

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD**

[Coram: Pramod Kumar VP and Mahavir Prasad JM]

ITA No. 1371/Ahd/2015
Assessment Year: 2011-12

The Deputy Commissioner of Income-tax**Appellant**
Circle 2(1)(1), Ahmedabad

Vs.

Gujarat Infotech Limited**Respondent**
*A-2, 2nd Floor, Jay Tower,
Ankur Complex, Nr. Ankur Bus Stop,
Navrangpura, Ahmedabad-380006
[PAN : AABCG 6123 E]*

Appearances by:

Saurabh Singh, for the Appellant
S N Divatia, for the Respondent

Date of concluding the hearing : 30.11.2018
Date of pronouncing the order : 28.02.2019

O R D E R

Per Pramod Kumar, Vice President :

1. By way of this appeal, the Assessing Officer has challenged correctness of learned CIT(A)'s order dated 4th February 2015, in the matter of assessment under section 143(3) of the Income-tax Act, 1961 for the assessment year 2011-12.

2. Grievances raised by the appellant are as follows:-

"1. The Ld.CIT(A) has erred in law and on facts by admitting the additional evidences submitted by assessee during appellate proceedings, in violation of provisions of Rule 46(A)(1) of IT Rules. The assessee's case is not covered by any of the clause a,b,c or d of Rule 46A of the I.T. Rules.

2. The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.42.4 lacs out of Rs. 69.25 lacs, being the amount of share application money received from 74 persons, by invoking provisions of section 68 of the I.T. Act despite the fact that the credit worthiness of the parties were neither proved at the time of assessment proceedings nor in the additional evidences submitted during the appellate proceedings.

3. The Ld.CIT(A) has erred in law and on facts by not taking into consideration, the proviso to sec 68, wherein, it is mentioned that in the case of introduction of Share Application money, the person in whose name credit has been recorded, also has to offer an explanation about the nature of

source of such. In the case of the assessee the bank statement of the parties had not been attached and their creditworthiness had not been proved.”

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is engaged in the business of data entry, data processing, printing job work, networking etc. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that assessee company has received share application money, aggregating to Rs.76,00,000 from 81 different persons. When he probed the matter further, the assessee furnished names, addresses and occupations of these persons. The Assessing Officer reproduced the chart containing these details and observed as follows:-

“3.3 From, the above mentioned chart, it is evident that the only few parties are filling their return of income that to very low income. And the most of the parties are employees of the assessee company, who are managing their bread and butter with the salary. The assessee failed to produce the relevant bank statements of the parties also and few bank statement furnished shows that the money invested in assessee company was received from somewhere else in the account only one or two days before issuing cheques in favor of company. The creditworthiness of the parties is not established.

4. The initial onus is upon the assessee to establish three things necessary to obviate the mischief of section 68 of the Act, These are : (i) the identity of investors; (ii) their creditworthiness/investments, and (iii) the genuineness of the transaction. In the present case, the assessee company failed to prove all three conditions cumulatively.

5. Further, An assessee's explanation of the nature and source of the credits cannot be entertained and held satisfactory unless and until the ground reality i.e. the de facto existence of the creditor is first established, is prima facie paving the way for the examine further the capacity and genuineness aspects. Hence merely based on arranged affairs and supporting documents, the identity cannot be said to be established, and in many case NOT the CAPACITY and GENUINESNESS of transaction. Therefore, I am not satisfied with the explanation offered by the assessee company.

6. As regards the assessee's contention that the transactions have been received through crossed cheques. I have to state that merely accepting the entry through crossed cheques should not prove the genuineness of the transactions. Payment by account payee cheque is not sacrosanct. This view is also supported by the Kolkata High Court in the case of CIT V. Precision Financer Ltd. - (1994) 121 CTR 20. In the case of subscription to the share capital of a company, the principal ingredient that has to be satisfied is to establish the identity of the subscribers, prove their creditworthiness and further prove genuineness of the transaction,”

4. He then extensively produced extracts from various judicial precedents, including from CIT vs. P. Mohanakala [(2007) 161 Taxman 169 (SC)], Pratibha Finvest Pvt Ltd vs. ITO [29 taxmann.com 420 (Del)], Dr. D. Siva Sankara Rao vs.

ITO [29 taxmann.com 17 (AP)(2013)], CIT vs. Frostair Pvt Ltd [26 taxmann.com 11 (Del) (2012)], CIT vs. Hindon Forge Pvt Ltd [25 taxmann.com 239 (All) (2012)], CIT vs. Independent Media Pvt Ltd [25 taxamnn.com 276 (Del) (2012)], Kaveri Associates vs. ACIT [26 taxmann.com 221 (Kar) (2012)], CIT vs. Aarti Jana [35 taxmann.com 2 (Cal) (2013)], CIT vs. NR Portfolio Ltd, [2 ITR-OL 68 (Del) (2014)] and finally concluded as follows:-

"8. Further, the assessee company from his submission failed to prove capacity of the parties except parties named Yogesh Suthar (Rs. 1,25,000), Vijay P. Pate! (Rs. 1,00,000), Madanlal M. Sharma (Rs.50,000), Piyush Parekh (Rs. 1,50,000), Jayesh F. Shah (Rs.50,000), Parul Jayesh Shah (Rs.50,000), Alkesh Nayak (Rs. 1,50,000). All others party's creditworthiness and capacity to pay, is not proved by the assessee. With respect to these 7 parties, Return of income was furnished by the assessee company and these 7 parties having a returned income more than their investments, therefore keeping them out of the addition. The other remaining share application money receipt entries are found in the books of account and it is for the Assessee to prove not only the identity of the parties but also to prove the capacity of the creditors to advance the money and genuineness of the transactions. And here the assessee company failed to do so.

9. In view of the detailed discussion made supra and in view of the legal and factual aspects, the share application money of Rs.69,25,000/- alleged to have been received from the parties whose creditworthiness & capacity to pay is not proved and for the said parties the assessee company failed to prove all three essential conditions of Section 68 cumulatively, is treated as income of the assessee company as per the provision of Section 68 of the Act."

5. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) deleted the addition to the extent of Rs.42.40 lakhs by observing as follows:-

"

Sr. No.	Particulars	No. of Share Holder	Application Amount
1	Past & Present Employee Share Holder	49	3920000
2	No KYC / Identity proof	5	230000
3	KYC & ITR Submitted (Other than Employee)	4	550000
4	KYC & Income Proof Submitted (Other than Employee)	12	1735000
5	KYC Submitted (Other than Employee)	4	720000
		74	6925000

The details furnished show that out of these share applicants up to Sl. No. 49 are the persons who are employees or ex-employees of the appellant company and total share capital pertaining to these applicants totals to 36.90 lakhs. In respect of these applicants, it is noted that the maximum amount that has been received is Rs. 2.5 lakh and balance persons have paid an amount ranging from 45,000 to 1 lakh and so on. It is further noted that the payments

have been received through cheque/banking channel. All the employees have confirmed the payment. The details on record show that the company had given some bonus or some amount to them out of which the payment for share application money has been made. Regarding creditworthiness, it is noted that all the details were there on record. The amount has come through the bank account. The shareholders are working with the appellant and have received dividend for the last one-two year. The amounts received are also not substantial. It is also noted that these share applications are not in the nature of accommodation entries and the persons who have applied for shares are not known to be in the business of providing accommodation entries for commission and other remuneration. In view of all these facts seems the appellant has given sufficient evidences related to the transaction and the identity of the shareholder no addition can be made in the hands of the appellant company in respect of the share subscription money received from employees and ex-employees. Therefore, the addition of Rs. 36.9 lakh is directed to be deleted.

Regarding the persons at Sl. No. 50, 51, 52, 53 and 54 it is noted that the appellant could not give any evidence regarding identity of these persons. The amount is received from these persons totals to Rs. 2.30 lakhs. Since the identity of these persons is not proved the onus has not been discharged by the appellant in respect of these person. Therefore, the addition of Rs.2.30 lakhs made by the AO in respect of these persons is upheld.

Regarding the other type of persons, from serial number 55 to 58, it is noted that the appellant has received Rs. 5.50 lakhs from four persons which are not employees but the appellant has given identity and income tax return of these persons. Since the appellant has discharged its onus of giving the information in respect of these persons, the amount has been received through banking channel and the persons are filing return of income the onus under section 68 has been duly discharged by the appellant and no addition in this respect can be made. The addition of Rs. 5.50 lakh is therefore, directed to be deleted.”

6. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

8. A plain look at the reasoning which prevailed with the CIT(A), resulting in impugned relief, would show that genuineness of the transactions has not been examined at all. It is only in four cases that copies of income tax returns are placed on record, and total share application money received in these four cases is Rs.5,50,000/-. In the remaining 49 cases of shareholders, the relief has been granted simply on the basis of the statement that these persons were present and former employees of the assessee company. Quite interestingly, the source of funding is indicated, in a rather vague manner, by observing that “*the details on record show that the company has given some bonus or some amount to them out of which the payment for share application money has been made*”. This observation is

made in the order of the CIT(A) but, if anything, this observation raises doubts about genuineness of transactions. The details of such payments by the company should have been examined in greater details, rather than in this superfluous manner, and the genuineness of transactions should have been examined. It is certainly an unusual position that a company gives bonus or makes some other voluntary payment to its employees and all such payments find its way back to the company as share capital. If that is what has happened, the genuineness of the transaction is to be examined with due care.

9. As we deal with this aspect of the matter, we may usefully refer to a decision of this Tribunal in the case of Pavankumar M. Sanghvi vs. ITO (165 ITD 260), which has been confirmed by Hon'ble Gujarat High Court (404 ITR 601) against which SLP is dismissed by Hon'ble Supreme Court (97 taxmann.com 398), as follows:-

"7. In my considered view, so far as the legal foundation of the impugned additions is concerned, it consists of assessee's inability to satisfy the Assessing Officer about all the three essential ingredients of a credit entry in the books of accounts- existence of the lender, ability of the lender to advance funds in question, and, above all, genuineness of the transaction. There is no dispute about the basic legal position about section 68 which provides that where any sum is found credited in the books of accounts of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and sources thereof, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as income of the assessee of that previous year. The expression 'nature and source' appearing in section 68 has to be understood as a requirement of identification of source and its genuineness. It is also a settled legal position that the onus of the assessee, of explaining nature and source of credit, does not get discharged merely by filing confirmatory letters, or demonstrating that the transactions are done through the banking channels or even by filing the income tax assessment particulars. In the case of CIT v. United Commercial and Industrial Co (P.) Ltd [1991] 187 ITR 596/56 Taxman 304 (Cal) , Hon'ble Calcutta High Court has held that "it was necessary for the assessee to prove prima facie the identity of creditors, the capacity of such creditors and lastly the genuineness of transactions". Similarly, in the case of CIT v. Precision Finance (P.) Ltd [1994] 208 ITR 465/[1995] 82 Taxman 31 (Cal), it was observed that "it is for the assessee to prove the identity of creditors, their creditworthiness and genuineness of transactions". There is thus no escape from proving genuineness of a transaction.

8. As I proceed to deal with genuineness aspect, it is important to bear in mind the fact that what is genuine and what is not genuine is a matter of perception based on facts of the case vis-à-vis the ground realities. The facts of the case cannot be considered in isolation with the ground realities.

9. I am reminded of Hon'ble Supreme Court's observation, in the case of CIT v. Durga Prasad More [1971] 82 ITR 540, to the effect that "Science has not yet invented any instrument to test the reliability of the

evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities". Similarly, in a later decision in the case of Sumati Dayal v. CIT [1995] 214 ITR 801/80 Taxman 89 (SC), Hon'ble Supreme Court rejected the theory that it is for allegor to prove that the apparent and not real, and observed that, This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities.....Similarly the observation that if it is alleged that these tickets were obtained through fraudulent means, it is upon the allegor to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely availableIn our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably". I will be superficial in my approach in case I donot examine the claim of the assessee on the basis of documents and affidavits filed by the assessee and overlook clear the unusual pattern in the documents filed by the assessee and pretend to be oblivious of the ground realities. As Hon'ble Supreme Court has observed, in the case of Durga Prasad More(supra),it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents". As a final fact finding authority, this Tribunal cannot be superficial in its assessment of genuineness of a transaction, and this call is to be taken not only in the light of the face value of the documents sighted before the Tribunal but also in the light of all the surrounding circumstances, preponderance of human probabilities and ground realties. Genuineness is a matter of perception but essentially a call on genuineness of a transaction is to be taken in the light of well settled legal principles. There may be difference in subjective perception on such issues, on the same set of facts, but that cannot be a reason enough for the fact finding authorities to avoid taking subjective calls on these aspects, and remain confined to the findings on the basis of irrefutable evidences. Hon'ble Supreme Court has, in the case of Durga Prasad More (supra), observed that "human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law". This faith in the Tribunal by Hon'ble Courts above makes the job of the Tribunal even more onerous and demanding and, in my considered view, it does require the Tribunal to take a

holistic view of the matter, in the light of surrounding circumstances, preponderance of probabilities and ground realities, rather than being swayed by the not so convincing, but apparently in order, documents and examining them, in a pedantic manner, with the blinkers on. I may also add that the phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent, and that, till recently, little was known, outside the underbelly of financial world, about modus operandi of shell entities. There were, therefore, not many questions raised about genuineness of transactions in respect of shell entities. That is not the case any longer. Just because these issues were not raised in the past does not mean that these issues cannot be raised now as well, and, to that extent, the earlier judicial precedents cannot have blanket application in the current situation as well. As Hon'ble Supreme Court has observed in the case in Mumbai Kamgar Sabha v. Abdulbahi Faizullahbai AIR 1976 SC 1455 "It is trite, going by Anglophonic principles that a ruling of a superior court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark". Genuineness of transactions thus cannot be decided on the basis of inferences drawn from the judicial precedents in the cases in which genuineness did come up for examination in a very limited perspective and in the times when shell entities were virtually non-existent. As the things stand now, genuineness of transactions is to be examined in the light of the prevailing ground realities, and that is precisely what I have done....."

10. In view of these discussions and bearing in mind entirety of the case, we deem it fit and proper to remit the matter to the file of the CIT(A) for adjudication *de novo* in the light of above observations and specifically dealing with genuineness aspect. While doing so, the CIT(A) will bear in mind binding judicial precedents and give due and reasonable opportunity of hearing to the assessee. Ordered, accordingly.

11. In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 28th February, 2019.

Sd/-

Mahavir Prasad
(Judicial Member)

Ahmedabad, the 28th day of February, 2019

%t

Sd/-

Pramod Kumar
(Vice President)

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *Commissioner*
(4) *CIT(A)*
(5) *Departmental Representative*
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By order

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Income Tax Appellate Tribunal
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