

आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 3212/Mum/2014

(निर्धारण वर्ष / Assessment Year 2008-09)

Sunshine Metals & Alloys Industries Pvt. Ltd. 109, Parasram Building, Dr. Babasaheb Jayakar Marg, Mumbai-400 002	Vs.	Income Tax Officer-4(3)(4), Room No. 637, 6 th Floor, Aayakar Bhawan, M.K. Road, Mumbai-20
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAACS6187M		

अपीलार्थी की ओर से / Appellant by	:	Shri Dharan Gandhi, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Jitendra Kumar, DR

सुनवाई की तारीख / Date of hearing:	27-09-2018
घोषणा की तारीख / Date of pronouncement :	12-10-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal filed by the assessee is arising out of the order of Commissioner of Income Tax-8, Mumbai [in short CIT(A)], in appeal No. CIT(A)-8/Cir.4/121/2012-13, order dated 28.02.2014. The Assessment was framed by the Income Tax Officer, Ward-4(3)4), Mumbai (in short 'ITO/ AO') for the A.Y. 2008-09 vide order dated 08-11-2012 under section



143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. At the outset, the learned Counsel for the assessee stated that he is not interested in prosecuting the issue of reopening, which is raised by way of ground No.2 which reads as under: -

“2. Reopening of the assessment under section 147 of the Income Tax Act 1961 is bad in law-

a. The Id. CIT(A) erred in confirming the action of the Id. AO in reopening the Assessment under section 147 of the Act without having any new tangible material in his possession to show that any income has escaped assessment. The Appellant, therefore, prays that reopening of assessment on the same set of facts during the original assessment amounts to change of opinion. The Appellant, therefore, prays that the notice issued under section 148 of the Act as well as subsequent proceedings are void-ab-initio and the same may be quashed.

b. The Id. CIT(A) further erred in confirming the action of the Ld. AO. in issuing notice under section 148 of the Act without recording proper and valid reasons to show that any income has escaped assessment. The Appellant, therefore, prays that reopening of its assessment is bad-in-law and the same may be quashed.”

3. As the learned Counsel for the assessee has not pressed this issue and want to withdraw under instructions of the assessee, the



learned Departmental Representative was asked and he has not objected. Hence, we dismiss this issue of re-opening as withdrawn.

4. The next issue on merits is as regards to the order of CIT(A) confirming the action of the AO in treating the share application money as unexplained cash credit under section 68 of the Act. For this assessee has raised the following ground No. 3: -

“3. Treating the share application money as unexplained cash credit under section 68 of the Act - Rs.35,00,000/-

a. The Id. CIT(A) erred in confirming the action of the Id. AO in treating the share application money received amounting to Rs.35,00,000/- as unexplained cash credit under section 68 of the Act without appreciating the facts and circumstances of the case. The Appellant, therefore, prays that the addition of Rs.35,00,000/- under section 68 of the Act is not at all justified and the same may be deleted.

b. The Ld. CIT(A) failed to appreciate that the Appellant has discharged the primary onus cast upon it to prove the identity, capacity and creditworthiness of the share applicant by furnishing the P.A. Nos. and share application forms. The Appellant, therefore, prays that treating the share application money amounting to Rs.35,00,000/- as undisclosed income of the Appellant under section 68 of the Act is not at all justified and the same may be deleted.



c. The Ld. CIT(A) further failed to appreciate that the share applicant has appeared before the AO during the course of remand proceedings confirming the transaction. Hence, treating the amount of Rs.35,00,000/- as unexplained cash credit under section 68 of the Act is not at all justified and the me may be deleted."

5. Briefly stated facts are that the assessee has received a sum of ₹ 35 lacs as share application money including share premium as under: -

Name of Allottee	No. of shares allotted	Nominal value of Shares @100% per share	Security premium value @ ₹ 600/-	Total Receipt in ₹/-
Buniyad Chemicals Ltd.	2500	250000	1500000	1750000
Talent Infoway Ltd	2500	250000	1500000	1750000
Total	5000	500000	3000000	3500000

The AO noted that the assessee has received share application and premium to the tune of ₹ 35 lacs from Buniyad Chemicals Ltd. & Talent Infoway Ltd. run by one Shri Mukesh Choksi, whose admission was that these entities were utilized by him only in the business of providing bogus share application money. The AO noted that the assessee has utilized their own resources but through Shri Mukesh Choksi who operated Buniyad Chemicals Ltd. & Talent Infoway Ltd. for routing back its undisclosed and unaccounted income of ₹ 35 lacs in the form of share application money and share premium. Accordingly, the AO added these receipts of share application money and share premium as cash credit under section 68 of the Act. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) confirmed the action of the AO by observing in para 3.3 as under: -



“3.3 I have carefully considered the facts of the case, observation of the Assessing Officer and also gone through the appellant's contention. I find that the authorised representative of the appellant relied on various judgements mainly dealing with two issues i.e. the identification of persons who had advanced share application money and secondly the onus to prove. In majority of the decisions cited by the appellant, the clinching point for consideration by the Hon'ble Courts are that where the identity of persons who had provided the share application money is proved then the onus is on the Department to prove whether there exists creditworthiness or not. In the instant case, I find that Shri Mukesh Choksi who was the director in M/s. Buniyad Chemicals Ltd.. and M/s. Talent Infoway Ltd.. attended the proceedings before the Assessing Officer. In remand report, it was admitted by him before the Assessing Officer that all the bills/share application money issued/given to different entities were accommodation entries without having any proper transaction. The statement was nothing but reiteration of the fact which Shri Mukesh Choksi and their group companies have made before the Investigation Wing. In their detailed submission, they have also explained the modus operandi of the group wherein they have given share application money to various persons. It is quite strange that the authorised representative of the appellant while quoting the facts of several cases is trying to infer that the facts



of these cases are applicable to the facts of appellant's case. However, I find that the said statement is totally devoid of any merit and is misleading the fact that there are two parties who has done transaction and the other party who categorically denying of having given any share application money to the appellant. Even the entire transactions these two parties have entered with several clients and the nature of business which in fact is nothing on record clearly proves that accommodation entries were made by these two parties to several other companies. It is a case where totally fraudulent company was created on record to provide accommodation entries The source of the said entries are nothing but cash receipts from the appellant and deposited in some other company and after four to five layers of circuitous transaction, the money is given as share application money to the appellant. The source, therefore, primarily remains that all the appellant's ill gotten money is routed through such transactions. Under the circumstances. I find that the Assessing Officer for the detailed reasoning given by him in his assessment order has accordingly made addition u/s. 68 of the Act. The addition made by the Assessing Officer is accordingly upheld. This ground of appeal, is thus dismissed."

Aggrieved, now assessee is in second appeal before Tribunal.

6. Before us, the learned Counsel for the assessee has furnished the Name, Address, P.A. Nos. and Share Application Form to prove that the



shares were allotted to the applicants. The assessee has also furnished its bank statement to show that the money was received through banking channels and there were no immediate withdrawals from the banks which shows that the share application amounts have not been returned in cash. Thus, the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions. The assessee, therefore, submits that the AO is not at all justified in treating the share application money amounting to ₹ 35,00,000/- received during the impugned assessment year as undisclosed cash credit under section 68 of the Act. The CIT(A) according to the learned Counsel when it was contended that they were not given proper opportunity to cross examine the departmental witness i.e. Shri Mukesh Choksi, he was allowed opportunity and he drew our attention to the statement of Shri Mukesh Choksi i.e. cross examination by the assessee on 30.10.2013. Wherein, he vide question No. 3 to 7 admitted investing by Buniyad Chemicals Ltd. & Talent Infoway Ltd. in assessee as share application and premium thereon as under: -

“Q.3 AO to Deponent No.2

During the course of assessment proceedings in the case of Sunshine Metals & Alloys Ind. P. Ltd, it has come to light that the company had allotted 5000 shares, details of which are as under:

- 1) *Buniyad Chemicals Ltd. -2500 shares\$.
17,50,000/-*
- 2) *talent Infoway Ltd. 2500 shares –₹
17,50,000/-*

Please explain.



Ans. Yes, I confirm the same

AO to Deponent No.1

Ans. Yes, I confirm the same.

Q.4 Deponent No.2

As you are aware, you are asking for an opportunity to cross examine before the CIT(A) and accordingly, the case has been remanded back to the undersigned. Now, Mr. Mukesh Maneklal Choksi is present before you. Therefore, I request you to take this opportunity and cross examine Mr. Mukesh Chokshi.

Ans. Yes I do.

Deponent No.2 to Deponent No. 1

a. have you applied for shares of Sunshine Metals & Alloys Ind. P. Ltd.? If yes, explain the mode of payment?

Ans. Yes, we have applied for shares of the aforesaid company. The mode of payment of share application money are as follows.

<i>Sr. No.</i>	<i>Company</i>	<i>No. of shares</i>	<i>Amount</i>	<i>Cheque No. & date</i>	<i>Bank</i>
1.	<i>Buniyad Chemicals Ltd.</i>	2500	17,50,000	142694 <i>Dt. 20.2.08 ₹ 10,00,000</i> 859216 <i>Dt. 07.03.08 ₹ 7,50,000</i>	<i>ICICI Bank</i> <i>Canara Bank</i>
2.	<i>Talent Infoway</i>	2500	17,50,000	305044 <i>Dt. 19.02.08 ₹ 15,00,000</i> 859214 <i>Dt. 05.03.08 ₹ 2,50,000</i>	<i>Canara bank</i> <i>Canara</i>



					bank
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(b) Have you received the share certificate of Sunshine Metals & Alloys Ind. P. Ltd.?

Ans. Yes, the shares have been allotted in the name of above mentioned two companies.

(c) Can you submit the relevant details with documents?

Ans All the relevant details and documents are lying with the present directors and will be submitted to you shortly.

Q.5 AO to Deponent No.1

In this connection, I invite your kind attention to your statement recorded under section 131 by the DDIT (Inv) Unit 1-(4), Mumbai dated 11.12.2009, wherein you have categorically affirmed that all the bills/ share application money issued/ given to different entities are accommodation entries without having any proper transactions. Please comment.

Ans. It was a general statement and since the shares were given actually, the transactions had taken place through sub-broker.

Q.6 A perusal of the answer given to Q. No.5, it is clear that there is a contradiction in your answer given before DDI and the answer given today. Please explain.



Ans. Again I state that the said answer was given in general and the aforesaid transactions are explained as above.

Q7. AO to Deponent No.1 and 2

Do you want to add anything other than the above?

Ans. No.”

7. This was done during remand proceedings and in the remand report vide CIT(A)'s letter No. CIT(A)-8/255/12.-13/2013-14/53 dated 21st August 2013 was called for from the Assessing Officer. The AO vide letter No. ITO-4(3)(4)/Remand Report /2013-14, dated 14.11.2013 has submitted as under: -

“As per your direction, the undersigned have verified the submission filed by the assessee before your honour in which it is stated that the assessee was not given proper opportunity to cross examination of the department's witness though specifically requested during the course of reassessment proceedings

In this connection the undersigned submit the comments as tinder:

The case was reopened as per provisions of section 147 and a notice u/s 148 dated 09/03/2012 was issued, in response to the same, the assessee filed an e-return on 28/03/2012. A notice u/s 143(2) dated 25/04/2012 was served on the assessee Vide letter dated 26/04/2012 the assessee was also furnished a copy of the reasons for issuing the



notice u/s 148. In response to the same. assessee Authorised Representative vide letter dated 20/09/2012 filed objections on record on 05/10/2012 against the action initiated u/s 147. Simultaneously a notice u/s 142(1) dated 09/10/2012 was issued calling for various details.

Following the rejections of objections raised, vide letter dated 16/10/2012 the assessee submitted that the Department was free to proceed against the share applicant as the assessee had established that the monies were received from proper banking channels from identifiable sources and further stated in the following words in para 8:

'Your honour have referred that the information from the Additional Director of Income Tax (Investigation, the applicant companies being involved in fraudulent transaction and share application money received by the company is an undisclosed income Therefore we hereby request you. to provide the documents or any evidence available with your honour of the department for the cross examination to the Assessee Company'

The above request was filed by the AR in course of hearing attended by him on 17/10/2012. As required by the assessee, copies of the documents were furnished and handed over to the AR. The case was thereafter adjourned to 29/10/2012 on request. On 29/10/2012. the AR submitted response vide letter dated 29/10/2012 and summarized as under that



- *the assessee has wound up u/s 560 of the Companies Act vide Order dated 24/11/2011*

The assessee does not have any bank account

- *As explained in earlier letters, during the year The assessee had received the amounts and allotted shares but due to financial crunch, the company had incurred heavy losses as of present and the accumulated losses had eroded the net worth of the assessee. Hence it was not able to pay any amount to its shareholders*

- *That as per cash book of the company from 01/04/2007 to 31/03/2008, there was no withdrawal of funds for purposes mentioned as per the reasons for reopening*

- *That the share application and premium monies cannot be added in the hands of the assessee in view of the decision of the Apex Court in the cases of CIT vs Lovely Exports 216 CTR 195 and CIT vs Divine Leasing & Finance Ltd 299 1TR 268*

- *The amounts received by the assessee as share application and premium are fully and properly explained.*

The AR concluded the submission in the following words: awe hope the above details are sufficed to complete the assessment at an earlier date



No other requests were made by the AR and nor filed by the assessee and it was requested that the assessment maybe completed at the earliest.

From the above it is clear that the assessee had requested for documents or any evidence available with the A.O. or department for cross examination, which had been provided to the assessee. However, the assessee had not asked for any cross examination thereafter. Therefore, the contention of the assessee that assessee was not given opportunity to cross examination of the department's witness is baseless.

Now, your honour has directed the undersigned to give an opportunity to the assessee to cross examine the department's witness. In this connection a summons u/s 131 of the IT Act is issued and served on the witness, Shri Mukesh M. Choksi, to attend the office of the undersigned on 8/10/2013. However, on 8/10/2013, Shri Choksi requested for few days time due to his ill-health. Further vide letter dated 11/10/2013 he has requested for adjournment after 19th 2013. Hence date of cross examination is adjourned to 22/10/2013. On 22/10/2013, since the assessee was unable to attend the same was adjourned and on 30/10/2013 both the parties attended and statement has been taken on oath of both the parties and assessee has been allowed to cross examine Mr. Mukesh Choksi (copy enclosed for ready reference) On perusal of the same it is seen



that the assessee has asked following three questions for which Shri Mukesh Choksi replied in affirmative.

a) whether you had applied for shares of assessee company and if yes mode of payment?

b) Have you received the share certificate of sunshine metals and Alloys Inds. P. Ltd. and

c,) Can you submit the relevant details with documents?

Since Mr. Mukesh Choksi's answers are in contrary to the statement recorded u/s 131 by the DDIT(Inv.) Mumbai dated 11/12/2009, wherein it was admitted that all the bills/share application money issued/given to different entities were accommodation entries without having any proper transaction, the undersigned asked Mr. Mukesh Choksi to comment on the same for which he simply replied that 'it was a general statement and since the shares were given actually, the transaction had taken place through sub broker'.

Mr. Mukesh Choksi was one of the Directors in M/s Buniyad Chemicals Ltd and M/s Talent Infoway Ltd. which was run by him, inter-alia other group concerns of M/s Mahasagar Securities Pvt. Ltd. In his statement recorded u/s 131 by the DDIT(Inv.) Mumbai dated 11/12/2009, Shri Mukesh Choksi explaining the motive and modus operandi behind such arrangement of receipt of Share Application



Money, stated that the beneficiary (assessee) utilized the services of his Group" companies to introduce its unaccounted income as bogus share application money It is stated that the beneficiary (Assessee) provides a list of documents to be given by the Group (in the instant case- by M/s Buniyad Chemicals Ltd. and M/s Talent Infoway Ltd.) and on furnishing such documents cash is received from the beneficiary seeking the entry/ adjustment which then deposited in the bank accounts of one of the Group company other than the company finally making such application (it) the instant case- by M/s Buniyad Chemicals Ltd. and M/s Talent Infoway Ltd.) Thereafter funds are transferred from the subsidiary companies to the bank account of the company making the investment (in the instant case- by M/s Buniyad Chemicals Ltd. and M/s Talent Infoway Ltd.) and cheque is issued in favour of the company seeking the entry / adjustment. As per records available, the assessee was in receipt of Share Application Money of Rs. 17,50,000/- each from M/s Buniyad Chemicals Ltd. and M/s Talent Infoway Ltd. totalling to Rs. 35,00,000/-."

8. The learned Counsel for the assessee stated that while cross examining Shri Mukesh Choksi, he admitted that Buniyad Chemicals Ltd. & Talent Infoway Ltd have invested in term of share application money and share premium in assessee company. The assessee furnished the name, address, PAN no and Bank details to the AO and it is the duty of the AO to make further investigation and also to provide cross examination of the parties on whose statement he is relying upon. The



learned Counsel for the assessee pointed out that the statement given by Shri Mukesh Choksi, where assessee's name is not at all mentioned as one of the beneficiaries of the share application money. On the other hand, the learned Departmental Representative, relied on the assessment order and the findings of CIT(A).

9. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that the assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the shares were allotted to the applicants. The assessee has also furnished its bank statement to show that the money was received through banking channels and there were no immediate withdrawals from the banks which shows that the share application amounts have not been returned back to these parties in cash. Thus, the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions. We also find that the CIT(A) provided opportunity to assessee to cross examine Shri Mukesh Choksi by sending the matter to AO for remand report. During remand proceeding, the AO provided opportunity to assessee to cross examine Shri Mukesh Choksi and who in turn during cross examination admitted having invested in assessee company by these two concerns namely Buniyad Chemicals Ltd. & Talent Infoway Ltd. in assessee as share application and premium amounting to ₹ 35 lacs. During cross examination the AO could not further examine Shri Mukesh Choksi that why he is now admitting that why these two concerns admitted in the assessee company as share application money and share premium. The AO could not controvert the same. The CIT(A) also could not give any finding on this aspect. We have gone through the statement of Shri Mukesh Choksi i.e. cross examination by the assessee on



30.10.2013, wherein, he vide question No. 3 to 7 admitted investing by Buniyad Chemicals Ltd. & Talent Infoway Ltd. in assessee as share application and premium.

10. In view of the above facts and circumstances, we are of the view that in the given facts of the present case the issue is considered by Hon'ble Bombay High Court in the case of CIT vs. Orchid Industries Pvt. Ltd. (2017) 397 ITR 136 (Bom.) wherein honorable High court has considered the decision of division Bench of Bombay High Court in the case of CIT vs. Gagandeep Infrastructure P. Ltd (2017) 394 ITR 680 (Bom) & Hon'ble Supreme Court in the case of CIT vs. Lovely Exports (P) Ltd (2008) 216 CTR (SC) and held as under: -

"5. The Assessing Officer added Rs. 95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6. The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares



to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case.”

11. Respectfully following the ratio of Hon'ble Bombay High court in the case of Orchid Industries Pvt. Ltd. (supra) and the facts of the present case, we delete the addition made by AO and confirmed by CIT(A) on account of share application money and share premium and allow the appeal of the assessee on this issue.

12. **In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 12-10-2018.

Sd/-

(एन. के. प्रधान / NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 12-10-2018

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai