

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "D" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 1165/Mum/2017 (A.Y. 2012-13)

Rehwa Corporation Pvt. Ltd. 611, Tulsiani Chambers Nriman Point Mumbai-400 021. PAN : AADCR9424P (Appellant)	Vs.	ITO-3(3)(1) Mumbai. (Respondent)
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Assessee by	Shri Rakesh Joshi
Department by	Smt. Mahita Nair
Date of Hearing	14.09.2023
Date of Pronouncement	07.11.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 30.11.2016 passed by the learned CIT(A)-8, Mumbai and it relates to A.Y. 2012-13. The assessee is aggrieved by the decision of the learned CIT(A) in confirming the addition of Rs. 5.50 crores relating to the share application money received by the assessee as unexplained income under section 68 of the Act.

2. The facts relating to the case are stated in brief. The assessee is an investor in shares. It filed its return of income declaring nil income, which was processed under section 143(1) of the Act. Subsequently the Assessing Officer took up the return of income by issuing notice under section 143(2) of the Act. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has received share application money from various persons. Accordingly the Assessing Officer asked the assessee to furnish details of shareholders, directors, share application money received during the year, share premium charged etc. Initially assessee did not respond to

the notice issued on 16.2.2015. Hence the Assessing Officer issued another letter dated 2.3.2015 asking for the above said details and also further details. In response thereto, the assessee furnished certain details. On examining the same, the Assessing Officer noticed that the assessee did not furnish details relating to the share application money received from following persons :

a) M/s. Sarang Chemicals Limited	:	Rs. 2.50 crores
b) M/s. Sheetal Bio Agro Tech Ltd.	:	<u>Rs. 3 crores</u>
Total	:	<u>Rs 5.50 crores</u>

3. The Assessing Officer also received information from ADIT(Investigation), Ahmedabad that the revenue has carried out a search operation under section 132 of the Act in the case of M/s. Sarang Chemicals Limited on 26.10.2012. At that point of time, a Statement was taken from Mr. Pratik R. Shah, director of M/s. Sarang Chemicals Ltd., wherein he had stated that his group companies which included M/s. Sarang Chemicals and M/s. Sheetal Bio Agro Tech Limited (referred above), were providing accommodation entries to the beneficiaries. Accordingly the Assessing Officer asked the assessee to prove share application money of Rs. 5.50 crores received in the above said two concerns in the light of the statement given by Mr. Pratik R. Shah. The assessee submitted reply vide its letter dated 30.3.2015, wherein it furnished copies of Balance sheet and bank statement of both the above said companies. It also stated that the assessee company was associated with Cement project in Satna, Madhya Pradesh and investment in the assessee company was made by the above said two companies in connection with the above project. It was also stated that the assessee had several rounds of discussions with the above said two companies and there after only, they have share application money. The assessee also submitted that the share application money has been received through banking channel from both the parties. Accordingly it contended

that they were genuine commercial transactions and cannot be considered as unexplained cash credit.

4. However, the Assessing Officer took the view that the assessee has furnished details belatedly. Accordingly the Assessing Officer did not accept the explanations furnished by the assessee. Accordingly, by placing reliance on the information received from ADIT(Investigation), Ahmedabad, the AO took the view that the assessee has received only accommodation entries by way of share application from the above said two companies. He also observed that no businessmen will invest such a huge amount into a company from which on interest income/dividend income was received. Accordingly the Assessing Officer took the view that the assessee has failed to prove nature and source of share application money of Rs. 5.50 crores received by the assessee. Accordingly, he assessed the same under section 68 of the Act.

5. The Ld CIT(A) also placed reliance on the statement given by Shri Pratik Shah, wherein he had stated that both the above said companies have provided only accommodation entries. Even though the Ld CIT(A) acknowledged the fact that the assessee has furnished copies of Balance Sheet and bank statements of share applicants, yet he took the view that the assessee has failed to furnish details of PAN numbers, ITR acknowledgement, computation of income of the share applicants. He also noticed that the share applicants have declared either NIL income or meager income. He also noticed that cash deposits have been made into their bank accounts. Accordingly, the Ld CIT(A) took the view that the credit worthiness of the share applicants has not been proved. He also took the view that the assessee being a private limited company, only known persons shall invest in it. Accordingly, he took the view that the assessee did not bring any material to prove genuineness of the transaction. Accordingly, the Ld CIT(A) confirmed the addition made by the AO u/s 68 of the Act.

6. The Ld A.R submitted that the assessee has discharged the initial onus placed upon it u/s 68 of the Act by proving the identity of the share applicants, credit worthiness of the share applicants and genuineness of transactions. He submitted that the ld CIT(A) himself has observed that the identity is proved. He submitted that the assessee has furnished copies of Balance Sheet of the share applicants, which prove their credit worthiness, since the investments made into the assessee company is reflected therein, meaning thereby, they have given share application money out of the funds available with them. He submitted that the tax authorities did not examine the Balance Sheet to find out credit worthiness. However, they have taken negative view on the reasoning that both the share applicants are showing either NIL profit or meager profit. He submitted that the share applicants have made investments out of other funds available with them and this fact has been ignored by the tax authorities. He submitted that the share application money has been received through banking channels and in support of the same, the assessee has furnished copies of bank statements. Accordingly, he submitted that the assessee has proved the genuineness of transactions also. Accordingly, he submitted that the assessee has discharged the initial onus placed upon it u/s 68 of the Act. He submitted that the AO, however, did not find fault with any of the documents furnished by the assessee. He submitted that the assessee is not required to prove source of sources in this year.

7. He submitted that the AO & CIT(A) has relied upon the statement given by Shri Pratik Shah. He submitted that Shri Pratik Shah was not a director during the year under consideration in both the share applicants companies, i.e, he was director in those companies upto 2005 only. In support of the same, the Ld A.R furnished copies affidavit obtained from the present director of share applicant companies. He further submitted that the assessee has asked for cross examination of Shri Pratik shah before ld CIT(A), but was not given. Accordingly, the Ld A.R submitted that the

statement of Shri Pratik Shah cannot be relied upon with regard to the transactions carried out during the year under consideration. The Ld A.R further submitted that the assessee has collected share premium of Rs.390/- per share from its related concerns, while it has collected share premium of Rs.90/- only from the above said two share applicant companies. He submitted that the assessee company has allotted 10 lakhs and 12 lakhs shares respectively to M/s Sarang Chemicals P Ltd and M/s Sheetal Bio Agro Tech Ltd @ Rs.100/- per share (Face value Rs.10/- plus Share premium of Rs.90/- per share). However, the assessee has collected only 25% of the aggregate amount from these two companies, i.e., Rs.2.50 crores from M/s Sarang Chemicals P Ltd and Rs.3.00 crores from M/s Sheetal Biotech Agro Tech Ltd.

8. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A). He submitted that Shri Pratik Shah was controlling the affairs of both the share applicant companies. He submitted that the statement of Shri Pratik Shah was given to the assessee. He submitted that the same proves that the assessee has received only accommodation entries. Accordingly, he submitted that the Ld CIT(A) was justified in confirming the addition of Rs.5.50 crores made u/s 68 of the Act.

9. We heard rival contentions and perused the record. In the instant case, the addition has been made u/s 68 of the Act, wherein cash credits in the nature of share application money received by the assessee, has been added. Sec. 68 enables assessment of such types of cash credits, if the assessee fails to prove the nature and source of cash credits. "Nature of cash credit" would mean that the assessee is required to show that it is not of revenue nature. In order to prove the sources, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, i.e., the assessee is required to prove three main ingredients, viz., the identity of the creditor, the genuineness of the transactions and the credit

worthiness of the creditor. If the assessee discharges the initial burden, then the burden would shift to the shoulders of the assessing officer, i.e., it is the responsibility of the AO to disprove the claim of the assessee by bringing evidences on record.

10. We shall examine the facts prevailing in the instant case. We notice that the Ld CIT(A) has observed that the identity of both the share applicant companies are not in doubt. Hence it is required to be seen as to whether the credit worthiness of the share applicants and genuineness of transactions are proved. With regard to the credit worthiness, we have seen that the assessee has furnished financial statements of both the share applicant companies. We notice that the investment made by them with the assessee company is duly reflected in their respective Balance Sheets. Since the payments have been made from of funds available with them, in our view, the credit worthiness would also stand proved. We notice that the AO has observed that the share applicant companies are either showing loss or meager profits and such meager profits are not commensurate with the investments made by them. However, there is no bar under the law that a person could not make investments out of borrowed funds. In the instant case, it is not the case of the AO that the applicant did not have funds available with them for making investments in the assessee company. In fact, the said investments have been routed through the bank accounts of the assessee as well as the share applicants. Hence genuineness of transactions also stand proved.

11. We notice that the AO/CIT(A) has mainly relied upon the Statement given by Shri Pratik Shah. However, it is the submission of the assessee that the above said person was a director upto 2005 only and his statement should not be relied upon for the transactions carried out during the year under consideration. Be that as it may, the fact would remain that the assessee has furnished the relevant details before the AO to prove the three

main ingredients and all those details were earlier filed with either Income tax department or with Registrar of Companies, i.e., with Government authorities. Hence the authenticity of those documents could not be doubted with. When all the relevant details are available with the AO, it is the requirement that the AO should examine those documents and could reject them, only if he finds fault with those documents. We notice that the AO did not find any deficiency or fault with the evidences produced by the assessee. With furnishing of all these documents, in our view, the assessee has discharged initial burden placed upon it under section 68 of the Act by furnishing above said documents. Hence the source as well as the source of source also stands proved by the subscribers.

12. The question that arises is whether the Assessing Officer could have made addition under section 68 of the Act by relying upon report of investigation wing or the statement given by the alleged accommodation entry providers. It is apposite to refer to the decision rendered by the Coordinate Bench in the case of M/s. Moraj Realty Pvt. Ltd. (ITA No.708 & 709/Mum/2019 dated 08-12-2020), wherein the decision was rendered by following the decisions rendered by Hon'ble Bombay High Court. It was held as under :-

“17. Moreover, except for relying on the statement of VVB the Assessing Officer has not done any inquiry himself except for referring to a notice issued under section 133(6) in A.Y. 2009-10 only. The learned counsel of the assessee has challenged the very veracity of this observation. He has submitted that assessee has asked for the copy of the said notice issued under RTI Act. In response it was replied that copies thereof are not available. Hence, this shows that even the so called inquiry by the Assessing Officer was done in case of only one party for A.Y. 2009-10 and the veracity of which is itself in doubt.

18. We find ourselves in agreement with the submissions of the assessee's counsel. We note that except for the statement of the entry operator which was also retracted the addition made by the authorities below is devoid of cogent material. In this regard we note that in similar circumstances honourable Bombay High Court in the case of CIT Vs. Orchid Industries Pvt. Ltd. (ITA No. 1433 of 2014 dated 5.7.2017)(397 ITR 136) held as under :-

“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 werenot 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.

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.”

19. Similarly honourable Bombay High Court in the case of Gagandeep Infrastructure Pvt. Ltd. (394 ITR 680) has held as under :-

.....

(ii) Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in CIT v/s. Lovely Exports (P)Ltd. 317 ITR 218 in the context to the preamended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

20. Similarly Hon'ble Bombay High Court in the case of CIT Vs. Apeak Infotech (397 ITR 148) has held as under :-

“Amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it was not applicable for the subject Assessment year 2012-13, So for as the pre-amended Section 68 of the Act was concerned, the same cannot be invoked in this case, as evidence wasled by the Respondents-Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment Therefore, admittedly, the Assessing Officer did not invoke Section 68

of the Act to bring the share premium to tax. Similarly, the CIT(A), on consideration of facts, found that Section 68 of the Act cannot be invoked, in view of the above, it was likely that the Revenue may have taken an informed decision not to urge the issue of Section 68 of the Act before the Tribunal. High Court may also point out that decision of High Court in *Major Metals Ltd. vs. Union of India*, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers re shares of the Assessee - Company were not creditworthy in as much as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium of Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by High Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

High Court find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in *Vodafone India Services Pvt. Ltd. (supra)* and of the Apex Court in *M/s G.S. Homes and Hotel P. Ltd. (supra)*. In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income. It was further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assesses in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that High Court in *Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) ltd* (Income Tax Appeal No. 1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14. In view of the above, Question No .B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of High Court in *M/s Vodafone India Services Pvt. Ltd. (Supra)* and in the Apex Court in *M/s G.S. Homes & Hotels P. Ltd. (supra)*. Thus not entertained. ”

21. Accordingly in the background of aforesaid discussion and precedent in our considered opinion assessee has given all the necessary details required for establishment of identity creditworthiness and genuineness under extant provisions of section 68 of the IT Act. The onus cast upon the assessee stands discharged. The addition by invoking amended provisions of section 68 of the Act which are not applicable for the assessment year is not sustainable.”

13. The Hon’ble Bombay High Court has held in the case of CIT vs. Orchid Industries (P) Ltd (397 ITR 136)(Bom) that the addition u/s 68 could not be made once the assessee had produced the documents to prove the cash credits. It was further held that non-appearance of the share subscriber before the AO will not change this position. It is also apt to refer to the decision rendered by Hon’ble Bombay High Court in the case of PCIT vs. Paradise Inland Shipping (P) Ltd (2017)(84 taxmann.com 58)(Bom). In this case, it was allegation of the revenue that the assessee has received share application money from fictitious companies. The Hon’ble jurisdictional High Court held as under:-

5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :

1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-

Date of Registration 09/05/1995

(a)	Memorandum of Association and Article of Association
(b)	Certificate of Incorporation
(c)	Certificate of Commencement of Business
(d)	Acknowledgment of the Return of Income AY 08-09
(e)	Affidavit of the Director confirming the investment

(f)	Application for allotment of shares
(g)	Photocopy of the share certificate
(h)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.
(i)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010
(j)	The Bank Statement highlighting receipt of the amount by way of RTGS.
(k)	Banks certificate certifying the receipt of the amount through Banking channels."

6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.

7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial questions of law which arises in the present Appeal for consideration.

8. The Apex Court in the case of *Orissa Corpn. (P.) Ltd. (supra)*, has observed at Para 13 thus :

"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income- tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under S. 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were

credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

9. This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.

10. We find no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellants-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Section 260A of the Income Tax Act would not at all be justified."

14. In our view, the above said decisions rendered by the jurisdictional Hon'ble High Court and the co-ordinate bench supports the case of the assessee. Accordingly, following the above said decision, we hold that the addition made by the Assessing Officer under section 68 of the Act during the year under consideration, in the facts and circumstances of the case, was not justified. Accordingly, we set aside the order passed by Ld CIT(A) for the reasons discussed above and direct the AO to delete the addition made under section 68 of the Act in the year under consideration.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced in on 07.11.2023.

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 07/10/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai