaction (subscription of shares at a premium of Rs.490/-) is extremely unreasonable. On examining the transaction, I find that the excess amount paid by the subscribers were in effect about Rs.60.70 per share The following working establishes this fact:

4.4.7 Therefore, the subscribers had in effect paid Rs.500/- for shares valued at shares with intrinsic value of Rs.439.30. Therefore, the apparent loss was Rs.60.70 per share and not Rs.490/- per share as the AO seems to suggest. In my view, the observation of the AO that those 17 companies had meager income is irrelevant.

4.4.8 In view of the above, I hold that the addition made by the AO is not sustainable. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Lovely Exports and the case laws cited by the appellant. In the result, the ground of appeal No.1 is allowed."

Being aggrieved, the Revenue is in appeal before us.

7. During the hearing, the learned Departmental Representative ("*learned DR*") vehemently relied upon the assessment order and submitted that all the 17 companies who have invested in the share capital of the assessee have a meagre income with respect to the huge turnover. The learned DR further submitted that notice issued to 5 out of 17 companies under section 133(6) of the Act was returned unserved by the postal authorities. It was further submitted that the financial position of the assessee does not support receiving huge premiums from the investors. Further, there is no material available on

record as to how the investors were contacted for making the investment. It was further submitted that some of the investor companies have common addresses, common directors, and auditors. Further, by referring to the details of the source of funds of these companies, the learned DR submitted that the funds were received from each other. By referring to the assessment orders passed under section 143(3) of the Act in the case of certain investor companies, the learned DR pointed out the transactions which have been found to be colourable by these entities. The learned DR further submitted that the reply by all the investors to the notice issued under section 133(6) of the Act is similar.

8. On the contrary, the learned Authorised Representative ("*learned AR*") submitted that the assessee is not concerned with the bank balance of the shareholders/investors. It was submitted that all the investors have a huge share capital and reserves & surplus. The learned AR further submitted that the assessee provided the source of funds of the investors for investing in the shares of the assessee, however, there was no further investigation by the AO. Further, the AO also did not conduct any enquiry from where the money came in the accounts of the investor. The learned AR further submitted that all the investors are duly filing the return of income and in some of them, scrutiny assessment proceedings were also conducted. It was further submitted that the assessee followed up with all the investors for filing the reply without waiting for the notices issued under section 133 (6) of the Act and thus, all the replies were filed before the AO.

9. We have considered the submissions of both sides and perused the material available on record. In the present case, it is an accepted fact that the return of income filed by the assessee on 27/09/2010 was processed under section 143(1) of the Act. In the assessment year 2013-14, the case of the assessee was selected under CASS for the reason large share premium was received. On the perusal of data filed by the assessee during the scrutiny assessment proceedings for the assessment year 2013-14, it was observed that the assessee has raised share capital by way of the issue of shares at a high premium during the previous year corresponding to the year under consideration. Accordingly, on the basis of said details, the AO initiated proceedings under section 147 of the Act. In the reasons recorded for reopening the assessment, it was noted that during the year, the assessee has issued 4,23,380 equity shares at a face value of Rs.10 per share with a premium of Rs.490 per share and the assessee has not earned any substantial profits or paid taxes in the year under consideration or in the preceding year, which justify the issue of shares at a high premium. Accordingly, it was alleged that the financial position of the company does not commensurate with the level of high share premium charged and the credit appearing in assessee's books under the head share/security premium is taxable. Thus, the income of the assessee chargeable to tax has escaped assessment within the meaning of section 147 of the Act. The reasons recorded, while reopening the assessment, are as under:-

> *"The assessee has filed its return of income for A.Y.2010-11 on 27-09-2010 declaring total income at Rs.22,362/-. The return of income was processed u/s 143(1) of the I.T Act.*

2. In this case AY 2013-14 was selected under CASS for the reason Large Share Premium receive On perusal of the details filled during the year the course of assessment proceedings for A.Y. 2013-14 it was seen that assessee company has raised share capital by the way of issue of shares at high premium during the previous year corresponding to the AY 2010-11.

3. During the assessment year 2010-11, the assessee had issued 4,23,380 shares of face value at Rs 10/- and charged premium of Rs 490 per share. The assessee had received Share Capital of Rs 42,33,800/- & Share Premium of Rs. 20,74,56,200/-, the premium charged is 4900% of the face value and not comparable with the intrinsic value of the shares of company as on date of issue. The assessee has not earned any substantial profits or paid taxes in the year under consideration or in the preceding year which is apparent from record. The above facts of the case, do not justify issue of shares at a premium and the nature and sources of such unjustified premium is therefore required to be examined within the meaning of provisions of section 68 of the 1.T. Act 1961. Once the nature and source remained unexplained, such credits appearing in the books of assessee may be charged to income-tax as the income of the assessee of that previous year. Hence, the credit appearing in assessee's books under the head share/security premium is taxable in the hands of the assessee u/s 68 of the Act. The assessee has not disclosed these facts in the return filed.

4. Considering above facts, I have reasons to believe that the income of the assessee escaped assessment within the meaning of section 147 of the IT Act, 1961. Therefore, I am satisfied that this is a fit case to issue notice u/s 148 of the 1.T.Act, 1961".

10. During the course of proceedings under section 147 of the Act, notice under section 133(6) of the Act was issued to all the 17 companies who had invested in shares of the assessee. Out of the aforesaid 17 companies, notices in the case of 5 companies were returned unserved by the postal authorities. However, it is an undisputed fact that the assessee filed replies of all 17 companies to the notice issued under section 133(6) of the Act, which forms part of the paper book from pages 396-417. In order to substantiate the identity of these companies, the assessee also furnished ITR for the year under consideration filed by these companies. The assessee has also placed on record the assessment orders passed under section 143(3) of the Act in respect of some of these companies. From the details forming part of the

paper book, we find that in the case of 12 out of 17 companies, scrutiny assessment under section 143(3) of the Act was concluded either in the year under consideration or in the preceding/subsequent assessment years. Further, it is pertinent to note that out of 5 companies, in respect of whom notice issued under section 133(6) of the Act was returned back, in the case of 3 companies scrutiny proceedings under section 143(3) of the Act were concluded either in the preceding or subsequent years. It is discernible from the assessment order that apart from questioning the receipt of replies to notices issued under section 133(6) of the Act from the 5 companies, despite the return of the notices, the AO did not raise any other objection questioning the identity of these investors. Thus, it is evident that the Revenue has accepted the identity of the shareholders of the assessee. Further, no material has been brought on record to show that after receipt of the aforesaid information the AO has raised any doubt regarding the information so furnished.

11. During the hearing, the learned DR submitted that all the replies to the notices issued under section 133(6) of the Act are similar. However, no material has been brought on record to deny the claim made in the reply to notices issued under section 133(6) of the Act. It was also submitted that some of the directors are common in some of the companies that have invested in shares of the assessee. However, nothing has been brought on record to show that the same has led to the alleged manipulation. Further, despite the above allegation the identity of such directors has not been questioned. It was also submitted that these companies have the same

auditors. We find no prohibition in the law regarding the same. Further, it was alleged that the same directors have signed the financials of 2 companies at different locations on the same date. In this regard, it is pertinent to note that apart from making this allegation, no evidence/material has been brought on record by the Revenue that the assessee has in any manner controlled the affairs of these companies. If at all, it is for the concerned authority to examine such aspects, if there is any irregularity in preparing the financial statement. However, no such adverse findings have been brought on record. It is reiterated that most of these companies are assessed to tax and have been subjected to scrutiny proceedings at some point in time.

12. By referring to the assessment orders, forming part of the paper book, of these companies it was alleged that bogus transactions of share application have been found by the Revenue in these companies. In this regard, it is pertinent to note that all the allegations of the Revenue while passing the assessment orders are not in respect of investment made in the assessee company, rather the same was in respect of some other companies, and in most of the cases, the assessment orders do not pertain to the year under consideration.

13. In the present case, the assessee has placed on record the source of funds received by all 17 companies for investing in the shares of the assessee. During the hearing, the learned DR submitted that these sources of funds are from each other. However, from the perusal of the details, forming part of the paper book from pages 418-424, we find 5 such companies have invested in shares of the other companies, which are part of the investors who have

invested in the assessee. We further find that in respect of all the 5 companies the Revenue has conducted scrutiny assessment in the preceding years. A mere isolated transaction by one of the alleged entry operators in one of the investor companies does not taint the entire share transaction in the assessee company in the absence of any corroborative material being brought on record. Further, we find that the funds were received, inter-alia, from the sale of equity shares of some other companies by these investors or from the refund of advances for the purchase of shares. Thus, in view of the above, we find no merit in the aforesaid submission of the learned DR. Therefore, from the above it is evident that the assessee has also proved the source of source of the investors in the present case to satisfy the test of creditworthiness of the investor and genuineness of the transaction, against which no contrary material has been brought on record.

14. Further, in DCIT vs Leena Power Tech Engineers Private Limited, in ITA No. 1313/Mum/2020, relied upon by the learned DR, we find that the assessing officer found the circuitous transaction conducted by the taxpayer and investors in the facts of that case. However, in the present case, apart from making bald allegations, the Revenue did not bring any such material on record to substantiate its claim. Thus the said decision is factually distinguishable. Therefore, in view of our aforesaid findings and in light of the peculiar facts of the present case, we find no infirmity in the impugned order passed by the learned CIT(A). As a result, the grounds raised by the Revenue are dismissed.

15. In the result, the appeal by the Revenue is dismissed.

Cross Objection no.143/Mum./2021 – by Assessee
(Arising out of Revenue's Appeal being
ITA no.3788/Mum./2019 for A.Y. 2010–11

16. As we have dismissed the appeal filed by the Revenue, the cross-objection filed by the assessee becomes infructuous and is accordingly dismissed.

17. In the result, the cross-objection by the assessee is dismissed as infructuous.

18. To sum up, the appeal by the Revenue and cross objection by the assessee are dismissed.

Order pronounced in the open Court on 23/06/2023

Sd/-	**Sd/-**
S. RIFAUR RAHMAN	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 23/06/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai