

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1946/Mum/2016
(Assessment year: 2010-11)

Dy. CIT-1(1)(1), Mumbai	vs	M/s Alcon Biosciences P Ltd 112, Marine Chambers, New Marine Lines, Mumbai-400 020 PAN : AAACA 5119P
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Appellant by	Shri MC Omi Ningshen
Revenue by	Shri Prakash Jothwani

Date of hearing	29-01-2018
Date of pronouncement	28-02-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the revenue is directed against order of the CIT(A)-2, Mumbai dated 15-12-2015 and it pertains to AY 2010-11.

2. The brief facts of the case are that the assessee company is engaged in the business of manufacturing, trading and exporting pharmaceutical items, filed its return of income for the assessment year 2010-11 on 05-10-2010 declaring total income of Rs.32,81,207. The case has been selected for scrutiny and notice u/s 143(2) and 142(1) of the Act were issued. In response to the notices, the authorized representative of the assessee appeared from time to time and furnished

details, as called for. The assessment has been completed u/s 143(3) on 04-03-2013 determining total income at Rs.1,73,63,846 inter-alia making addition towards unexplained cash credits u/s 68, towards share application money received from 3 parties and disallowance of interest expenses u/s 36(1)(iii) of the Act. The assessee carried the matter in appeal before the CIT(A). The CIT(A) for the detailed reasons recorded in his order dated 15-12-2015 allowed appeal filed by the assessee, wherein he has deleted addition made by the AO towards share application money u/s 68 of the Act, disallowance of interest u/s 36(1)(iii) of the Act. Aggrieved by the CIT(A)'s order, revenue is in appeal before us.

3. The only issue that came up for our consideration from this appeal is deletion of addition made by the AO towards share application money u/s 68 of the Act. The facts with regard to the impugned addition are that during the course of assessment proceedings, the AO noticed that the assessee has received share application money to the tune of Rs.1.15 crores from 3 parties, therefore, called upon the assessee to furnish necessary evidence including share application forms, copy of PAN card, incorporation certificate of the share applicants and copy of bank statements. In response to notice, the assessee vide letter dated 05-09-2010 furnished the details called for by the AO in respect of 3 share applicants, viz. (i) Hemang Fincap Services Pvt Ltd; (ii) Avdhan

Tradelink Pvt Ltd; and (iii) Arpita Tradelink Pvt Ltd. In order to verify the genuineness of details filed by the assessee, the AO issued notice u/s 133(6) to all the parties calling for the details of share application money paid to the assessee including bank statement highlighting the amount of share application money paid along with financial statements for the relevant financial year. The notices issued u/s 133(6) to all three parties were returned unserved as the parties refused to accept the notices. Thereafter, the AO issued notice u/s 133(6) to Bank of Baroda calling for the details of bank account number from which share application money has been credited to the account of the assessee. In response to notice, Bank of Baroda, vide its letter dated 07-12-2012 furnished the details of credits made to the account of the assessee. On verification of details, the AO noticed that cheque deposits in Bank of Baroda in the name of all 3 concerns were made by single person. Therefore, issued further notices u/s 133(6) to ICICI Bank, i.e. the bank in which the share applicants held their accounts calling for statements of M/s Hemang Fincap, Avdhan Tradelink Pvt Ltd; and Arpita Tradelink Pvt Ltd.. The AO, on verification of bank statement furnished by ICICI Bank Ltd, observed that all three bank accounts operated by these 3 share applicants were operated only for a limited period during which share application money has been received by the assessee and also those bank accounts have received money from some individual. The AO

further observed that on further verification of source of money received from individuals, it was noticed that the individuals have deposited cash into their bank account either on the same day or immediately preceding the day on which the funds have been transferred to the share applicants' bank accounts. Therefore, he opined that the assessee has failed to discharge the genuineness of transactions and creditworthiness of the parties. Accordingly, the amount received by the assessee from 3 parties to the extent of Rs.1.15 crores has been treated as assessee's own undisclosed income and the same has been brought to tax u/s 68 of the Act.

4. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has reiterated its submissions made before the AO to argue that it has furnished various details including share application forms, PAN card, incorporation certificate, bank statement of share applicants and also the bank statement of the persons from whom share applicants have received money to the AO. However, the AO has ignored all evidences merely for the reason that share applicants have received money from other persons and the other persons have deposited cash into their bank accounts without appreciating the fact that once assessee discharged its onus by filing identity, genuineness of transactions, creditworthiness of the parties, AO cannot look into the source of source. The assessee

further contended that out of 3 applicants, M/s Hemang Fincap Services Pvt Ltd filed its return of income and copy of ITR acknowledgements have been furnished to the AO. Though the other two applicants have not filed return of income, they have filed enough evidences to justify the source of share application money given to the assessee, therefore, the AO was incorrect in making addition u/s 68 of the Act. The CIT(A), after considering relevant submissions of the assessee and also relying upon the decision of Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (2008) 216 CTR (SC) 195, observed that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee. Accordingly, directed the AO to delete addition made towards share application money received from 3 share applicants, however, the CIT(A) further directed the AO to take proper care in passing on the information of 3 share applicants to the concerned AO where PAN have jurisdiction and request them to make further enquiry and see to that whether they have been properly assessed to tax and paid tax thereon. Aggrieved by the order of CIT(A), revenue is in appeal before us.

5. The Ld.DR submitted that the Ld.CIT(A) was erred in deleting the

addition made u/s 68 in respect of share application money received from the investors when the AO gave a clear finding that the assessee could not satisfactorily explain the nature and source of credit in its books. The Ld.DR further referring to the company master data extracted from ROC website submitted that out of three share applicants, two share applicants, viz. Avdhan Tradelink Pvt Ltd; and Arpita Tradelink Pvt Ltd, the names of these two companies have been struck off by the ROC from this, it is abundantly clear that those companies are shell companies engaged in providing accommodation entries under the guise of share application money which was further supported by the facts gathered by the AO during the course of assessment proceedings. Therefore, the CIT(A) erred in deleting addition without properly appreciating the facts and hence, the addition made by the AO should be sustained.

6. On the other hand, the Ld.AR for the assessee strongly supporting the order of the CIT(A) has submitted that the assessee has furnished enormous documents to prove the identity, genuineness of transactions and creditworthiness of the parties including share application forms, PAN, bank statements and their income-tax return acknowledgment copies. Therefore, the AO was incorrect in making addition merely because the notices issued u/s 133(6) were returned unserved and also the share applicants have received money from third parties where they

have deposited cash into their bank accounts without appreciating the fact that once assessee proves identity of the share applicants, the AO cannot question source of source. The Ld.AR further submitted that the assessee has discharged its initial onus cast u/s 68 of the Act by filing various documents and once the initial burden has been discharged, the onus shifts to the revenue to prove otherwise. The AO without any evidence which could rebut the documents produced by the assessee, made addition merely on the basis of surmises and suspicion only on the basis of bank statements of share applicants and their concerns. In this regard relied upon decision of Hon'ble Bombay High Court in the case of CIT vs M/s Gagandeep Infrastructure Pvt Ltd (2017) 394 ITR 680 (Bom). The assessee also relied upon the decision of Hon'ble Supreme Court in the case of CIT vs Orissa Corporation Pvt Ltd 1986 AIR 1849. Insofar as the arguments of the Ld.DR, that the name of two companies have been struck off by the ROC, the Ld.AR submitted letters from those companies stating that their names have been struck off by the ROC as the annual returns of the companies were not filed for years. However, they are in the process of restoring the name of the companies with ROC by filing a petition before NCLT. The Ld.AR further submitted that merely because the names found struck off from the register of Registrar of Companies, the genuineness of transactions cannot be questioned as the names of companies can be struck off for various reasons including

non filing of balance-sheets. The assessee has filed various details, therefore, there is no reason for the AO to make addition towards share application money u/s 68 of the Act.

7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The AO made additions towards share application money u/s 68 of the Act on the ground that the assessee has failed to discharge identity, genuineness of transaction and creditworthiness of the parties which is evident from the fact that the AO has brought out certain facts with regard to the share applicants by issuing notice u/s 133(6) of the Income-tax Act, 1961. According to the AO, the assessee has raised share application money from three companies and all the three companies are having bank accounts in Bank of Baroda where a single person has operated the accounts of all the companies. The AO further observed that the share applicants have received money from certain individuals before the date of transfer of money to the assessee company and those individuals have deposited cash on the same day or a day before the date on which the money has been transferred to share applicants' bank account. The AO further observed that notice u/s 133(6) were not served and the parties refused to accept the notice. The AO also observed that the assessee failed to explain how it has issued share having face value of Rs.10 with a huge premium of Rs.990

per share when it was an unlisted company. Therefore, the AO opined that the assessee has obtained accommodation entries from so-called share applicants to convert its own undisclosed income in the guise of share application money. Accordingly treated share application money received from all the three parties as unexplained credit and brought to tax u/s 68 of the Act.

8. The AO has made addition towards share application money on the basis of analysis of bank statements of share applicants and the source of applicants' bank accounts. The assessee has filed various details including share application forms, incorporation certificate of the share applicants and their bank statement. The assessee also furnished copy of income-tax return acknowledgment in respect of M/s Hemang Fincap Services Pvt Ltd. On verification of details filed by the assessee, we find that the share applicants have paid share application money to the assessee through bank accounts and also disclosed investments in their financial statements for the relevant financial year. Though two share applicants have not filed their income-tax returns, furnished copy of PAN and their bank statements. Once the assessee has discharged its initial burden cast u/s 68 by filing documents to prove identity, genuineness of transactions and creditworthiness of the parties, then the burden shifts to the revenue to prove otherwise. In this case, the AO does not have any evidence which could rebut the documents produced by the assessee.

The AO made addition only on the basis of suspicion and surmises on the ground that the share applicants do not have any capacity to explain amount transferred to their account.

9. Having considered facts, we do not find any merit in the arguments of the revenue for the reason that once the assessee has furnished necessary evidence to prove the identity of the share applicants and their PAN details to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee. This legal proposition is supported by the decision of Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (supra), wherein it was categorically held that the AO cannot make addition towards share application money, if the names and addresses and PAN of the creditors have been furnished to the AO. This legal proposition is supported by the judgment of Hon'ble Supreme Court in the case of CIT vs Orissa Corporation Ltd (supra). The jurisdictional High Court of Bombay in the case of CIT vs M/s Gagandeep Infrastructure Pvt Ltd (supra) and CIT vs Paradise Inland Shipping Pvt Ltd in ITA No. 66 of 2016 dated 10-04-2017, has reiterated the legal position laid down by the Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (supra). The sum and substance of the ratios of the Hon'ble Supreme Court and jurisdictional High Court, is that once the assessee has furnished names and

addresses alongwith PAN of subscribers, then the AO is free to reopen the assessment of subscribers in accordance with law, but the share application money cannot be regarded as undisclosed income of the assessee.

10. Insofar as the argument of the Ld.DR in the light of Company Master Data taken from ROC website that the names of two companies have been struck off by the ROC, we find that the ROC has struck off the names of two companies for the reason that those two companies have not filed their annual accounts for few years, but fact remains that the assessee has furnished letters from those two companies wherein they have admitted that their names have been struck off by the ROC for non filing of annual accounts, but they are in the process of restoring the names by filing an application before NCLT. As regards the AOs observation with regard to the issue of shares at a face value of Rs.10/- issued at a premium of Rs.990 per share, we find that there is no merit in the findings of the AO for the reason that the issue of shares at a premium and subscription to such shares is within the knowledge of the company and the subscribers to the share application money and the AO does not have any role to play as long as the assessee has proved genuineness of transactions. We further notice that the AO cannot question issue of shares at a premium and also cannot bring to tax such share premium within the provisions of section 68 of the Act, before

insertion of Proviso to section 68 by the Finance Act, 2012 w.e.f. 1-04-2013 as the Hon'ble Bombay High Court in the case of CIT vs M/s Gagandeep Infrastructure Pvt Ltd (supra) held that Proviso inserted to section 68 is prospective in nature.

11. In this view of the matter and considering the ratios of the case laws discussed above, we are of the considered view that the assessee has proved identity, genuineness of transaction and creditworthiness of the parties insofar as 3 share applicants are concerned. The CIT(A), after considering relevant facts has rightly deleted addition made by the AO. We do not find any error in the order of the CIT(A); hence, we are inclined to uphold the findings of the CIT(A) and dismiss the appeal filed by the revenue.

12. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 28th February, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 28th February, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai