

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No. 1384/DEL/2009
[Assessment Year: 2002-03]**

The Dy. C.I.T
Central Circle - 13
New Delhi

Vs.

M/s Alfa Bhoj Ltd
4-A, Pusa Road
New Delhi

PAN : AAACA 1066 F

**ITA No. 1057/DEL/2009
[Assessment Year: 2002-03]**

M/s Alfa Bhoj Ltd
4-A, Pusa Road
New Delhi

Vs.

The Dy. C.I.T
Central Circle - 13
New Delhi

PAN : AAACA 1066 F

[Appellant]

[Respondent]

**Date of Hearing : 28.08.2018
Date of Pronouncement : 31.08.2018**

Assessee by : Shri K.R. Manjani, Adv
Revenue by : Smt. Aparna Karan, CIT-DR

ORDER**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

These two cross appeals by the Revenue and assessee are preferred against the order of the Commissioner of Income Tax [Appeals] - II, New Delhi dated 30.01.2009 pertaining to assessment years 2002-03. Both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. We will take up both the appeals together as the underlying facts are common.

3. Grievance of the assessee relates to the addition of Rs. 78,05,370/-.

4. Briefly stated, the facts of the case are that a search and seizure operation was conducted at the business premises of the assessee and subsequent to the search, notices u/s 153A of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] were issued and served upon the assessee. The A.Y under consideration is one of the A.Ys out of six A.Ys, relevant for the date of search.

5. Pursuant to the notice u/s 153A of the Act, the assessee filed its return of income declaring total income of Rs. 7,13,983/-. The assessee was asked to furnish information and to produce books of account/vouchers as per questionnaire attached with the notice issued u/s 142(1) of the Act.

6. No compliance was made and once again fresh notices were issued and served upon the assessee. The assessee chose not to furnish evidences and no compliance was made. Subsequently, the Assessing Officer was informed that an application before the Settlement Commission has been filed and requested the Assessing Officer for adjournment of the case.

7. The Settlement Commission, however, vide their order passed u/s 245D(2C) of the Act dated 17.09.2007, declared the application filed by the assessee for all the A.Ys as invalid on account of non-payment of tax. The assessment proceedings were once again started and the assessee was once again directed to comply with the details.

8. While scrutinising the seized documents and register of share applications, the Assessing Officer noticed that the following persons applied for shares of the company on different dates:

Name and address of the Applicants	No. of shares applied for	Total amount paid	Date of application	Date of allotment	Date of payment
K.R.Fincap Pvt. Ltd. 63 Shankar Market, New Delhi	30,000	3,00,000	28.02.2002	28.02.2002	28.02.2002
Bampal Securities Pvt. Ltd. 100, Cycle Market, Jhandewalan Exn. N. Delhi	70,000	7,00,000	28.02.2002	28.02.2002	28.02.2002
Punjab State Industrial, Udyog Bhawan, Chandigarh	2,50,000	25,00,000	28.02.2002	28.02.2002	28.02.2002
Royal Credit Pvt. Ltd. D-35A, First Floor, Rajouri Garden, New Delhi	50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
Dinanath Luhaliwala Spinning Mills, A- 261, Shastri Nagar, Delhi- 110052	50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
Shatarchi Finance & Leasing. 196/1, Pck. D-12, Sector-7, Rohini, Delhi	2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Shatarchi Finance & Leasing. 196/1, Pck. D-12, Sector-7, Rohini, Delhi	50,000	5,00,000	30.03.2002	30.03.2002	30.03.2002
Rabik Exports Ltd. RZ-41A, Mohan Nagar, Panka Road, New Delhi	1,00,000	10,00,000	28.02.2002	28.02.2002	28.02.2002
Changia Steels Pvt. Ltd. 10/3596, Regarpura Karol Bagh, New Delhi	2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Bic Consultants Pvt. Ltd. 204, Delhi Chamber, Delhi Gate, New Delhi	50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
Sehgal Fluid Equipment RZ-41A, Mohan Nagar, Pankha Road, New Delhi	1,00,000	10,00,000	30.03.2002	30.03.2002	30.03.2002

FNS Consultancy Pvt. Ltd. A-66, Tagore Garden, New Delhi	1,50,000	15,00,000	30.03.2002	30.03.2002	30.03.2002
Rajesh Kumar Gupta 127, Mohalla Kanjimal, Dasna Gate (Ghaziabad)	30,000	3,00,000	30.03.2002	30.03.2002	30.03.2002
Maestro Marketing Adversiting Pvt. Ltd. A- 4/181, Sec-17, Rohini Delhi-85	1,50,000	15,00,000	30.03.2002	30.03.2002	30.03.2002
Harish Bhashin T-l, Rajori Garden, New Delhi	1,50,000	15,00,000	10.12.2001	10.12.2001	10.12.2001
Harish Bhashin T-l, Rajori Garden, New Delhi	1,00,000	10,00,000	22.03.2002	22.03.2002	22.03.2002
Jyoti Bhasin T-l, Rajori Garden, New Delhi	1,00,000	10,00,000	10.12.2001	10.12.2001	10.12.2001
Jyoti Bhasin T-l, Rajori Garden, New Delhi	1,00,000	10,00,000	22.03.2002	22.03.2002	22.03.2002
Jyoti Bhasin T-l, Rajori Garden, New Delhi	20,000	2,00,000	30.03.2002	30.03.2002	30.03.2002
T-l, Rajori Garden, New Delhi					
Connoisseur Mangement Services Pvt. Ltd. 34, Engineers Enclave, Pitampura, New Delhi	1,00,000	10,00,000	10.12.2001	10.12.2001	10.12.2001
Connoisseur Mangement Services Pvt. Ltd. 34, Engineers Enclave, Pitampura, New Delhi	1,00,000	10,00,000	28.02.2002	28.02.2002	28.02.2002
Tanita Leasing Finance Ltd. A-2/3, Lusa Tower, 3rd Floor, Azadpur, New Delhi	70,000	7,00,000	10.12.2001	10.12.2001	10.12.2001

Tanita Leasing Finance Ltd. A-2/3, Lusa Tower, 3 rd Floor, Azadpur, New -Delhi	1,30,000	13,00,000	28.02.2002	28.02.2002	28.02.2002
Ethnic Creation Pvt. Ltd. A-32, Tagore Garden Ex., New Delhi	1,00,000	10,00,000	10.12.2001	10.12.2001	10.12.2001
Ethnic Creation Pvt. Ltd. A-32, Tagore Garden Ex., New Delhi	50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
SGC Publishing Pvt. Ltd. 50/15, Ashok Nagar, New Delhi-18	1,50,000	15,00,000	10.12.2001	10.12.2001	10.12.2001
SGC Publishing Pvt. Ltd. 50/15, Ashok Nagar, New Delhi-18	50,000	5,00,000	30.03.2002	30.03.2002	30.03.2002
Polo Leasing & Finance Ltd. A-4/181, Rohini Sector-17, New Delhi	1,25,000	12,50,000	13.12.2001	13.12.2001	13.12.2001
Polo Leasing & Finance Ltd. A-4/181, Rohini Sector-17, New Delhi	1,00,000	10,00,000	28.02.2002	28.02.2002	28.02.2002
M.V.Marketing Pvt. Ltd. A-32, Tagore Garden (Ext), New Delhi	1,00,000	10,00,000	10.12.2001	10.12.2001	10.12.2001
M.V.Marketing Pvt. Ltd. A-32, Tagore Garden (Ext), New Delhi	20,000	2,00,000	28.02.2002	28.02.2002	28.02.2002
Shree Niwas Leasing & Finance Ltd. A-10, 204 Sai Bhawan, Ranjeet Nagar, New Delhi	60,000	6,00,000	10.12.2001	10.12.2001	10.12.2001
Shree Niwas Leasing & Finance Ltd. A-10, 204 Sai Bhawan, Ranjeet Nagar, New Delhi	50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
Laxman Indus Resources Ltd. 101, 3 rd Floor, - A Commercial Chambers	30,000	3,00,000	10.12.2001	10.12.2001	10.12.2001

Satwant Singh Sons Pvt. Ltd. A-66, Tagore New Delhi-27	Sodhi & Garden,	30,000	3,00,000	10.12.2001	10.12.2001	10.12.2001
Satwant Singh Sons Pvt. Ltd. A-66, Tagore New Delhi-27	Sodhi & Garden,	1.65,000	16,50,000	28.02.2002	28.02.2002	28.02.2002
Geeface Finance Ltd. 3 rd Floor, 13/34, WEA Karol Bagh, New Delhi		1,00,000	10,00,000	10.12.2001	10.12.2001	10.12.2001
Geeface Finance Ltd. 3 rd Floor, 13/34, WEA Karol Bagh, New Delhi		1,30,000	13,00,000	28.02.2002	28.02.2002	28.02.2002
Rahul Finlease Pvt. Ltd. A-2/23, Shakti Nagar Extn., New Delhi		55,000	5,50,000	28.02.2002	28.02.2002	28.02.2002
Suma Finance & Investment 1366/21, Nalwala, Karol Bagh, New Delhi		20,000	2,00,000	28.02.2002	28.02.2002	28.02.2002
Performance Trading and Investment Pvt. Ltd. A-261, Sashtri Nagar, New Delhi		1,70,000	17,00,000	28.02.2002	28.02.2002	28.02.2002
Technocom Associates Pvt. Ltd. 205, Delhi Chambers, Delhi Gate. Nev.' Delhi		50,000	5,00,000	28.02.2002	28.02.2002	28.02.2002
Transpan Financial Services Ltd. E-36, Jawahar Park, Laxmi Nagar, Delhi-92		1,00,000	10,00,000	28.02.2002	28.02.2002	28.02.2002
Jasdeep Financers Pvt. Ltd. 203, Mukund House, Commercial Complex, Azadpur, New Delhi		1,50,000	15,00,000	28.02.2002	28.02.2002	28.02.2002
S.N. Electrical Pvt. Ltd. S-172, Co Cir. 29(4), New Delhi		1,50,000	15,00,000	28.02.2002	28.02.2002	28.02.2002
Titan Securities Ltd. A-2/3, Lusa Tower, Azadpur, New Delhi		2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Tanuja Industries Credit Ltd. A-2/3, Lusa Tower, 3 rd Floor, Azadpur, Delhi		75,000	7,50,000	28.02.2002	28.02.2002	28.02.2002

Arun Finvest Pvt. Ltd. CA/16-D, Hari Nagar, New Deih	2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Fair N Square A-66, Tagore Garden Ex., New Delhi	2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Surya Udyog 4832/24, Ansari Road, Daryaganj, New Delhi	2,00,000	20,00,000	28.02.2002	28.02.2002	28.02.2002
Zed Leasing & Finance 4A, Pusa Raod, New Delhi	60,000	6,00,000	28.02.2002	28.02.2002	28.02.2002
Zed Leasing & Finance 4A, Pusa Raod, New Delhi	1,00,000	10,00,000	30.03.2002	30.03.2002	30.03.2002”

9. The Managing Director/partners of all such companies/firms were examined on oath and all of them accepted that they were name lenders on commission basis. The statements of all such directors/partners were confronted to the assessee company. However, the assessee company chose not to reply. Accordingly, share application money to the tune of Rs. 1.55 crores was treated as bogus. In respect of remaining share applicants, the assessee could not furnish any detail within the parameters of the provisions of section 68 of the Act.

10. The assessee, in one of its replies, explained that the share application money was received by it in tranches, which was rotated again and again and, therefore, only peak of such credits should be added as undisclosed income of the assessee. The assessee explained

the modus operandi by admitting that, to avail the loan from IDBI Bank, it inflated cost of land/building. It also inflated cost of plant and machinery. The explanation of the assessee did not find favour with the Assessing Officer who was of the firm belief that the entire share capital is bogus and benefit of peak credit cannot be allowed on the peculiar facts of the case. The Assessing Officer, accordingly, made addition of Rs. 5.27 crores on account of bogus share capital u/s 68 of the Act.

11. Proceeding further, the Assessing Officer noticed that the assessee has taken unsecured loans from the following parties:

a.	C.V. Metal Power [P] Ltd	Rs. 20,00,000/-
b.	Ganesh Leasing [P] Ltd	Rs. 15,00,000/-
c.	Prakash Puneet Co & Coma [P] Ltd	Rs. 10,00,000/-
d.	Vinayak Corporate Con [P] Ltd	Rs. 5,00,000/-
e.	V.P.S. Values & Tubes [P] Ltd	<u>Rs. 15,00,000/-</u>
	Total	<u>Rs. 65,00,000/-</u>

12. On receiving no plausible explanation in respect of unsecured loans, the same were treated as unexplained cash credit u/s 68 of the Act and, accordingly, addition of Rs. 65 lakhs was made.

13. The assessee carried the matter before the CIT(A) and once again explained the modus operandi pleading that the benefit of peak credit should be allowed to the assessee. In support of its claim, the assessee furnished the valuation report by the Valuation Cell of the I.T. Department pointing out that even the Valuation Cell has valued the cost much lesser than the cost shown by the assessee. It was strongly contended that by inflating the cost, the assessee siphoned the surplus towards its share capital and, therefore, benefit of peak credit should not be denied. The assessee also furnished a chart arriving at the peak amount of cash introduced during the year. The CIT(A) found that the peak is coming to Rs. 70 lakhs. The CIT(A) assumed that the assessee must have incurred 5% as commission. The first appellate authority was also of the opinion that by inflating the cost of machinery, peak amount comes to Rs. 1,40,05,370/-. Being convinced with the theory of peak credit, the first appellate authority restricted the total addition to the maximum peak credit of Rs. 1,40,05,370/- and deleted the addition of Rs. 4,48,94,630/-.

14. In so far as addition on account of unexplained cash credit relating to unsecured loan amounting to Rs. 65 lakhs is concerned, the

CIT(A) was convinced with the findings of the Assessing Officer and confirmed the addition of Rs. 65 lakhs.

15. The CIT(A) further added a sum of Rs. 44.40 lakhs being 5% commission being expenditure incurred by the assessee for arranging bogus bills and bogus share capital.

16. Aggrieved by this, both the Revenue and the assessee are in appeal before us.

17. The ld. AR reiterated what has been stated before the lower authorities.

18. Once again, the ld. AR tried to explain the modus operandi for taking the loan from IDBI Bank. The ld. AR fairly conceded that the entire share capital is bogus but at the same time, strongly contended that the entire credit cannot be added as income of the assessee, benefit of rotation has to be given and the CIT(A) has rightly given the same.

19. For addition of Rs. 65 lakhs as unexplained cash credit, the ld. AR pointed out that all the loans have been repaid in the subsequent years. The ld. AR drew our attention to the bank statements which are exhibited in the paper book and substantiated its claim that the loans were genuine and have been repaid.

20. In so far as the addition on account of 5% commission is concerned, the ld. AR stated that this addition was not made by the Assessing Officer and the CIT(A) has made the addition without notice. Therefore, it is not sustainable in law.

21. Per contra, defending the order of the Assessing Officer, the ld. DR vehemently stated that nowhere the assessee has demonstrated the rotation of money for claim of benefit of peak credit. It is the say of the ld. DR that the first appellate authority has grossly erred in accepting unsubstantiated claim of the assessee in so far as the benefit of peak credit is concerned.

22. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that the entire share capital has been accepted as bogus by the assessee itself. It would not be out of

place to mention that the assessee itself has accepted this before the Settlement Commission in its petition. There is no dispute that the petition of the assessee was dismissed by the Settlement Commission as the assessee could not pay tax as per the provisions of law. The fact of the matter is that the assessee has admitted that the share capital is bogus.

23. Now the only issue remaining to be decided is whether the assessee is entitled for benefit of rotation of cash thereby restricting the addition to the extent of peak credit. No doubt, the assessee in its explanation has time and again stated that it has inflated the cost of land/building/plant and machinery/expenditure. It is also not in dispute that the assessee has time and again contended that by inflating the assessee has rotated cash back in its books of account, therefore, bogus share capital introduced through accommodation entries taken from the brokers. But the most important fact is that the assessee could not adduce a single piece of evidence to demonstrate that the money has been circulated and reintroduced in the books of account. The assessee could not demonstrate any nexus between the inflation of items mentioned elsewhere and reintroducing the cash generated from such inflation. Forget about the direct

evidences, there is not even a single circumstantial evidence to substantiate the claim of the assessee. The first appellate authority, in his wisdom, blindly accepted the theory of the assessee without asking for /looking for any evidence in support of the claim of peak credit theory.

24. Since the assessee could not adduce any evidence, the benefit of peak credit cannot be given to the assessee. The first appellate authority has grossly erred in giving benefit and, therefore, his finding deserves to be set aside. We accordingly set aside the order of the CIT(A) to this extent and restore that of the Assessing Officer.

25. Appeal filed by the Revenue is, accordingly, allowed.

26. In so far as addition of Rs. 65 lakhs contested by the assessee in its appeal is concerned, we find force in the contention of the ld. AR. The loan taken during the year under consideration appears to have been repaid in the subsequent years as can be seen from the bank accounts exhibited in the paper book. In our considered opinion and in the interest of just and fair play, we restore this issue to the file of the Assessing Officer. The assessee is directed to furnish bank statement

for verification. The Assessing Officer is directed to examine the bank statement and decide the issue afresh. The assessee is also directed to furnish PAN details of all the five parties from whom unsecured loans have been taken. Needless to mention, the Assessing Officer shall give reasonable and proper opportunity of being heard to the assessee.

27. In so far as the addition of Rs. 44.40 lakhs is concerned, we find that the same was not made by the Assessing Officer but was made by the CIT(A). There is no doubt that the powers of the CIT(A) are co-terminous to that of the Assessing Officer, but at the same time, the CIT(A) cannot enhance an assessment unless the assessee has had reasonable opportunity of showing cause as per provisions of section 251(2) of the Act. In our considered opinion, any act of the first appellate authority done in violation of provisions of section 251(2) of the Act would make his order a nullity. We, accordingly, direct the Assessing Officer to delete the addition of Rs. 44.40 lakhs.

30. In the result, the appeal of the assessee is allowed in part for statistical purposes.

31. To sum up, in the result, the appeal filed by the Revenue is dismissed whereas the appeal filed by the assessee is partly allowed for statistical purposes.

The order is pronounced in the open court on 31.08.2018.

**Sd/-
[KULDIP SINGH]
JUDICIAL MEMBER**

**sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 31st August, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the C-DC/DO	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the C-DC/DO	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	