

आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI PAWAN SINGH, JM

आयकर अपील सं./I.T.A. No. 8054/Mum/2010
(निर्धारण वर्ष / Assessment Year: 2005-06)

Asst. CIT-9(3), 2 nd Floor, Room No. 229, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	Stationery Point India Ltd. A-7/60, Saraf Choudhary Nagar, Thakur Complex, Kandivali (E), Mumbai-400 101
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAFCS 3137 G		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Mohammed Rizwan
प्रत्यर्थी की ओर से/Respondent by	:	Shri Haresh P. Shah

सुनवाई की तारीख / Date of Hearing	:	17.5.2016
घोषणा की तारीख / Date of Pronouncement	:	12.8.2016

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-20, Mumbai ('CIT(A)' for short) dated 21.9.2010, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) r/w s. 254 of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2005-06 vide order dated 30.12.2009.

2. The instant appeal raises two issues per its two effective grounds, which we shall take up in seriatim. The first is in relation to the deletion of the addition u/s. 68 of the Act in the sum of Rs.70.43 lacs. This is the second round before the Tribunal, which restored the matter for fresh assessment back to the file of the Assessing Officer (AO) in the first instance in view of the assessee filing additional evidences before, which though had not been admitted by, the first appellate authority. The addition was on account of share application money received from various persons. The AO was of the view that the details filed by the assessee were only reproduction of that filed earlier, and it did not prove the capacity of the creditors or the genuineness of the credit transactions. He, accordingly, confirmed the addition, made at Rs.80.43 lacs vide assessment dated 28.12.2007, i.e., except for Rs.10 lacs credited to the account of M/s. Pushkaraj Packaging India (P.) Ltd., in view of the balance-sheet and the return of income of that company, evidencing the payment, including its' source.

In appeal, the Id. CIT(A) found that the assessee had filed confirmations, bearing verifiable addresses, from all the shareholders, which were not pursued by the AO, who only relied on his findings in the original assessment order to arrive at his conclusions, reproducing them in *extenso*. The addition being deleted thus, the Revenue is in appeal, raising the following Ground:

'1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs.70,43,000 made by the Assessing Officer u/s. 68 of the I. T. Act, 1961, as unexplained cash credits, without appreciating that adequate facts have been brought on record to show that the identity of the creditors, their creditworthiness and genuineness of the transaction have not been established despite sufficient opportunities given.'

4. We have heard the parties, and perused the material on record.

The issue arising, thus, is if the materials as adduced by the assessee are adequate to prove the impugned credits, detailed as under, as to their nature and source, in terms of section 68 of the Act:

	<i>Name</i>	<i>No. of shares</i>	<i>Amount (Rs.)</i>
(1)	<i>Companies</i>		
(i)	<i>Saavi Packers & Printers P. Ltd.</i>	<i>1,20,000</i>	<i>12,00,000</i>
(2)	<i>Directors</i>		
(i)	<i>Mr. Shanker Kashid [Director]</i>	<i>4,51,200</i>	<i>45,12,000</i>
(ii)	<i>Mrs. Sharmila Kashid [wife]</i>	<i>1,900</i>	<i>19,000</i>
(iii)	<i>M/s. Pushkaraj Corporation [Prop. Sharmila Kashid]</i>	<i>11,900</i>	<i>1,19,000</i>
(iv)	<i>Mr. Paul D. Macwan</i>	<i>1,900</i>	<i>19,000</i>
(3)	<i>Others-63 individuals</i>	<i>1,17,400</i>	<i>11,74,000</i>
	<i>Total</i>	<i>7,04,300</i>	<i>70,43,000</i>

The same, as is well-settled, requires the credit being proved on the parameters of identity and capacity of the creditor, and the genuineness of the credit. As shall be apparent, the failure to do so *qua* the latter two forms the basis of the non-acceptance of the assessee's explanation by the AO, while the Id. CIT(A) considers the same as *prima facie* established, satisfactorily explaining the same. The documents furnished in support of its' case by the assessee are as under:

i. Statement showing details of share applications like name & address of the shareholders, no. of shares with value, PAN wherever available and relationship.

ii. Attendance details from Financial Year 2001-05 to 2008-09 (till August, 2008) of employees who had subscribed the shares.

iii. Muster Roll of employees for the period from April, 2001 to March, 2005 and for the month of August, 2008, showing their daily attendance.

iv. Confirmation letter, copies of share applications, copies of Income tax Return of Shri Shankar Kashid (Director).

v. Confirmation letter, copies of share applications, copies of Income tax Return of M/s Saavi Packers & Stationery P Ltd.

vi. Confirmation letter, copies of share applications, copies of Income tax Return of M/s. Pushkaraj Packaging India P Ltd.

vii. Confirmation letter, copies of share applications, copy of relevant bank statement of M/s Pushkaraj Corporation, Prop Mrs Sharmila Kashid.

viii Confirmation letters, copies of share applications of others including employees.'

Confirmations, by themselves do not prove the credit (refer: *Bharati P. Ltd. v. CIT* (1978) 111 ITR 951 (Cal); *CIT v. W. J. Walker & Co.*, (1979) 117 ITR 690, 694 (Cal); *CIT v. United commercial & Industrial Co. (P.) Ltd.*, (1991) 187 ITR 596, 599 (Cal). The assessee is an unlisted company, whose shares are, therefore, illiquid. There is nothing on record to show that the share subscription had been sought in the course of raising share capital from the public, or by way of private placement, filing the requisite details (viz. Prospectus or, as the case may be, Statement in lieu of Prospectus, etc.) with the concerned Registrar of Companies. Apart from exhibiting its' genuineness, i.e., as a attempt to raise capital from the public following the due process of law, it serves to inform the proposed investor (shareholder) of the purpose for which the capital is being raised. The company can subsequently be questioned in its' respect. Could the shares issued be regarded as so in its' absence? Be that as it may, the shares being not marketable, and the investment thus not liquid, a person who is not a promoter, or a concern belonging to him, as, say, Pushkaraj Corporation P. Ltd., the proprietary concern of Sharmila Khasid, the promoters' wife, would ordinarily have no reason to invest therein, being, rather, contrary to the normal, natural human behavior and conduct. They are after all parting with their funds as investors, in the hope of and on the premise of a prospective gain, and not as charity. The test of human probabilities is fully applicable to the proceedings under the Act

(refer: *CIT vs. Durga Prasad More* [1971] 82 ITR 540 (SC) and *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC)). They, then, need to be satisfied about the future prospects of the company, and toward which there is nothing on record, again impinging directly on the genuineness of the credit/s. This, once again, underscores the primacy of the Prospectus/Statement in lieu of Prospectus. Further, there is admittedly no material to establish the creditworthiness of the 64 individuals, including, as stated, 30 employees, from whom cash (at a maximum of Rs.19,000/- each, in their names) has been accepted. What is their financial capacity? What are their regular sources of income? What is their income for the past 2-3 years? Answers to these and like questions are conspicuous by their absence, considering also the material on record, which in fact only forms a part of the assessee's explanation *qua* the credit/s. The addition of Rs.11.93 lacs, representing credits there-from, is accordingly confirmed. For the balance credits, the same are ostensibly from related parties, and in respect of whom the assessee has filed, besides confirmations, copies of tax returns, and which again appear to be for the current year only, while the payment, in all probability, would stand made from accumulated capital; the current year's income being uncertain and, besides, presumably un-realized at the relevant time. Also would be relevant is if the shares were indeed issued, and when? This is as where not issued, a genuine investor shall, except in case of a tacit understanding of the money being 'given' for good, recall his money back. The material furnished by the assessee is thus hardly adequate for proving the genuineness (of the credit/s) and/or the capacity of the creditors. The AO, as observed by the Id. CIT(A), has also not examined or sought any further materials in the matter. We, accordingly, vacating the findings of both in relation to the credit for the balance Rs.58.50 lacs, restore the matter back to the file of the AO to enable the assessee to, once again, establish the credit/s on the anvil of section 68 of the Act. We decide accordingly, and the Revenue gets part relief.

Before parting, we may also note the assessee's reliance on the order by the Tribunal for A.Y. 2006-07 (in ITA No. 1162/Mum/2010 dated 18.4.2012/PB pgs. 1-

18). Whether or not an assessee has satisfactorily explained the genuineness of the credit is principally a matter to be decided on the basis of the explanation/s furnished as regards the nature and source of the impugned credit/s (which in the present case stands credited to the share application money account), together with evidences led in support. *That is, is a finding of fact.* In other words, whether the burden of proof, which is on the assessee-recipient, the beneficiary, stands discharged or not is essentially a matter of fact. The tribunal as a final fact finding authority found it to be so in that case, endorsing the findings of the first appellate authority. The Id. CIT(A) in the present case has found that the assessee had furnished adequate materials, discharging the burden of proof on it, and that the AO had not made any enquiry falsifying the same. In our view, the material is grossly inadequate in the case of individuals, being without stating their incomes; social and educational background – impinging on the genuineness of the credit; share application forms; bank accounts; financial capacity, some of whom are stated to be the assessee's employees, stated to having given cash to the assessee (at is at a maximum of Rs.19,000/-, i.e., just below the limit as prescribed u/s. 269SS for the receipt of money in cash). Why, even the reason for making an illiquid investment has not been stated? It is also not correct to say that the AO is not entitled to reject the explanation without some other positive evidence falsifying the assessee's case. The true view is that, while the A.O. is not bound to accept as true any possible explanation which the assessee may put forth, he cannot also arbitrarily reject the assessee's explanation [*Sriram Jhabarmull (Kalimpong) Ltd. vs. CIT* (1967) 64 ITR 314 (Cal). Also see, *Akberally Esufally vs. CIT* (1966) 60 ITR 563 (Mad); *Hazarilal vs. CIT*, (1963) 47 ITR 516 (AP); *Homi Jehangir Gheesta vs. CIT* (1961) 41 ITR 135, 142 (SC); *M. M. A. K. Mohideen Thamby & Co. vs. CIT* (1959) 36 ITR 481 (AP); *Bachhraj Amolakchand vs. CIT*, (1956) 29 ITR 1009 (Nag); *R. B. N. J. Naidu vs. CIT*, (1956) 29 ITR 194 (Nag); *Lal Mohan Krishna Lal Paul vs. CIT* (1944) 12 ITR 441 (Cal); *Anil Kumar Singh vs. CIT*, (1972) 84 ITR 307 (Cal)]. The genuineness of the transaction has itself being found as

seriously wanting. For the balance credits for Rs.58.50 lacs, the assessee giving partial details/materials, so that a view, one way or the other, could not be adopted, we have restored the matter back to the file of the AO, before whom the assessee shall furnish all the material it wishes to rely upon in the matter. This, we may clarify, implies that the real or the actual source of the sum of money, of which the assessee is found to be the beneficiary, as evidenced by the credit in its respect in its books of account, and not the ostensible source, and which may require an investigation into or examination of the money trail. Why, if that be so, the mere credit in the assessee's books of account in the name of another should be sufficient to accept it as a genuine credit (*CIT vs. S. Kamaraja Pandian* [1984] 150 ITR 703 (Mad), SLP against which stands dismissed in 155 ITR (St.) 66). A reproduction from the same would be elucidative:

‘Under section 68 of the Income-tax Act, 1961, the assessee has to establish the *identity* of the creditor, the *capacity* of the creditor to advance the loan and the *genuineness* of the transaction in spite of the entries to that effect in the account books and if the assessee does not offer any explanation about the nature and source of the cash credits or the explanation offered is not satisfactory, then the cash credit may be charged to income-tax as the income of the assessee of that previous year. Only after the assessee *prima facie* establishes these things, the onus shifts to the department, but where the assessee merely establishes the identity of the creditor and nothing more, the cash credits can be treated as the income of the assessee from undisclosed sources.’

[emphasis, ours]

Unless the genuineness of the source of the sum of money found credited in the assessee's books is satisfactorily established, the assessee cannot be said to have discharged the requisite burden of proof placed on him u/s. 68.

5. The only other issue, agitated per its Ground 2 by the assessee, is with regard to the restriction of depreciation *qua* machinery installed during the first half of the relevant previous year to 50% of the normal depreciation on the ground of it being put to use for less than 180 days during the relevant previous year. The assessee's - on whom the burden of proof lies, case before us was that the machinery was put to trial

production before 30.9.2004 and, thus, was put to use for over 180 days during the relevant year.

6. We have heard the parties, and perused the material on record. Without doubt, being deployed in trial production would qualify as being put to use for the purposes of the business. There is, however, admittedly no contemporaneous material to establish the same. It is also pertinent that trial production could be caused only upon successful commissioning of all the different parts of the plant, stated to be a lamination plant, i.e., in the main. The trial production expenses, including wastages, would also stand to be capitalized, of which there is no reflection. In view of the foregoing, we therefore have no hesitation in upholding the inference of the additions to the machinery being put to use for less than 180 days during the relevant year and, thus, exigible to depreciation at 50% of the normal rate. The Id. CIT(A) stating that this is a non-issue as the assessee would in any case stand to avail depreciation from the year following, is neither here nor there. And, therefore, only needs to be stated to be rejected. Each year is an independent unit of assessment, and the fact in issue is if the relevant machinery had been put to use for the required period during the relevant previous year, so as to enable the assessee to its' claim, as made, or is the same not in accordance with law. That is the only question that is required to be addressed, and the further question that if it was in fact put to use during the relevant year is admitted by both the parties. We decide accordingly, and the Revenue succeeds.

7. In the result, the appeal by the Revenue is partly allowed.

Order pronounced in the open court on August 12, 2016

Sd/-
(Pawan Singh)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 12.08.2016

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

व.नि.स./Roshani, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

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