

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'D' BENCH, KOLKATA**

**(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member)**

**ITA No. 1141/Kol/2017**  
Assessment Year: 2012-13

**M/s. ABA Earthline Communications Ltd.....Appellant**  
**Rajesh Mohan & Associates**  
**Unit No. 18**  
**5<sup>th</sup> Floor**  
**Bagati House**  
**34, Ganesh Chandra Avenue**  
**Kolkata - 700 013**  
**[PAN : AABCK 4264 E]**

**Vs.**

**Income Tax Officer, Ward-1(4), Kolkata.....Respondent**

**Appearances by:**

*Shri S.M. Surana, Advocate, appeared on behalf of the assessee.*

*Shri Goulen Hangshing, Sr. D/R. appearing on behalf of the Revenue.*

Date of concluding the hearing : October 16<sup>th</sup>, 2018

Date of pronouncing the order : November 9<sup>th</sup>, 2018

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax (Appeals)-9, Kolkata, (hereinafter the 'Ld. CIT(A)'), dt. 28/02/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2012-13.

2. The assessee is a company and is engaged in the business of investments. It filed its return of income for the Assessment Year 2012-13 on 31/03/2012, declaring Nil income. The Assessing Officer completed the assessment u/s 143(3) of the Act, on 20<sup>th</sup> March, 2015, making addition of Rs. 40,24,70,000/-, u/s 68 of the Act, on the ground that the assessee has not substantiated the genuineness of fresh share capital and share premium applied for and allotted by the assessee company. On appeal, the Id. First Appellate Authority, confirmed the addition.

2.1. Aggrieved the revenue is in appeal before us on the following grounds:-

- “1. For that the order of the Ld. CIT (A) is arbitrary, illegal and bad in law.*
- 2. For that the Ld. CI.T(A) erred in deciding the appeal ex parte without allowing the appellant any proper opportunity of being.*
- 3. For that the Ld. C.I.T(A) erred in disposing of the appeal ex parte and confirming the order of the AO even without consulting the assessment records with reference to the grounds taken in the Memo of appeal from which it would have been apparent that the assessee duly filed all the evidences including PAN, copy of acknowledgement of filing of the return by the shareholders, copy of agreement for investment purchase and allotment made by the appellant in consideration thereof, copy of balance sheets, evidence of identity and source of source which were also verified by Issuing notice u/s.133(6).*
- 4. For that the Ld. CIT(A) erred in confirming the order of AO when it is apparent from assessment records that there is no unexplained cash credit as the appellant did not receive any money from the share allottees.*
- 5. For that the Ld. CI.T(A) erred in confirming the order of the AO when it was apparent from the assessment records that the assessee duly discharged its onus to prove the identity and creditworthiness of the share applicants and genuineness of the transaction and the department fail to bring on record any evidence to discharge the onus shifted on it.”*

3. The ld. Counsel for the assessee submitted that, in this case, the assessee has allotted shares at a premium, as purchase consideration for purchase of shares in the share applicant companies. Shares were purchased from the companies who had applied for shares in the assessee company and got allotted the same. He submitted that the shares were allotted for consideration other than cash and hence Section 68 of the Act, does not apply. He relied on the order of the ‘C’ Bench of this Tribunal in the case of *ITO vs. M/s. Anand Enterprises Ltd., ITA No. 1614/Kol/2016 & C.O. No.56/Kol/2016; dt. 26/09/2018.*

4. The ld. D/R, on the other hand could not controvert the claim of the assessee that shares were allotted for otherwise than cash and as consideration towards purchase of shares from the allottee companies. Nevertheless, he submitted that the issue should be remanded to the file of the ld. CIT(A) for fresh adjudication as the ld. CIT(A) has passed an *ex-parte* order.

5. The facts in this case are not in dispute and the issue in question is a legal issue. Hence we dispose off the appeal on merits. We find that the assessee has filed

before the Assessing Officer, details of share capital raised during the Financial Year 2012-13 along with Form No. 3 and list of allottees of shares. He filed the details giving the names of the share applicants, addresses, PAN Nos., number of shares issued, amount adjusted against share capital, amount adjusted against share premium and the total amount adjusted. 25,39,997 number of shares were raised during the year. Out of this for the Financial Year 2012-13 only 3,00,000 shares were issued for consideration in cash and 22,39,997 number of shares were issued for consideration other than cash. Notices u/s 133(6) of the Act, were issued by the Assessing Officer, to all the share applicants. These were duly replied by them, enclosing therewith with all the requisite information, directly to the Income tax Officer. These are placed from pages 81 to 171 of the paper book filed by the assessee.

6. On these facts, we find that the issue in question which is to be adjudicated is whether the addition can be made u/s 68 of the Act be made where there was allotment of shares other than by way of cash i.e. for consideration for purchase of shares of another company. This issue is covered by the order of the 'C' Bench of the Kolkata Tribunal in the case of *ITO vs. M/s. Anand Enterprises Ltd., ITA No. 1614/Kol/2016 & C.O. No.56/Kol/2016; dt. 26/09/2018*, wherein it has been held as follows:-

*"4. We have heard the rival submissions. At the outset, we find that the assessee had not raised any share capital by receipt of cash consideration in the instant case. The shares were issued for consideration other than cash in lieu of assessee company making investment in shares in some other company. Effectively, the assessee purchased certain shares from the aforesaid six shareholders and instead of paying cash to them, assessee company issued shares in its own company to those shareholders. Hence the assessee had made investments in shares of another company for which consideration was settled through issuance of its shares to those shareholders. Now the crucial point is whether the provisions of [section 68](#) could be invoked in the instant case for making investment towards share capital. There was no receipt of any sum as provided u/s 68 of the Act in the instant case. It would be pertinent here to refer to the decision of Hon'ble Supreme Court in the case of [Shri H.H. Rama Varma vs. CIT](#) reported in 187 ITR 308 (SC) wherein it was held that 'any sum' means 'sum of money'. We find that ld. CIT(A) had deleted the addition by observing as under:*

*"6. On consideration of the AR's submission, especially the portion reproduced above, it is seen that [section 68](#) of I.T. Act, 1961 does not apply to cases of purchase of share assets and allotment of shares by the appellant when purchase*

and allotment are under a barter system. The AO has not refuted the appellant's claim that shares were allotted in exchange for acquisition of shares by the appellant from the companies which surrendered such shares to the appellant. Though as per the AO to apply [section 68](#) to make the said addition in the appellant's hand. Transactions purportedly executed by entry operators involve multiple layers and other complexities, introducing delays in introduction of unaccounted cash/money and multiple players being incorporated entities. Measures taken by the AO in the course of the assessment proceeding falls much short of what is required to be done in such case laws, which have evolved on this issue, call for concerted actions on the part of the AO pinpointing utilization of unexplained/unaccounted/untaxed money and the players and the beneficiaries effectively using the weblike scheme to plunder black money. For example introduction and use of black money in the present case may be at a different point of time and in different hands. The AO's action in the present case cannot be upheld in law. I, therefore, delete the additions and grounds of appeal Nos. 3 & 4 are allowed."

4.1. We find that the Hon'ble Allahabad High Court in the case of [CIT vs. Sohanlal Singhania](#) reported in 235 ITR 616 (All) had held in the context of allowability of donation as deduction u/s 80G of the Act that the expression 'any sum paid' used in the said section denotes 'sum of money paid'. Hence if certain shares were donated by a person, then the same would not fall eligible for deduction u/s 80G of the Act. We also find that the Hon'ble Jurisdictional High Court in the case of [Jatia Investment Company \(Co.\) vs. CIT](#) reported in 206 ITR 718 (Cal) also supports the case of the assessee herein, wherein it was held as under:

"It is finally emphasised by learned counsel for the assessee that the ultimate result is that the firm becomes a debtor to GB and Co. and the three non-financial companies of the group got discharged. Learned counsel also emphasised that, at the worst, it can be said that the assessee-firm has received valuable assets being the said shares of the equivalent value of the debt taken over by it from the companies, i.e., Rs. 11.20 lakhs.

Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash. In other words, the transactions are mere book entries. It was contended that the fact that the entries passed through the cash book could not detract from or efface the essential nature of the entries. It was also urged that the entries were passed through the cash book so that the repayment of loans by the said three companies could be established before the Reserve Bank of India. But, according to Shri Bajoria, that does not mean that it amounts to an artifice employed to deceive any authorities, because the transactions showing the amount as received in cash and paid away spontaneously and simultaneously were not actual but only notional. He, however, stated that, as far as the question of [section 68](#) is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed. It was further stressed that the transactions are above board. No outsider is involved. The entries were made in the books of the concerns of the same group. The shares in question were also of the companies of the group. There was no attempt at hiding the transactions. Nor is it the case of any of the parties to the transaction that there was any passing of cash. Every party unequivocally stated that the transactions were carried into effect merely by way of adjustments of the said loans and the share transfers.

*Shri A. C. Moitra, the learned advocate for the Revenue, reiterated the grounds on which the Tribunal has affirmed the addition of the amount of Rs. 11.20 lakhs as unexplained cash credit. He particularly emphasised that the assessee's contention that the entries are only adjustment entries is not acceptable, because the adjustment entries are not made through the cash book. It is an accepted principle of accounting that book adjustments and the entries in effecting them are made by journal entries and not cash entries. He urged that the purported motive of the entries being the reduction of loans of the three limited companies does not explain the whole matter, because the entries are cash entries. The fact remains that, at every stage, the parties showed the payments and receipts of cash even when there was no cash available for such entries. This quite justifies the addition as sustained by the Tribunal.*

*We have perused the assessment order carefully. We find that cash did not pass at any stage though entries were made in the cash book showing payments and receipts ; but since the entries made a complete round, no passing of cash was necessary for the purpose of making the entries. That there was no passing of cash is also admitted by the Income- tax Officer himself. We have already extracted the observation of the Income- tax Officer in paragraph 14 of his assessment order. The Income- tax Officer has clearly opined that all the respective parties did not receive cash nor did pay cash as none had any cash for the purpose. The only point in the assessment order is that the entries not involving the passing of cash should not have found a place in the cash book, but in the ledger account through journal entries. There is another self- contradiction in the Income-tax Officer's finding that, if there was no real cash entry on the credit side of the cash book, but merely a notional or fictitious cash entry, as admitted by him, there is no real credit of cash to its cash book ; the question of inclusion of the amount of the entry as unexplained cash credit cannot arise.*

*One of the grounds of the Tribunal for disbelieving the assessee's case is that the adjustment entries were made by notional cash entries with a view to bringing down the debt-and-capital ratio, i.e., that while being discharged of the debt the said companies also jettisoned their assets, i.e., the shares held by them of equivalent sum without achieving the avowed purpose. Here the Tribunal certainly misdirected itself. The ratio to be reduced is of the loan in relation to the share capital and the reserves. Jettisoning the shares had the desired effect of reducing the borrowed capital.*

*Again, as regards the Tribunal's refusal to take notice of the directions of the Reserve Bank, it is not correct for the Tribunal to hold that the said document was a new evidence in the true sense of the term. The assessee has been consistently pleading before the lower authorities that the entries had to be made in order to bring the companies in conformity with the said direction. Moreover, the direction of the Reserve Bank is a public document within the meaning of [section 74](#) of the Evidence Act, 1872. Documents of a public nature and public authority are generally admissible in evidence subject to the mode of proving them as laid down in [sections 76](#) and [78](#) of the Evidence Act.*

*In our view, the effect and import of the transactions is that the assessee took over the liability of the aforesaid non-financial companies to GB and Co. in exchange for the shares as aforesaid.*

*In the premises, we answer all the questions, in the affirmative and in favour of the assessee and against the Revenue."*

*4.2. It would be pertinent to note that in the instant case, the ld. AO had not doubted the investment made in shares by the assessee company. There is no dispute raised by the ld. AO with regard to number of shares; value thereon invested by the assessee company. We also find that the Co-ordinate Bench decision of Pune Tribunal in the case of Kantilal and Bros. vs. ACIT reported in 52 ITD 412 (Pune Trib.) also supports the case of the assessee.*

*4.3. In view of the aforesaid observations, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the ld. AO had erroneously invoked the provisions of [section 68](#) of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Moreover, in the balance sheet of the assessee company in the schedule to share capital, it is very clearly mentioned by way of note that the fresh share capital was raised during the year for consideration other than cash. Hence we hold that provision of [section 68](#) of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted which has rightly been done by the ld. CIT(A) which does not require any interference. Accordingly, grounds raised by the revenue are dismissed."*

7. Applying the proposition of law laid down in the case-law cited above, to the facts of the case on hand, we delete the addition in question made u/s 68 of the Act.

8. In the result, appeal of the assessee is allowed.

***Kolkata, the 9<sup>th</sup> day of November, 2018.***

Sd/-

**[S.S. Viswanethra Ravi]**

Judicial Member

Dated : 09.11.2018

{SC SPS}

Sd/-

**[J. Sudhakar Reddy]**

Accountant Member

*Copy of the order forwarded to:*

- 1. M/s. ABA Earthline Communications Ltd**  
**Rajesh Mohan & Associates**  
**Unit No. 18**  
**5<sup>th</sup> Floor**  
**Bagati House**  
**34, Ganesh Chandra Avenue**  
**Kolkata - 700 013**
- 2. Income Tax Officer, Ward-1(4), Kolkata**
3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar  
ITAT, Kolkata Benches