

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA
BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER, AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

**ITA No. 290/Agra/2016
(ASSESSMENT YEAR: 2003-04)**

Arjun Trading Company Private Ltd. A-4, Ganesh Nagar, Firozabad. PANNo.AADCA7230J (Assessee)	Vs.	ITO-5,(1), Firozabad. (Revenue)
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Assessee by	Shri Deependra Mohan, AR.
Revenue by	Shri Waseem Arshad, Sr. DR.

Date of Hearing	16.04.2018
Date of Pronouncement	14.06.2018

ORDER

PER, A. D. JAIN, JUDICIAL MEMBER:

This is assessee's appeal for A.Y. 2003-04, raising the following grounds:

- “1. That the authorities below have erred in law and on facts in making addition amounting to Rs.59,80,000/- being the share application money, received even when the identity genuineness and creditworthiness of the transactions were proved in unequivocal terms.*
- 2. That the learned A.O. has erred in law and on facts in making the addition without bringing on record any material to substantiate that the share application money emanated from the coffers of the appellant.*

3. *That the learned Assessing Officer has erred in charging interest u/s 234A amounting to Rs. 43,348/- and u/s 234B amounting to Rs. 30,56,047/-."*

2. The facts are that order dated 29.12.2010 was passed under sections 143(3)/147 of the Act at a total income of Rs.59,07,149/-, wherein an addition of Rs.59,80,000/- was made on account of unexplained cash credits in the form of share application money received during financial year 2002-03, invoking the provisions of section 68 of the Act, in respect of the following parties:

Name of share applicants	Share application money received
J SINGH TRADING & INVESTMENT PVT. LTD.	500,000 300,000
MODI ROAD LINES PVT, LTD.	300,000
VIKAS TAYAL	200,000
PERFORMANCE TRADING & INVESTMENT PVT. LTD.	500,000
H.V. TRADERS PVT. LTD.	400,000
ABM ALUMINIUM INDUSTRIES PVT. LTD.	250,000
ADISH JAIN	300,000
ATUL GUPTA	300,000
RAHUL FINLEASE PVT. LTD. ,	500,000

JAIBHAGWAN	200,000
SWASTIC LEASE FIN (P) LTD.	550,000
DHARMENDRA SHARMA	100,000
LEENA GUPTA	300,000
GARG FINVEST PVT. LTD.	500,000
LATE VIDHYA RANI VIJ	40,000
REETA VIJ	190,000
ONKARNATH VIJ	300,000
RUCHIKA VIJ	230,000
Total	59,80,000

3. The assessee's appeal was dismissed by the Id. CIT(A). The ITAT, vide its order in ITA No. 326/AGR/2012, dated 04.04.2013, directed the AO to decide the issue afresh in accordance with law and after considering the additional evidence as admitted by the ITAT and after providing reasonable opportunity to the assessee.

4. The AO framed the assessment afresh and repeated the same addition of Rs.59,80,000/-, vide order dated 31.12.2014, passed u/s 254/143(3) of the IT Act. The Id. CIT(A) confirmed the addition and dismissed the assessee's appeal. The assessee is now before us.

5. As for Ground Nos. 1 and 2, the Id. Counsel for the assessee has contended that the assessee started its business operations from 28.02.2003, as available from the sales account (APB 8); that all the share application money was received before 28.02.2003, i.e., before the date of commencement of the assessee's business, as evident from APB 32-143, i.e., the documents/confirmations filed; and that the Id. CIT(A) has erred in relying on decisions where the amounts were received *after* the start of business, whereas in the assessee's case, the amounts were received *before* the commencement of business.

6. On the other hand, the Id. DR has placed strong reliance on the impugned order. It has been contended that as correctly observed by the Id. CIT(A), the assessee's case ought to be perused in the light of its peculiar facts.

7. Heard. The Id. CIT(A) while dealing with this issue, has observed as follows:

“6.2 As regards the assessee's reliance in the decision of Hon'ble Supreme Court in the case of CIT Vs. Bharat Engineering & Construction Company 83 ITR 187 (SC) wherein it has been held that the amounts received were before the commencement of assessee's business and hence they cannot be added as assessee's business income, with respect to the said decision of the Hon'ble Apex Court, in my humble view and while keeping in view the catena of case laws that have

been rendered in respect of addition made u/s 68 by an AO, the case of the appellant ought to be perused in the light of the peculiar facts it presents and as duly brought on record by the AO. In this it is relevant to refer to a subsequent decision of Hon'ble Calcutta High Court as rendered in the case of CIT vs. Ashok Timber Industries reported as 125 ITR 336 (Cal.), wherein the Hon'ble High Court while considering the decision of the Hon'ble Apex Court in Bharat Heavy Engineering & Construction (supra), and answering the undernoted question of law which was based upon the aforesaid decision of Hon'ble Apex Court, has held as under:-

"whether, on the facts and in the circumstances of the case, and on a correct interpretation of section 68 of the Income-tax Act, 1961, the Tribunal was right in holding that the unexplained cash credits amounting to Rs. 8,100 appearing within one month of the commencement of the business in the books maintained for the previous year relevant to the assessment year 1963-64 were not taxable as the income of the assessee of the said previous year?"

The assessee is a firm. The assessee commenced business on 27th November, 1961. The assessment year is 1963-64, for which the previous year ended on 27th October, 1962.

In the course of the assessment proceedings, the ITO found certain cash credits appearing in the books of the assessee. The explanation offered by the assessee was not accepted by the ITO. He, therefore, added these cash credits in the assessment. ,

The assessee filed an appeal. The AAC found that the ITO made a mistake in the addition of those amounts and he, therefore, corrected the amount. After making such correction the AAC was also unable to accept the explanation offered by the assessee and, therefore, confirmed the addition to the extent of Rs. 16,300.

The assessee filed a further appeal. Both the Judicial and the Accountant Members of the Tribunal were not satisfied with the genuineness of those cash credits. The Judicial Member, however, held that Rs. 8,100 being the cash credit appearing within one month of the commencement of the previous year could not represent the income of the assessee of the year under reference. The Accountant Member did not agree with him. The matter was thereafter referred to the Vice-President as the third Member of the Tribunal.

The Vice-President agreed with the Judicial Member and held that Rs.8,100 could not possibly represent the income of the assessee of the year under reference.

The decision in the case of CIT v. Bharat Engineering and Construction Co. [1972] 83 ITR 187 (SC), on which reliance was placed by the Judicial Member and also by the Vice-president is a case under the 1922 Act. It was held in that case that a large amount of cash appearing on the very first day of the accounting year was not assessable in that year as it was not possible, for the assessee to make such a huge income on the very same day on which the assessee started business for

that year, whereas, under s. 68 of the I.T. Act, 1961, even in a case where an amount is credited on the very first day of the accounting year and the explanation offered by the assessee is not accepted such amount may be assessed as income of the assessee of the accounting year for which the books are maintained: (See 7th Edn., Vol. I of Palkhivala's Income Tax Act, at page 610, s. 68 under the heading "Cash credit on first day of accounting year").

In the premises, we answer the question- in the negative and in favour of the revenue.

6.3 Further, the coordinate Bench of Hon'ble ITAT, Hyderabad 'A' Bench Hyderabad, vide its decision rendered in the case of Shri B. Srinivasulu vs. ITO Ward 6(4), Hyderabad ITA No. 647/Hyd/2009 AY 2005-06 Date of Decision 04.06.2010, has followed the above decision of Hon'ble Calcutta High Court. The Hon'ble ITAT has held as under:-

"We have carefully gone through the judgment of the Calcutta High Court in the case of Ashok Timber Industries (supra). The Calcutta High Court after considering the judgment of Apex Court in the case of M/s Bharat Engineering and Construction Company (supra) found that the judgment of the Apex-Court was rendered in the context of Income Tax Act 1922. After introduction of Sec. 68 of the IT Act 1961, even in a case where an amount is credited on the very first day of the accounting year and the explanation offered by the assessee is not accepted, the amount may be assessed as income of the

assessee during the accounting year for which the books of accounts are maintained. In view of the judgment of Calcutta High Court, in our opinion, the judgment of the Apex Court in the case of M/s Bharat Engineering and Construction Company (supra), may not be of any assistance to the assessee. Moreover, a Coordinate Bench of this Tribunal elaborately considered this issue and found that in the absence of any explanation, addition may be sustained u/s 68 of the IT Act, even though the assessment year is the very first year. In view of the above, we do not find any merit in the contentions of the assessee's counsel. Accordingly we confirm the order of the CIT(A)."

6.4 Thus from the above decisions of Hon'ble Calcutta High Court and Hon'ble ITAT Hyderabad, it is clear that even in the first year of commencement of business, if there are cash credits, then, in view of the provisions of section 68, as brought on the statute by the Income Tax Act, 1961, an AO can still adjudge the assessee's claim and if such claim is found not to his satisfaction, the AO may treat the same as unexplained u/s 68 of the Act. While looking to the facts of the instant, appeal, it is thus seen that the AO was well within his powers to examine and call for details and based upon the enquiries conducted, he could have proceeded to add the assessee's receipt of share application money, even if the year involved was the first year, of assessee's business operations. Thus this contention of assessee is liable to be rejected.

6.5 Thus, in view of the foregoing and while considering the facts of the case in entirety, I am, therefore, of the considered view that the AO while farming the assessment in the assessee's case in pursuance of the directions of the Hon'ble ITAT has provided adequate opportunity to the assessee. He has conducted the enquiries from the persons/entities involved and duly confronted the results to the assessee appellant. It is from the results of the ground enquiries that the identities of the persons/ entities are not established. Therefore, the assessee's reliance only on the evidences admitted by the Hon'ble ITAT is not found to be on any sound footing, as the assessee's claim has been sufficiently repudiated and refuted by the AO with his effective rebuttal as the ground/field enquiries which is the touchstone of the evidence on paper, have proved otherwise. In this regard, it is apt to refer to a decision of Hon'ble Delhi High Court as rendered in the case of CIT vs. Ultra Modern Exports Pvt. Ltd, reported as 220 Taxman 165(Mag) (Del), wherein it has been held that where notices to five out of nine share applicants returned unserved although other evidences were filed, the addition made u/s 68 is justified. Since the assessee's claim in terms of vital ingredients of section 68 i.e. the identity, creditworthiness and genuineness of transactions involved, has not been proved by the assessee, therefore, the AO's action, in making the addition is found justified and the same is therefore sustained and confirmed. Accordingly, the addition of Rs. 59,80,000/- as made by the AO u/s 68 of the Act is hereby

confirmed. As a result, the Ground Nos. 2 & 3 of assessee are dismissed.”

8. It is patent on record and not disputed that the assessee started its business operations from 28.02.2003. All the share application money, undisputedly, was received before this date. Question is whether it can be treated as unexplained. In ‘CIT vs. Bharat Engineering Construction Company’, 83 ITR 187 (SC) (supra) also, as in the present case, the amounts were received before the commencement of the business. The Hon’ble Supreme Court held that as such, they could not be added as the assessee’s income.

9. In ‘CIT vs. Ashok Timber Industries’, 125 ITR 336 (Cal.), relied on by the ld. CIT(A), the amounts were received within one month of the commencement of the business.

10. In ‘Shri B. Srinivasulu vs. ITO’, order dated 04.06.2010, passed by the Hyderabad Tribunal in ITA No.647/Hyd/2009, for A.Y. 2005-06, again, the amounts were received post the commencement of the business.

11. Reliance by the ld. CIT(A) on these decisions is, therefore, mis-conceived.

12. In the following decisions, amongst others, it has been held, following ‘Bharat Engineering and Construction Company’, (supra) that amounts received before the commencement of business cannot be added:

- i. 'CIT vs. Lal Mohar & Others 252 Taxman 401 (All).
 - ii. 'DCIT vs. M/s Surajmal Cold Storage P. Ltd', ITA No.345/Agr/2009 (Agra Tribunal).
 - iii. 'M/s Garg Preservation (P.) Ltd., ITA No.79/Agra/2012, (Agra Tribunal).
 - iv. 'Sugandhi Cold Storage (P) Ltd. Vs. Department of Income Tax, ITA No.368/Agra/2010 (Agra Tribunal).
 - v. 'India Rice Mills', 218 ITR 508 Allahabad High Court.
 - vi. 'Shastri Construction Co. vs. Department of Income Tax'.
 - vii. 'Mitesh Rolling Mills P. Ltd. Vs. CIT', 258 ITR 278 (Guj).
 - viii. 'ITO vs. M/s Divya Fuels', ITA No. 134/Hyd/2011.
 - ix. 'Surendra Prasad Mishra', 7 SOT 457 Lucknow Bench.
 - x. 'Sai Baba Rupadas', ITA 1543/98 (Delhi Trib.).
 - xi. 'Ghabiabad Footwear', 142 Taxman 8 (Delhi-Trib.).
 - xii. 'Smt. Meera Devi', 14 SOT 190 (All.Trib.).
13. In view of the above settled position of law, the assessee is right in contending that the share application money having been received before the start

of the assessee's business, it cannot be considered as the assessee's undisclosed income and that as such, no income of the assessee can be said to have escaped assessment.

14. Accordingly, the addition as confirmed by the Id. CIT(A), amounting to Rs.59,80,000/- is deleted. Nothing further survives for adjudication qua this issue, nor was anything else argued with regard thereto.

15. Ground No. 3 is consequential.

16. In the result, the appeal is allowed.

Order pronounced in the open court on 14/06/2018.

Sd/-

**(DR. MITHA LAL MEENA)
ACCOUNTANT MEMBER**

Sd/-

**(A.D. JAIN)
JUDICIAL MEMBER**

AKV

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR