

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA
(Virtual Court)**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

**I.T.A. No. 1829/Kol/2018
Assessment Year: 2012-13**

***Midaas Construction Co. Pvt. Ltd.....Appellant
[PAN: AAGCM 3244 F]***

Vs.

DCIT, Circle-10(1), Kolkata.....Respondent

Appearances by:

Sh. Manish Tiwari, FCA, appeared on behalf of the Assessee.

Sh. Supriyo Paul, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : December 3rd, 2020

Date of pronouncing the order : January 12th, 2021

ORDER

Per J. Sudhakar Reddy, AM:

This is an appeal filed by the assessee directed against the order of the Learned Commissioner of Income Tax (Appeals)-4, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 31.07.2018 for the Assessment Year 2012-13.

2. The assessee is a company and is in the business of civil construction and other allied activities and hiring of heavy machineries. It filed its return of income on 30.09.2012 for the AY 2012-13 declaring the total income of ₹74,43,596/-. The AO passed an order u/s 143(3) of the Act on 30.03.2015 determining the total income of the assessee at ₹3,46,50,520/- inter alia making an addition as Gross Profit of ₹1,33,89,565.44 at the rate of 8% of the total turnover of the assessee of ₹16,73,69,568.06 and an addition of ₹2,10,00,000/- u/s 68 of the Act. The assessee during the year has received share capital at a face value of ₹10 and a share premium of ₹490/- from five companies. The AO has issued notices u/s 133(6) of the Act to all the share applicant companies. Notices issued to M/s. Shivrashi Construction Pvt. Ltd. and M/s. Sidhant Residency Pvt. Ltd. were returned to the Department by the Postal

Department with the comment "No such building exists". The other two companies M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. replied to the notices issued u/s 133(6) of the Act. In the case of M/s. Panghat Textiles Pvt. Ltd. notices have been served but no reply was received by the AO.

2.1. The AO issued a show cause notice dated 05.03.2015 to the assessee company, requiring it to explain as to why the amount of ₹2,10,00,000/- should not be treated as unexplained cash credit. This notice was given by the Addl. CIT, Range-10, Kolkata who was the then AO. Thereafter, the Addl. CIT, Range-10, Kolkata issued notices u/s 131 of the Act to each of the principal officers of the five share applicant companies. None of the principal officers of the companies appeared in response to the summons issued u/s 131 of the Act.

2.2. Thereafter the jurisdiction of the assessee was changed to DCIT, Circle-10(1), Kolkata vide order dated 17.03.2015. The DCIT, Circle-10(1), Kolkata deputed an inspector to verify the existence of these companies. The inspector, in his statement reported that, none of these companies physically exist at the addresses stated by the assessee.

2.3 Based on this Inspector report, a show cause notice was issued to the assessee company by DCIT, Circle-10(1), Kolkata on 25.03.2015. Thereafter for the various reasons given in the assessment order an addition was made u/s 68 of the Act for this amount of ₹2,10,00,000/-. After receiving a reply from the assessee in respect of the share applicant companies, the AO held that the assessee failed to prove the creditworthiness of the three share applicant companies. He made an addition of ₹2,10,00,000/- u/s 68 of the Act.

3. Aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) challenging both the estimation of income of ₹1,33,89,565/- at the rate of 8% of total turnover, as well as the addition of ₹2,10,00,000/- as unexplained cash credit u/s 68 of the Act. The Id. CIT(A), during the course of appellate proceedings, called for the remand report from the AO. He directed the AO to conduct further enquiry into the share application money received by the assessee company from the five companies. After receiving the remand report from the DCIT, Circle-10(1), Kolkata on the cash credits

from these five companies, the ld. CIT(A) issued an enhancement notice to the assessee, proposing to enhance the assessment by, making an addition u/s 68 of the Act of share application money received from the three companies M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. in addition to the ₹2,10,00,000/- received from two companies. After considering the replies, the ld. CIT(A) not only confirmed the addition of ₹2,10,00,000/- made u/s 68 of the Act by the AO, of share application money received by the assessee company from three share applicant companies i.e. M/s. Shivrashi Construction Pvt. Ltd., M/s. Sidhant Residency Pvt. Ltd. and M/s. Panghat Textiles Pvt. Ltd., but also enhanced the addition u/s 68 of the Act by adding the share application money received from M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. on various grounds given in his order. He dismissed the other grounds raised by the assessee against the estimation of income at 8% of the turnover. Nevertheless he granted the benefit of telescoping to avoid double taxation.

4. Aggrieved, the assessee is before us challenging, both the enhancement of assessment made by the ld. CIT(A) as well as, the confirmation of the addition of ₹2,10,00,000/- u/s 68 of the Act.

5. As far as the estimation of profit at the rate of 8% of the turnover amounting to ₹1,33,89,565.44, the ld. Counsel for the assessee submitted that he is not pressing the same. Thus, ground no. 4 is dismissed as not pressed.

5.1. The ld. Counsel for the assessee submitted that the ld. CIT(A) is wrong in enhancing the assessment for the following reasons.

5.2. The powers of the ld. CIT(A) are coterminous and co-extensive as that of the AO, and thus he cannot do what the AO himself could not do. He submitted that the AO has in this case, after giving summons u/s 131 of the Act to the parties making requisitions for Section 133(6) of the Act to the share applicant companies and after giving a show cause notice and receiving replies and other documents had accepted the amounts received as share application money from companies M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. as genuine and has not made any addition u/s 68 of the Act. He submitted that the AO after making such a detailed enquiry and taking a possible view on the matter, cannot change his opinion on the very same set of facts,

without any fresh or new material. Thus he submits that the ld. CIT(A) cannot invoke his powers of enhancement on this issue as he cannot do what the AO cannot do. He relied on the following case laws for the proposition that the power of the ld. CIT(A).

a) *CIT vs. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC)*.

b) *CIT vs. Hardeodas Agarwalla Trust [1992] 198 ITR 511(Calcutta)*.

c) *ITA No 343/Kol/2018 M/s. Matarani Vintrade Pvt. Ltd. vs. ITO, Wd-15(1), Kolkata, "B" Bench order dated 04.11.2020.*

5.3. On the addition made of ₹2,10,00,000/- he submitted that just because the principal officers of the share applicant companies could not present themselves before the AO, the addition has been made. He pleaded that there were changes in the addresses of the share applicant companies due to elapse of time and that the notices were not served on the correct present addresses and hence, none appeared before the AO and pleaded that the matter be set aside to the file of the AO for fresh adjudication in accordance with law. He submitted that the assessee has submitted each and every document in support of the transactions such as audited books of accounts, confirmation letters, details of the transactions, photocopy of the bank pass book, PAN details and in some cases assessment order passed u/s 143(3) of the Act for the earlier assessment year to prove the genuineness of the transactions and to prove the identity and creditworthiness of the shareholders.

6. The ld. D/R, on the other hand submitted that in case the assessee wants to set aside the matter to the file of the AO, then the entire addition, as enhanced by the ld. CIT(A), u/s 68 of the Act, may be restored to the file of the AO for fresh adjudication in accordance with law. He submitted that the ld. CIT(A) had given a notice of enhancement to the assessee and after considering the reply of the assessee, the remand report of the AO, the inspector's report, as well as the other papers and documents on record, came to a conclusion that the AO was wrong in accepting as genuine, the share application money received by the assessee company from M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. He relied on the order of the ld. CIT(A) and submitted that a clear finding of the fact has been given that none of these companies have creditworthiness. He argued that first because some

transactions have been made by account payee cheques and because these share applicant companies are regularly filing their returns with Registered Companies and the Income Tax Department etc., it cannot be held that the transaction was genuine and that the identity and the creditworthiness of the share applicant companies have been proved. He prayed that the additions be upheld or in the alternative, that the entire addition be restored to the file of the AO, for enabling the assessee company to furnish correct addresses, provided the assessee provides undertaking that principal officers of the particular share applicant companies would be produced before the AO for examination.

7. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

8. The first issue is whether the enhancement made by the Id. CIT(A) is in accordance with law. A perusal of the assessment order shows that the AO has conducted enquiries into the issue of genuineness of the share application money received by the assessee company from the share applicant companies. Earlier the Addl. CIT, Range-10, Kolkata conducted enquiries and thereafter the DCIT, Circle-10(1), Kolkata also conducted enquiries. The show cause notices were given to the assessee company and after considering the replies and the documentation furnished by the assessee in support of these transactions, the AO came to a conclusion that the share application money received from M/s. Khetrapati Vinimay Pvt. Ltd. and M/s. BPMK Energy Systems Pvt. Ltd. are genuine and that these companies have proved their identity and creditworthiness. No addition was made. Now the question is whether, on the same set of facts, without any fresh information or material, the CIT(A) could enhance the assessment.

8.1. An identical issue is considered by the ITAT 'B' Bench of the Kolkata Tribunal in *ITA No 343/Kol/2018 M/s. Matarani Vintrade Pvt. Ltd. vs. ITO, order dated 04.11.2020* wherein at para 7 page 8 to para 10 page 13 held as follows:

"7. We have heard both the parties and perused the records. We note that the assessee had filed before us three (3) paper book. [P.B-1 contains 93 pages. P.B-2 contains 843 pages and P.B-3 contains case law]. We note that the Ld. CIT(A) has fixed the matter on six (6) occasions. However, it was brought to our notice that though the Ld. CIT(A) sent notice of hearing, those

notices were returned back by the postal authority with the comments "Refuse/ No such company was found". Therefore, he passed an ex parte order qua the assessee on merits after going through the documents kept in the assessment folder. According to the Ld. CIT(A), the assessment order was passed by the AO accepting the share capital collected by assessee of Rs.20.54 crs, which action of AO, according to the Ld. CIT(A), was prejudicial to the interest of the revenue and consequently he issued notice for enhancement of addition made u/s. 68 by a letter dt. 8-3-2017 fixing the matter on 17/3/2017. According to the Ld. CIT(A), the notice of enhancement returned back un-served with the postal remark "Unclaimed". According to the Ld. CIT(A), second notice of hearing dated 24-03-2017 for enhancement of addition was issued fixing the case on 31-03-2017. However, the Ld. CIT(A) notes that this notice was also returned back with the remark 'no such company exists'. Therefore, he passed the impugned order on that day itself i.e. 31-3-2017 enhancing the income as assessed by the AO at Rs. 84 lakhs to Rs. 21.38 crs, thereby enhanced total amount of Rs. 21.54 crs. It was brought to our notice by the Ld. AR that even though the Ld. CIT(A) fixed the appeal on six (6) occasions, first three (3) notices were posted to the earlier address which got changed, but this fact of change of address was brought to the notice of AO as well as Ld. CIT(A) and, therefore, assessee company cannot be faulted for non-service of notice. According to the Ld. AR when the assessment order was passed on 30-03-2015 itself, the assessee has changed its address from 6/3 Ola Bibi Tala Lane, Howrah-711104, which was informed to the AO vide a letter dated 14-01-2015. However, the AO while passing the assessment order has wrongly reflected the old address on the body of the assessment order, whereas the assessee has changed its address to 21 Hemanta Basu Sarani, Fifth Floor, Room No. 506, Kolkata-700 001 (New address from 14/1/2015 referto page-7 of the P.B-1). However, according to the Ld. AR, at the new premises i.e. 21, Hemanta Basu Sarani, there arose a dispute between the landlord and the assessee. So, the landlord played mischief on the assessee and thereby kept the assessee in dark and did not co-operate with the assessee. Thus, the landlord ensured that no notice could be served upon the assessee from the office of Ld. CIT(A) i.e. last two letters (i.e. 24.03.2017 and 24.03.2017) which were the enhancement notice. Because of this mischievous action of the landlord three (3) notices to the address at 21, Hemanta Basu Sarani, Fifth Floor, Room No. 506, Kolkata-700 001 could not be served upon the assessee; and therefore, the assessee was forced to shift to a new premises by changing its address to the latest address at 9, Crooked Lane, 1st floor, Room No. 7A, Kolkata-700 069 (refer Form 36 filed before this Tribunal). According to the Ld. AR in between 14/1/2015 and 14/6/2017 due to landlord's illegal action, the assessee could not get the last two notices of enhancement as issued/sent by the Ld. CIT(A) in the premises at 21, Hemanta Basu Sarani, Fifth Floor, Room No. 506, Kolkata-700 001. However, according to the Ld. AR before any enhancement of addition could have been made, the Ld. CIT(A) ought to have given reasonable opportunity as contemplated in sub-section (2) of section 251 of the Act. Section 251(2) of the Act reads as under:-

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.(emphasis given by us)

8. We note that as per provisions of section 251(2) of the Act, unless the assessee has been offered a reasonable opportunity of showing cause of such enhancement, the Ld. CIT(A) could not have enhanced the assessment made by the AO. In this context, we note from a perusal of the impugned order that first enhancement notice was issued by Ld. CIT(A) on 8/3/2017 fixing the appeal for hearing on 17/03/2017 and thereafter a second notice was issued on 24/3/2017 fixing the appeal for hearing on 31/03/2017 and the Ld. CIT(A) has passed the impugned order on that date itself 31-3-2017. In this regard, we note that within a short span of 23 days after issuing the first show cause notice for enhancement, the Ld. CIT(A) had enhanced the assessment to Rs.21.38 crores from Rs. 84 lakhs as made by the AO. This action of the Ld. CIT(A) to pass the enhancement order in haste (when there is no time barring as per statute) goes against the spirit of the statutory mandate of section 251(2) of the Act to provide reasonable opportunity to the assessee. Therefore we note that the impugned order was passed enhancing the income without giving proper / reasonable opportunity to the assessee.

9. Be that as it may be, we note that the Id. CIT(A) has passed the impugned order after going through the assessment folder which contained the order-sheet maintained by Assessing Officer in assessee's case and the statutory notices issued by Assessing Officer and replies filed by the assessee and the thirty eight (38) share-applicants / shareholders as well as the recorded statement of assessee company's director on oath u/s 131 of the Act. We note that reply of assessee is found placed at 17-55 (PB-I) and the notices issued by AO & replies of thirty eight share applicants, copies of which are found placed at PB-II (Page-1 -843) and from a perusal of these documents, we note that all of them have filed inter alia, their respective PAN Card, ITR acknowledgment, Certificate of Incorporation issued by ROC evidencing their identity, Bank Statements evidencing the genuineness of the money transactions and Audited Accounts for the year evidencing their high net-worth/creditworthiness to invest in the share capital of the assessee. Moreover, it is noted that PAN Card, Voter's Id Card of the Directors of the respective share applicant companies are also found enclosed with their replies. (We will discuss later in detail about each share applicant company infra). And it is noted that assessee pursuant to Assessing Officer's notice u/s 142(1) of the Act has filed the following documents which are found placed at 17-55 (PB-I):

1. Copy of Income Tax Return for AY 2011-12 and 2012-13
2. Copy of Audited Accounts for AY 2011-12 and 2012-13
3. Copy of Annual Return filed with ROC
4. Details of Fresh Share Capital introduced during the year along with the names, full postal addresses and PAN of all the 38 the share applicant companies.
5. Detailed Fund Flow Statement for the year.
6. Copy of Bank Statement.
7. Details of Business Activities
8. Details of Fixed Assets and depreciation
9. Computation of total income.

10. Thus, the aforesaid documents were received by the Assessing Officer during assessment proceedings and thereafter he issued notices u/s 133(6) of the Act to all the thirty eight (38) share applicant companies and after perusal of the documents furnished by them (PB-II pages 1-843) and thereafter, summoned the director of assessee company questioned & examined him and has recorded his statement on oath u/s 131 of the Act. From the aforesaid exercise and verification made, it can be discerned that all the thirty eight (38) share applicants are income tax assessee's and their financials shows financial credibility and the bank statement reflected the entire inflow and outflow of funds and that there is no cash deposits in their respective bank account, thus the AO took a view to accept share capital raised by assessee from thirty six (36) out of thirty eight (38) share applicants, and made an addition of Rs. 84 lakhs u/s 68 of the Act. However, the Id. CIT(A) despite the aforesaid documents which were found in the assessment folder, has decided to overturn the decisions of the Assessing Officer, cannot be countenanced since the view of the AO on facts or law is a plausible view and cannot be termed as perverse. And according to us, if he has to be upset a possible view of Assessing Officer, then he has to demonstrate that Assessing Officer was wrong in arriving at the finding of fact about identity, creditworthiness and genuineness of the thirty six (36) share applicants. In other words, when the Id. CIT(A) perused the documents kept in the assessment folder and still if he felt that he was not satisfied with the replies filed by the share applicant companies, then he could have insisted on the personal attendance of the Directors of the share applicant companies by exercising his plenary powers and issue summons u/s 131 of the Act to the Directors of the share applicant companies and examine them on oath. However, we note that no summons/notices were issued by the Id. CIT(A) to the share subscribers in the present case. It is

settled that the first appellate authority has plenary powers in disposing of an appeal and the scope of his power is co-terminus and co-extensive with that of the Assessing Officer. A perusal of section 131 of the Act reveals that it empowers the Commissioner (Appeals) to issue summons u/s 131 of the Act. Section 131 of the Act reads as follows:

131. (1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals), Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner and the Dispute Resolution Panel referred to in clause (a) of sub-section (15) of section 144C shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely :—

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.(emphasis given by us)

However, in the present case, it is evident from the impugned order that ld. CIT(A) neither summoned the present/erstwhile directors of the assessee company nor the Directors of the share applicant companies. And it is not the case of ld. CIT(A) that ITR, balance sheet, bank statement, ROC documents, PAN etc. of assessee as well as of all or any of the share applicants or any documents filed / found in assessment folder are bogus or not genuine. So the action of Ld. CIT(A) to overturn the decision of Assessing Officer without any enquiry or investigation cannot be countenanced.”

The Hon'ble Delhi High Court in the case of *Gurinder Mohan Singh Nindrajog vs. CIT [2012] 348 ITR 170 (Delhi)* held as follows:

“We have considered the submissions of both the parties. There is no doubt about the fact that while framing the assessment even under section 143(3) of the Act, the Assessing Officer may omit to make certain additions of income or omit to disallow certain claims which are not admissible under the provisions of the Act thereby leading to escapement of income. The Income-tax Act provides for remedial measures which can be taken under these circumstances. While framing an assessment under section 143(3) of the Act, any of the following situation may occur:

(a) the Assessing Officer may accept the return of income without making any addition or disallowance; or

(b) the assessment is framed and the Assessing Officer makes certain addition or disallowance and in making such additions or disallowances, he deals with such item or items of income in the body of order of assessment but he underassessed such sums; or

(c) he makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income;

(d) yet, there can be another situation where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry;

(e) further another situation may arise, where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the Revenue, or

(f) where an item of income which ought to have been taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary for computation of income.

To ensure for each of such situations, an income which ought to have been taxed and remained untaxed, the Legislature has provided different remedial measures as are contained in sections 251(1)(a), 263, 154 and 147 of the Act.

In the category stated in (a), obviously if an income escapes an assessment, the provisions of section 147 of the Act can be invoked, subject to the condition stated in the proviso to the said section. In the category of cases falling in category (b), section 251(1)(a) provides the Commissioner of Income-tax (Appeals) could enhance such an assessment qua the underassessed sum, i.e., where the Assessing Officer had dealt with the issue in the assessment and was the subject-matter of appeal. In category falling in (c) and (e), the Commissioner of Income-tax has been empowered to take an appropriate action under section 263 of the Act. In the category of cases falling under clauses (d) and (f), appropriate action under section 147 of the Act can be taken to tax the income which has escaped assessment or had remained to be taxed. There can be situations where an item has been dealt with in the body of the order of assessment and the assessee being aggrieved from the addition or disallowances so made, had preferred an appeal before the Commissioner of Income-tax (Appeals) against the said addition and disallowance, the said disallowance and addition being the subject-matter of appeal before the Commissioner of Income-tax (Appeals) has been empowered under section 251(1)(a) of the Act to enhance such an income where the Assessing Officer had proceeded to make addition or disallowance by dealing with the same in the body of order of assessment by underassessing the same as the same was the subject-matter of the appeal as per the grounds of the appeal raised before him. In other words, the Commissioner of Income-tax (Appeals) has a power of enhancement in respect of such item or items of income which has been dealt with in the body of the order of the assessment, and arose for his consideration as per the grounds of appeal raised before him, being the subject-matter of appeal.

This is succinctly stated in CIT vs. Edward Keventer (Successors) P. Ltd. [1980] 123 ITR 200 (Delhi)."

The case on hand falls in category (c) as the AO made no addition in respect of these items of cash credit, though in the course of hearing before him he holds the discussion of such items of income. As per the propositions of law, on such facts only the Pr. CIT or the CIT(A) is empowered to take appropriate action u/s 263 of the Act.

8.2. Coming to the addition of ₹2,10,00,000/-, the assessee stated that the old address of the company has changed. Notices were sent to the old addresses. In the case of M/s. Sidhant Residency Pvt. Ltd., he submitted that the address of the company was 56, Metcalfe Street, 1st Floor, Kolkata-700 013 and whereas the inspector conducted enquiries at 22/23, Radha Bazar Street, 4th Floor, Kolkata-700 001. Similar was the case with other share applicant companies. The ld. D/R submitted that the addition of ₹2,10,00,000/- may be restored to the file of the AO for fresh adjudication after giving the assessee adequate opportunity of being heard, provided the assessee in the case, cooperate and furnish all the necessary details required for the assessment including the present addresses of the companies. In view of the above submission we set aside

this matter to the file of the AO for fresh adjudication in accordance with law. The Id. Counsel for the assessee is directed to produce the principal officers of the share applicant companies before the AO and also furnish the present addresses of those companies. In the result, ground nos. 2 & 3 are allowed for statistical purposes.

8.5. Ground no. 4 is dismissed as not pressed.

8.6. Ground no. 5 is general in nature.

9. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Kolkata, the 12th January, 2021.

Sd/-
[S.S. Godara]
Judicial Member

Dated: 12.01.2021

Bidhan (P.S.)

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. ***Midaas Construction Co. Pvt. Ltd., p-74, Ramswaroop Khettri Road, New Alipore, Kolkata-700 053.***
2. ***DCIT, Circle-10(1), Kolkata.***
3. CIT(A)-4, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches