

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA**

Before **Shri N.V. Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.937 & 631/Kol/2010 Assessment Year :2005-06
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Income Tax Officer Ward-22(2), Bamboovilla, 8th Floor, 169, A.J.C.Bose Road, Kolkata 700 014 M/s Arup Kumar Chakraborty, 7/1/1, Ramkrishna Acharjee Lane, Salkia, Howrah – 711106 [PAN No. ACSPC 0807 H]	V/s.	Sri Arup Kumar Chakraborty, 17/1/1, Ramkrishna Acharjee Lane, Salkia, Howrah-711106 V/s. Income Tax Officer, Ward-22(2), Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri S.M.Surana, Advocate
राजस्व की ओर से/By Revenue	None
सुनवाई की तारीख/Date of Hearing	08-10-2015
घोषणा की तारीख/Date of Pronouncement	24-11-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These cross-appeals filed by Revenue and assessee are arising out of common order of Commissioner of Income Tax (Appeals)-XIV, Kolkata in appeal No.430/CIT[A]-XIV/08-09 dated 08.02.2010. Assessment was framed by ITO Ward-22(2), Kolkata u/s 147/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2008 for assessment year 2005-06.

2. At the time of hearing none appeared on behalf of Department and the DR filed the adjournment application in 11 cases. The bulk adjournment in 11 cases is not accepted. So we decided to hear those cases where we find that the hearing is possible without the appearance of the Ld. DR. However in the instant case we find that it is an old appeal and has been fixed for hearing 28 times till date. Hence, we rejected the adjournment application and proceeded for hearing both the appeals after hearing Ld. Authorized Representative, Shri S.M. Surana, appearing on behalf of assessee.

First we take up Revenue's appeal in ITA No.937/Kol2010.

3. Sole issue raised by Revenue in this appeal is that Ld. CIT(A) has erred in treating the loan liability as genuine one on the ground that both assessee and creditor have made entries in their respective books of account.

4. Briefly stated facts are that assessee is an individual and is into the business of share trading. During the year under consideration, assessee took loan from following parties:-

Date	Amount (Rs)	Received from
21.09.2004	Rs.10,00,000/-	M/s Advin Fiscal Services (P) Ltd.
22.09.2004	Rs.10,00,000/-	M/s PKD Trading & Investment Co. P.Ltd.

However, these loan entries were not reflecting in the bank statement of the assessee. Accordingly, Assessing Officer called upon assessee to explain the accounting entries of the said loan in its books of account. Assessee provided the explanation, which reproduced below:-

"In reply to the above the assessee vide his letter dated 08.12.2008 stated as, 'I did maximum share transaction with M/s Tirupati Stock Dealers and by making purchases of shares a sum of Rs.20,00,000/- become payable to them at a point of time in the month of September, 2004. I was not in my position to pay Rs.20,00,000/- or also not in a position to liquidate my portfolio as market was on down ward side at that point of time forcing me to take loan from outside party or fulfill the outstanding against share purchased. For making arrangement of loan or advance against my shares as purchased certain time was lapsed

and on request of M/s Tirupati Stock Dealers I have arranged to pay Rs.20 lacs through my loan Creditor to the Creditors of M/s Tirupati Stock Dealers i.e Mr.Giridhari Prasad Bagla and respective entries were made in my books by debiting the account of M/s Tirupati Stock Dealers. In the ledger of my party M/s Tirupati Stock Dealer, you will find the said entries. Hence the queries in your letter vide no. 4 stands clear.”

However, the AO found that there was sufficient cash balance during the period when the loan was taken so he observed that loan was not from a genuine source. Accordingly, AO has disallowed the loan amount of Rs.20 lakh and added it to the income of assessee as unexplained cash credit.

5. Aggrieved, assessee preferred appeal before Ld. CIT(A) who deleted the addition made by AO by observing in para-5.3 of his order, which reproduced below:-

“5.3 I have considered the various facts and circumstances of this issue and the submission made by the assessee. I find that in the books of account of the proprietary concern of the assessee there is a credit entry of Rs.20,00,000/-. The assessee is required to explain this credit entry. He has explained that this entry has been made because two concerns namely, M/s Advin Fiscal and M/s PKD Trading paid Rs.10,00,000/- each to one Shri Gridhari Prasad Bagla on behalf of the assessee. Since this payment was made on behalf of the assessee therefore he has credited these two parties in his books of account. The confirmations of these two parties were independently called by the A.O by issuing notice u/s 133(6) to them. These parties filed their confirmations along with their PAN numbers with the Assessing Officer in which they confirmed this transaction. Since the party giving the money has confirmed the payment it is not justified on the part of the A.O to reject this claim of the assessee. Therefore, I feel that the credit entry of Rs.20,00,000/- as advance received appears to be explained and therefore I delete this addition made by the Assessing Officer.”

Aggrieved, Revenue is in appeal before us.

6. We have heard Ld.AR and perused the materials available on record. Ld. AR supported the order of Ld. CIT(A). From the aforesaid discussion we find that assessee has not directly taken the loan but the amount of loan was

transferred from the above stated facts to the party of M/s Tirupati Stock Dealer (MTSD for short), namely, to Mr. Gridhari Prasad Bagla. All the parties have given their confirmations letters along with bank statements showing respective entries. We further find that AO has added the loan entries of the assessee on the ground that assessee was having sufficient cash balance in its books of account during the period when loan was obtained. In our view the contention of AO is not tenable because availability of cash and taking loan from the parties are two different aspects and merging the same is not appropriate. When all the parties have given their confirmation for the loan entries of Rs. 20 Lacs then there is no room for the AO to doubt the transactions. Therefore, we are inclined not to interfere in the order of Ld. CIT(A) and this ground raised by Revenue is dismissed.

Coming to assessee's appeal in ITA No.631/Kol/2010

7. At the time of hearing Ld. AR stated the he has not pressed the ground No. 2, hence, we dismiss the ground No. 2 as not pressed.

8. Next issue raised by assessee in this appeal is that Ld. CIT(A) has erred in confirming the addition of Rs.76.20 lakh and Rs.11,01,075/- due to non-availability of supporting documents in support of transaction. During the year under consideration, it was found out by AO that assessee has deposited a sum of Rs.74,86,400/- in his savings account maintained with Citi Bank being a/c No.5301792338, Kolkata. Assessee was requested to submit the transaction details of the bank account with regard to the deposit of said cash. The assessee furnished copy of cash book to justify the cash entries made in the bank and stated that cash was received on different dates from MTSD against the sale of shares. AO asked the assessee to produce copy of party ledger a/c, contract notes and demat a/c in support of shares sold/purchased through MTSD along with PAN of the proprietor of MTSD. However, assessee failed to provide the documents as required by AO. In the absence of same, AO could not verify the genuineness of the transaction by invoking the

provision of Sec. 133(6) of the Act. Accordingly, AO disallowed the cash deposit of Rs.76.20 lakh and added it to the income of assessee vide his assessment order, which reproduced below:-

“Since the genuineness of the transaction and the identification of the persons have not been established as well as the capacity to give cash could not be established, reasonable explanation of receipt of cash of Rs.76,20,000/- from M/s Tirupati Stock Dealers was not received. Moreover the assessee failed to recall the receipt of Cash from M/s Trupati Stock dealers / manic Pugalia and as per the discussion above the entire amount of Rs.76,20,000/- received by the assessee as cash from the above party is added in his total income as a cash credit.”

As the assessee could not produce the necessary details of MTSD, therefore the cheques which was received from the said party have also not been explained by assessee, therefore AO disallowed the deposit of cheque for an amount of Rs.11,01,075/- and added the same to the income of assessee as unexplained cash credit.

9. Aggrieved, assessee preferred appeal before Ld. CIT(A) who has upheld the order of Assessing Officer by observing in his order in para-6.5, which is reproduced below:-

*“**6.5** I have considered this submission of the assessee. It is note that in this submission the assessee is harping only on one point that once the confirmation from Shri Pugalia regarding the share transactions is submitted along with his PAN number the responsibility of the assessee to prove the cash claimed to be received from him is over. He has cited some Court decisions in this regard. But I find that the facts in the case of the assessee are quite different. It is seen that M/s Tirupati Stock Dealers which is claimed as the property concern of Shri Pugalia is not a registered share broker. The shares which are shown to be sold by the assessee through M/s Tirupati Stock Dealers are actually sold through some other stock dealers such as Pradip Kumar Daga and the contract note is also made by Pradip Kumar Daga in the name of assessee only. The assessee has not been able to produce any contract note for the sale made through Tirupati Stock dealers. The documents related to sale claimed to be made through this concern are merely credit notes issued by the assessee himself in the name of Tirupati Stock Dealers. Thus actually it is not proved whether the assessee had sold his shares during the previous year or not which are claimed to be sold through Tirupati Stock Dealers. Since the sale of the*

shares itself is not proved the genuineness of the cash received as sale proceeds is also not proved. The assessee has been emphasizing a lot on the fact that the PAN number of Shri Pugalia and the information about his assessing office has been submitted. By highlighting this issue the assessee is trying to point out that if the department has any doubt about the dealings of Shri Pugalia it should take action against him since he himself is an assessee. In this respect it is important to note that Shri Pugalia may have acquired a PAN number but has actually not filed any return of income as hi income does not appear to be taxable. Thus prima facie the genuineness the transactions with Mr. Pugalia is not established. The only way to establish the genuineness was to examine Shri Pugalia, his books of account vouchers, bank statements etc., so that it could be determined whether he really had so much of cash to give to assessee. It was primary responsibility of the assessee to establish genuineness of transaction with Shri Pugalia and produce him for examination by the AO. He could not fulfill that responsibility. Even on his own the AO tried to examine Shri Pugalia and his books of account but he deliberately avoided all such attempts made by the A.O. Under such circumstances I do not have any choice but to conclude that the assessee has failed to prove the genuineness of transaction with Shri Pugalia and his so called proprietary concern and also his capacity to give cash to the assessee for the shares claimed to be sold to him. Therefore, the amount of cash of Rs.76,20,000/- claimed to be received from the proprietary concern of Shri Pugalia namely, M/s Tirupati Stock Dealers has been correctly added by the AO in the income of the assessee. Hence, I uphold this addition made by the AO.”

Aggrieved, assessee preferred second appeal before us.

10. We have heard Ld.AR and perused the materials available on record. Before us Ld. AR submitted two sets of paper book containing pages 1 to 120 and 1 to 41. Ld. AR submitted that assessee is dealing in share and doing his business in the name of Manglam Investment. The assessee has done the transactions for the sale / purchase of the shares with various parties during the year under consideration. The details of purchase and sales are placed on pages no. 2 to 5 of the paper book. During the year the assessee has received a sum of Rs. 76,20,000/- in cash and Rs. 1101075.00 in cheque from MTSD. The assessee claimed that the receipt is the sale of shares and submitted the cash book in support of the transactions. However the AO

treated the above receipts as unexplained cash credit under section 68 of the Act due to non production of the supporting documents. We find from the written submission that the assessee is a dealer in shares and doing his business in the name of M/s Manglam Investment. The business was being done through under broker MTSD, Prop. Manick Chand Pugalia. The said MTSD was working under the main broker Sri Pardeep Kumar Daga. The Ld. AR submitted a confirmation letter from MTSD with regard to all the transactions of purchase and sale of shares done through Triupati Stock Dealer vide paper book page No. 116-118. The Ld. AR submitted the purchase and sales bills of the shares which are placed in the paper book on pages 7 to 15 AND 16 to 28. The Ld. AR also submitted the DEMAT account details which is having the effect of the sale & purchase done through the MTSD as evidenced from the details submitted which is placed at 67-85. It is also important to note that there were receipts and payments from MTSD and the AO has treated the receipt as income without considering the payment. The Ld. AR claimed that the receipt of money from MTSD is for the sale of the shares which can be reconciled from the DEMAT account of the assessee. Similarly the purchase of the shares from MTSD can be reconciled with the DEMAT account of the assessee. Total transaction of purchase and sale of shares through the said party were to the extent of ₹2,71,87,946/-. All these transactions have been accepted but except only the receipt of ₹76.20 lacs by cash and ₹11,01,075/- by cheque. The profit arising out of the aforesaid share transaction was duly offered as 'business income' vide paper book at page 87. All the payments received by cheque and also entered in the confirmation letter as well as bank statement of the assessee vide paper book at pages 106 to 114. The said MTSD also filed the reply before the AO on 23.12.2008 vide paper book at page 115. It is also apparent from the confirmation letter that all the **receipt** amount from MTSD have been treated as **income** whereas there are payment of ₹41,10,817/- and there were share transactions by way of purchase of ₹1,84,17,166/- and sales of Rs.2,11,92,040/-. All these

transactions have been accepted. We also find the order of ITAT- Jodhpur in the case of Suresh Chandra Bhansali Vs. Joint Commissioner of Income Tax (2008) 115 TTJ 116 (Jodh) where the appeal having similar facts and circumstances, was decided in favour of the assessee. The relevant extract is reproduced as under:-

“From the above account it can be seen that the assessee received cash on some occasions from her and on certain other occasions payment was received through cheques. There are transactions of settlement also, details of which follow at p. 119 onwards of the assessee’s PB. For example, the first credit entry of Rs.74,177 of settlement No. BIA/2000001 represents shares of Shyam Telecom, Reliance Petroleum purchased and sold by the assessee during the settlement period. As against the total sales made by the assessee in this settlement period at Rs.4,38,383, the assessee purchased shares of Rs.3,64,206 thereby leaving balance of Rs.74,177 which has been credited on 8th April, 2000 in her account. Similarly, p. 120 is detail of shares of Infotech against which the assessee had to receive Rs.8,000 which has been shown against the date 15th April, 2000. In the like manner, p. 124 of the PB is the detail of account for the purchase made at Rs.1,41,900 and sales made for this party at Rs.2,65,991 thereby leaving the amount payable at Rs.1,24,091 which has been shown as credit against the date 10th June, 2000. In the like manner, all the transactions against which the narration has been given ‘settlement’ show the amount receivable or payable by the assessee on account of transactions of purchase and sale of shares entered on the direction of Smt. Yashoda Maheshwari and the net balance whether receivable or payable has been debited or credited accordingly. In this way, pp. 156 to 168 of the PB shows total purchase of shares on behalf of Smt. Yashoda Maheshwari at Rs.87.92 lakhs and total sale of shares at Rs.84.80 lakhs during the year. From time to time the assessee kept on receiving payment from his customers so as to keep himself safe as regards the transactions entered into by him on their behalf. Apart from certain cash receipts of Rs.3,25,900, the assessee also received payments through cheques from Smt. Yashoda, which find duly reflected in the copy of account extracted above. The AO has chosen to make addition under Section 68 only in respect of cash receipts. The learned CIT(A) failed to appreciate the fact that the AO had not disputed the transactions of purchase and sale of shares in respect of his customers. Not only that, the assessee earned brokerage on such purchase and sale of shares which has been duly assessed by the revenue, it is true that the onus probandi to prove the genuineness of the transaction is on the assessee. In this respect the facts have to be seen in totality. The doctrine of approbate and reprobate prohibits the Revenue authorities from blowing hot and cold in the same breath thereby accepting one part of the transaction and treating the other part as incorrect. When the account has been accepted, the transactions of purchase and sale of shares by the assessee on behalf of the assessee’s customers have also not been doubted, amounts received through cheques have also not been disputed, how can the authorities make addition under Section 68 in respect of only cash receipts. It is further noted that the AO had made addition of Rs.3,25,900 in this case. When the debit and credit transactions are seen, net balance of credit in this account is only a paltry sum of Rs.1,831. If the contention of the Revenue is accepted that the sum of Rs.3,25,900 represents the assessee’s own income from undisclosed sources, then the balance in this account would become debit by almost similar amount which cannot be the case in this line of business.”

7. It is the common submission of both the sides that the other 12 parties in respect of which addition has been made and confirmed also represent the same type of transactions in which only cash receipts have been added under Section 68 leaving intact the payments received through cheques and also accepting the transactions of purchase and sale of shares. Under these circumstances, we are of the considered opinion that the learned CIT(A) was not justified in sustaining this addition. We, therefore, order for the deletion of this addition."

In view of above, we find that the transaction with the MTSD was a business transaction for the sale & purchase of shares. The addition made by the AO & confirmed by CIT(A) on the ground of non availability of the documents from the MTSD does not hold good. Therefore we are inclined to delete the addition made by AO and confirmed by Ld. CIT(A). This ground of assessee's appeal is allowed.

11. In the result, appeal filed by Revenue is dismissed and that of assessee is partly allowed.

Order pronounced in the open court 24/11/2015

Sd/-
(N.V.Vasudevan)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 24/11/2015 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Sri Arup Kr. Chakraborty, 17/1/1, Ramkrishna Acharjee Lane, Salkia, Howrah - 711106
2. राजस्व/Revenue-ITO, Ward-22(2), bamboovilla, 8th Fl. 169 A.J.C.Bose Rd.Kol-14
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।