

OD-15

IN THE HIGH COURT AT CALCUTTA  
SPECIAL JURISDICTION (INCOME TAX)  
ORIGINAL SIDE

ITAT/148/2024  
IA NO : GA/1/2024  
PRINCIPAL COMMISSIONER OF INCOME TAX-5, KOLKATA  
VS  
M/S. DELTA DEALERS PRIVATE LIMITED

BEFORE :  
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM  
And  
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA  
Date : 8<sup>th</sup> November, 2024

Appearance :  
*Mr. Amit Sharma, Adv.*  
*...for appellant*  
*Mr. Kartik Kurmy, Adv.(VC)*  
*Mr. Indranil Banerjee, Adv.*  
*Mr. Subrata Mukherjee, Adv.*  
*...for respondent*

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against an order dated October 26, 2023, passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (Tribunal) in I.T.A No.1842/Kol/2017, for the assessment order 2009-10.

The revenue has raised the following substantial questions of law for consideration:-

- i) *Whether on the facts and in law, the Hon'ble ITAT is justified in setting aside the order of the Ld. CIT(A) and deleting the additional made by the A.O. towards unexplained share capital and share premium of Rs.15,51,00,000/- u/s. 68 of the Act by holding that the assessee had discharged its onus to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transactions*

*overlooking the fact that not even a single Director of the share subscribing companies appeared before the Assessing Officer nor provided a valid reason for their non-appearance?*

- ii) Whether on the facts and in law, the Hon'ble ITAT is justified in setting aside the order of the Ld. CIT(A) and deleting the additional made by the A.O. towards unexplained share capital and share premium of Rs.15,51,00,000/- u/s. 68 of the Act by ignoring to acknowledge that the assessee remained non-cooperative and non-complaint during the entire assessment proceedings and failed to explain its non-existence at its registered address, share capital, reserves and surplus, net worth and turnover so as to justify the share premium charged by it within a short duration of seven months after its incorporation?*
- iii) Whether on the facts and in law, the Hon'ble ITAT is justified in setting aside the order of the Ld. CIT(A) and deleting the additional made by the A.O. towards unexplained share capital and share premium of Rs.15,51,00,000/- u/s. 68 of the Act even though the decision of the Hon'ble Supreme Court in the case of Pr. CIT, Central-1 vs. NRA Iron & Steel (P) Ltd. in Civil Appeal No.2463 of 2019 squarely covers the issue that assessee is under a legal obligation to establish identity and creditworthiness of share subscribing companies and merely because assessee company had filed all primary evidence, it could not be said that onus on assessee to establish creditworthiness of investor companies stood discharged and if not discharged by assessee to satisfaction of Assessing Officer would justify addition of said amount to income of assessee?*

We have heard Mr. Amit Sharma, learned standing counsel appearing for the appellant and Mr. Kartik Kurmy, learned counsel for the respondent/assessee.

The issue which falls for consideration is whether the learned Tribunal was justified in setting aside the addition made under Section 68 of the Act. The learned Tribunal has examined the factual position and has rendered the following finding :-

*“8. We also take note of the fact that all the share subscriber companies have filed their return of income with the department which have been either processed u/s. 143(1) of the Act for which intimations have been issued or have been assessed u/s. 143(3) or 147 on substantive basis, for which the respective intimation/assessment orders are placed on record in the paper book. We also take note of the fact that all the share subscriber companies have responded to the notice issued u/s. 133(6) of the Act and Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the share subscribing companies. These evidences furnished by them have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. Ld. AO has simply added the amount of share capital and share premium on the ground that assessee has not produced the directors/shareholders. Ld. AO has ignored the reply given in response to notice issued u/s. 133(6) of the Act which are on record under duly acknowledged seal and stamp of his good office. From the perusal of the order of Ld. CIT(A), we note that Ld. CIT(A) has perused the evidence in the nature of documents and details and on their examination has sustained the addition de by the Ld. AO. Thus, going by the records placed by the assess and by an the share subscribing companies in response to notices issued u/s 133(6), it can be safely held that the assessee has discharged its initial burden and the burden shifted on the ld. AO to enquire further into the matter which he failed to do so.*

*8.1. Further, we note that Id. CIT(A) has not taken into consideration the*

*creditworthiness of all the subscriber companies by going through the records and the net worth of each of them. It is also noted that all the investing companies have substantial own funds available with them to make investment in the assessee. In this respect, all the investing companies have also explained their source of funds in their reply to notices issued u/s. 133(6) of the Act.*

*8.2. From the perusal of the paper book and the replies filed by share subscribing companies in response to notice u/s. 133(6) of the Act, it is vivid that all the share applicants are (i) income tax assessees, (ii) they are filing their income tax returns, (iii) share application form and allotment letter is available on record, (iv) share application money was paid by account payee cheques, (v) details of the bank accounts belonging to share applicants and their bank statements are on record, (vi) in none of the transactions, there are any deposit of cash before issuing cheques to the assessee, (vii) all the share applicants are having substantial creditworthiness represented by their capital and reserves.”*

The above factual position is not controverted by the department. However, Mr. Amit Sharma, learned standing counsel for the appellant department would strenuously contend that on examination of the documents which were produced by the share subscribing companies, it is evidently clear that none of those companies had any creditworthiness to invest in the shares of the assessee company, that too, at a high premium. Unfortunately, examination of the factual position as sought for cannot be done in an appeal filed under Section 260A of the Income Tax Act and it is the duty of the Assessing Officer to have done such an exercise. The learned Tribunal on facts found that all the share subscribing companies have responded to the notices

issued under Section 138(6) of the Act and made their submissions and produced documents. Therefore, it is the duty on the Assessing Officer to deal with those documents, point out any discrepancies and then make the addition. However, the Assessing Officer failed to do so and the CIT(A) also committed same error.

Therefore, we find the learned Tribunal was well justified in allowing the assessee's appeal and in doing so, the learned Tribunal has also taken note of various decisions of this Court and recorded its reasons for allowing the appeal. Thus, we find no grounds to interfere with the order passed by the Tribunal.

The appeal is thus dismissed.

The stay application being IA No: GA/1/2024 also stands dismissed.

(T.S. SIVAGNANAM, C.J.)

(HIRANMAY BHATTACHARYYA, J.)