

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

I.T.A. No.6548/DEL/2014		
A.Y. : 2010-11		
INCOME TAX OFFICER, WARD 27(4), C.R. BUILDING, NEW DELHI	VS.	M/S ZEVEER TOWER PVT. LTD. 202, AGGARWAL CYBER PLAZA, NETAJI SUBHASH PLACE, PITAMPURA, NEW DELHI - 34 (PAN: AAACZ1508M)
(ASSESSEE)		(RESPONDENT)

Revenue by : Sh. Arun Kumar Yadav, Sr. DR
Assessee by : Sh. Amit Goel, CA

ORDER

PER H.S. SIDHU : JM

The Revenue has filed this Appeal against the impugned Order dated 04.9.2014 of the Ld. CIT(A)-XXI, New Delhi relevant to assessment year 2010-11.

2. The grounds raised in this Appeal read as under:-

- "1. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing the AO to assess the rental income as business income as claimed by the assessee.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition / disallowance of Rs. 38,12,230/- under the head interest expenses, Rs. 4,20,000/- under the head salary and wages as business expenses, Rs.*

1,56,000/- under the head Director's remuneration and Rs. 4,97,287/- under the head depreciation.

- 3. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 30,00,000/- made by AO as unexplained cash credit u/s. 68.*
- 4. The appellant craves, leave for reserving the right to amend, modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of appeal."*

2. The brief facts of the case are that assessee company filed its return of income declaring income of Rs. 3,57,080/-. Notice u/s. 143(2) of the Income Tax Act, 1961 (hereinafter referred as the Act) was issued and in response thereto the Assessee's A.R. attended the hearing from time to time. The assessee is in the business of real estate and property development and purchase and sale of lands and flats etc. During the year the assessee had received the rental income of Rs. 49,20,000/- which the assessee had declared as income from real estate business. The AO treated the rental income as income from house property u/s. 22 of the Act and has allowed the statutory deduction u/s. 24 of the Act. Further the AO has disallowed all the business and administrative expenses mainly on the ground that the assessee is not in business but in investment. AO further noted that assessee had collected share application of Rs. 68,30,000/- which included share capital of Rs. 21,70,000/- and share premium of Rs. 46,60,000/-. The assessee had collected the share capital with premium of Rs. 90/- per share on the face value of Rs. 10/- from 07 shareholders out of which the AO has made the

addition of Rs. 30,00,000/- under the head unexplained cash credit from the share capital of New Creation Fuels Pvt. Ltd. of Rs. 20,00,000/- and Aryan Infra Equipment Pvt. Ltd. of Rs. 10,000/- mainly on the ground of unsatisfactory source of the money. Accordingly, the AO assessed the income of the assessee at Rs. 64,42,302/- vide his assessment order dated 30.3.2013 passed u/s. 143(3) of the Act. Against the said assessment order, assessee appealed before the Ld. CIT(A), New Delhi, who vide his impugned order dated 04.9.2014 has allowed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal.

3. Ld. DR relied upon the Order of the AO and reiterated the contentions raised in the grounds of appeal. In support of his contention, he filed the written submissions, which read as under:-

"Sub: Written Submission in the above case- reg.

Grounds of Appeal 1 & 2 : CIT(A) erred in directing AO to treat Rental Income as Business Income and in deleting Business addition made by the AO by disallowing business expenses.

Facts

1) Assessee claimed that it is in the Business of Jewellery and Real State but facts of the case prove that

the assessee did not do any business during the year under reference and in previous years also.

2) As per P&L Alc assessee shows receipt of Rs. 7.9 lacs from trading in Jewellery, Rs. 48,000/- as Miscellaneous Income and Rs. 49.2 lacs as Income from Real Estate Business. However Rs. 49.2 lacs is nothing but Rent Received from Reliance Life Insurance Company by lease of unit no. 202, 2nd Floor, Aggarwal Cyber Plaza-1, Pitarnpura, Delhi.

3) For Jewellery Business the assessee has shown only 3 purchases in last week of March and 2 sales out of which one is cash sale. AO has analyzed the so called Jewellery Business of the assessee from F.Y 2007-08 to F.Y 2010-11 and found that the assessee company sales 100 grams gold and 100 carats diamond every year. During F.Y 2008-09, No sale was wade.

4) From the same Building Assessee's associated concern M/s Zever running big business of jewellery.

5) Assessee has no showroom/shop which is essential in Jewellery Business.

6) Minutes of AGM of the Company shows that the assessee had purchased gold for long term investment

purposes, relevant portion of Minutes is reproduced as under:

- (i) Assessee took loans of Rs. 2.94 cr. By mortgaging the property from which it is getting rent out of this loan amount, the assessee has invested in properties and gold.*
- (ii) None of property was sold during the year under reference as well as in previous years from incorporation of company till date.*
- (iii) Interest is being paid every year against the loan taken in invested in the properties and being claimed as business expenditure against the rental income. From the facts of the case it appears that the assessee is not doing any business but claiming business expenditure against rental income. Thus, AO has rightly disallowed all business expenditure and treated rental income as income from house property allowing 30 % of deduction against rental income.*

Ld. CIT(A) has not rebutted the finding of the AO and deleted the addition arbitrarily which is not justified at all.

Grounds of Appeal 3: *CIT(A) erred in deleting addition made by the AO u/s 68.*

Facts

1) *Assessee company raised Share Capital of Rs. 85 lacs during the year by allotting its shares to 7 different parties.*

2) *All these parties were relatives and friends of the directors, except two corporate parties:-*

(i) New Creation Fuels Pvt. Ltd.

(ii) Aryan Infra Equipment Pvt. Ltd.

3) *Premium of Rs. 90/- per share were taken from these two parties whereas no such premium was taken from other allottees.*

4) *These investors later transferred back the shares to an associate entity of the director of assessee company at face value.*

5) *In view of the above facts AO notice that above two corporate are doubtful. Thus he asked the assessee*

to produce the directors of the two companies. Assessee could not produce the before the AO.

6) AO issued summons u/s 131 (1) to the directors of the companies however these summons were not complied by these alleged applicants.

7) AO has noticed that bank account of the applicant companies just show routing of money, and no business activities. Total turnover of Aryan Infra Equipment P. Ltd was of Rs. 32, 725/- whereas total turnover of another applicant i.e. New Creation Fuel Pvt. Ltd was of Rs. 33,065/-. Thus it is proved that creditworthiness of these creditors was very doubtful.

Assessee could not proved Identity of the creditors/share applicant, genuineness of transaction and creditworthiness of the applicants. Thus AO has rightly made addition of Rs. 30 lacs u/s 68 of the LT. Act.

CIT(A) has not rebutted the finding of the AO and just deleted the addition in a routine manner.

In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to addition made u/s 68 of LT. Act:

1. *CIT Vs Nipun Builders & Developers (P.) Ltd (30 taxmann.com 292, 214 Taxman 429, 350 ITR 407, 256 CTR 34) (Copy enclosed)*

Where Hon'ble Delhi High Court held that where assessee failed to prove identity and capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68. It would not be correct to state that AO should get the addresses from Registrar of Companies Website or search for the addresses of the shareholders of the company with them.

Similarly, Credit Worthiness was not proved by mere issue of cheque or by furnishing a copy of statement of bank account. Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment acted as angel investors, after due diligence or for personal reasons.

2. *CIT Vs Ultra Modern Exports (P.) Ltd (40 taxmann.com 458, 220 Taxman 165) (Copy Enclosed)*

Where Hon'ble Delhi High Court held that where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer

sent notices to share applicants which returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68.

3. *CIT Vs Frostair (P.) Ltd (26 taxmann.com 11, 210 Taxman 221) (Copy Enclosed)*

where Hon'ble Delhi High Court held that where details furnished by assessee about share applicants were incorrect, addition under section 68 was proper.

4. *CIT Vs N R Portfolio Pvt Ltd (29 taxmann.com 291) (Copy Enclosed)*

where Hon'ble Delhi High Court held that if AO doubts the documents produced by assessee, the onus shifts on assessee to further substantiate the facts or produce the share applicant in proceeding. Mere production of incorporation details, PAN Nos. or fact that third person or company had filed income tax details in case of private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts reflect and indicate proper paper work or

documentation but genuineness, creditworthiness, identity are deeper and obtrusive.”

4. On the contrary, Ld. Counsel of the assessee relied upon the order of the Ld. CIT(A) and also relied upon the decision of the Hon'ble Supreme Court of India in the case of Chennai Properties & Investments Ltd. vs. CIT reported [2015] 56 taxmann.com 456 (SC) in support of argument relating to ground no. 1 and filed the copy of the said decision before us.

5. We have heard both the parties and perused the relevant records, especially the impugned order and the written submissions and the case law cited by both the parties. With regard to ground no. 1 relating to assessing the rental income as business income as claimed by the assessee is concerned, we find that assessee had filed the return income of Rs. 3,57,0899/- and the case was taken up for scrutiny. Shri Ghanshyam Agrawal and Smt. Anita Gupta are the Directors of the company. The assessee is in the business of real estate and property development and purchase and sale of lands and flats etc. During the year the assessee had received the rental income of Rs. 49,20,000/- which the assessee had declared as income from real estate business. The AO has treated the rental income as income from house property u/s 22 and has allowed the statutory deduction u/s 24. Against the AO's action, the assessee filed the appeal before the Ld. CIT(A) and submitted that the AO is not justified to assess the business income from

the rental income as house property income, because the assessee is in the real estate business and all the income are part of the business activity of the assessee and accordingly the income of the assessee should be assessed as normal business income. We further find that there is no proper justification in the order of the AO for converting the rental income from the real estate business to house property income and allow statutory deduction u/s 24 @ 30%. We note that the assessee is in the real estate business and also in the jewellery business and as such the income of the assessee is to be assessed as business income. Moreover, if the action of the AO is confirmed the assessee will be claiming additional deduction u/s 24 @ 30% in addition to the business and administrative expenses as the assessee is in the real estate business and the income of the assessee will be assessed lower than the returned income. In view of the above, we are of the view that that there is no proper justification for changing the head of income which will result in reduction of return income and accordingly the Ld. CIT(A) has rightly directed the AO to assess the rental income as business income as claimed by the assessee, which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 1 raised by the Revenue. This view is fortified by the decision of the Hon'ble Supreme Court of India in the case of Chennai Properties & Investments Ltd. vs. CIT reported [2015] 56 taxmann.com 456 (SC) wherein, it has been observed that "*Section 28(i), read with section 22, of the Income Tax*

Act, 1961 – Business income – chargeable as (letting out of properties) – Whether where in terms of memorandum of association, main object of assessee-company was to acquire properties and earn income by letting out same, said income was to be brought to tax as business income and not as income from house property.” (Heads Notes only).

5.1 Apropos ground no. 2 relating to deletion of addition/disallowance of Rs. 38,12,230/- under the head interest expenses, Rs. 4,20,000/- under the head salary and wages as business expenses, Rs. 1,56,000/- under the head Director's remuneration and Rs. 4,97,287/- under the head depreciation is concerned, we find that AO has disallowed all the business and administrative expenses mainly on the ground that the assessee is not in business but in investment. In appeal before the Ld. CIT(A), assessee has submitted that the AO is not justified to disallow all the business and administrative expenses without any valid reasons, because the assessee is in the real estate business and also in the jewellery business and as such the AO is not justified to disallow all the expenses except Rs.50,000/- which has been allowed by the AO as an expenditure. It is an admitted fact that assessee is evidently in the real estate business and also in jewellery business and as such the assessee is eligible for deduction of all the business expenses and the depreciation etc. and accordingly, Ld. CIT(A) has rightly deleted all the additions/disallowances made by the AO, which does not need any interference on our part, hence, we uphold the same and reject the ground no. 2 raised by the Revenue.

5.2 As regards ground no. 3 relating to deletion of addition of Rs. 30,00,000/- made by the AO as unexplained cash credit u/s. 68 of the Act is concerned, we find that assessee had collected share application of Rs. 68,30,000/- which included share capital of Rs. 21,70,000/- and share premium of Rs. 46,60,000/-, the assessee had collected the share capital with the premium of Rs. 90/- per share on the face value of Rs. 10/- from 07 shareholders out of which the AO has made the addition of Rs.30,00,000/- under the head unexplained cash credit from the share capital of New Creation Fuels Pvt Ltd. of Rs. 20,00,000/- and Aryan Infra Equipment Pvt Ltd. of Rs. 10,00,000/- mainly on the ground of unsatisfactory source of the money. Against the AO's action, the assessee appealed before the Ld. CIT(A) and stated that the AO was not justified to make the selective addition of share capital of two shareholders out of the 07 shareholders without any valid reasons. It was also submitted that all the share capital has been received from other assesseees having valid PAN numbers and having filed their I.T returns in their respective cases. We note that in this case the share capital money has been received through the banking channel and all the details and confirmations of the parties were submitted before the AO but the AO has selectively made the addition of Rs. 30,00,000/- in the case of two share holders only without any valid reasons, which is not permissible under the law. We further note that no material evidence has been collected against the assessee for making the selective addition of the two shareholders of the share capital of Rs. 30,00,000/-only out of

total share capital of Rs. 68,30,000/- and accordingly the addition made by the AO was rightly deleted by the Ld. CIT(A), which does not need any interference on our part, hence, we uphold the same and reject the ground no. 3 raised by the revenue.

6. We further find that the case laws cited by the Ld. DR are not applicable in the present case being distinguishable on facts of the case.

7. In the result, the appeal filed by the Department stands dismissed.

Order pronounced in the Open Court on 18/10/2017.

Sd/-
[L.P. SAHU]
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Date 18/10/2017

SRBHATNAGAR

Copy forwarded to: -

1. Assessee -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches