

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC', NEW DELHI
BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 2995/Del/2018
Assessment Year: 2005-06

RAMESH CHANDRA GARG,
HOUSE NO. 4, ROAD NO. 7,
EAST PUNJABI BAGH,
NEW DELHI
(PAN: AAGHR2553F)
(APPELLANT)

VS.

ITO, WARD 41(5),
NEW DELHI

(RESPONDENT)

Assessee by : Sh. Rakesh Khetan, CA
Revenue by : Sh. SL Anuragi, Sr. DR.

ORDER

The Assessee has filed the Appeal against the Order dated 28.3.2018 of the Ld. CIT(A)-14, New Delhi pertaining to assessment year 2005-06 on the following grounds:-

1. That the assessee has received refund of Rs. 2,50,000/- from Sh. Niraj Jain / Pooja Expo Inc. out of payment of Rs. 3,00,000/- paid to him earlier as advance against property leaving a balance of Rs. 50,000/-. The AO treated this amount of Rs. 2,50,000/- received from Niraj jain/ Pooja Expo Inc. as unaccounted income of the assessee. Addition has been made on surmises and conjectures, presumption and without bringing any

evidence on record that it is the unaccounted income of the assessee, hence, the addition made is totally wrong, bad in law and needs to be quashed.

2. That the addition made without cross examination of Niraj Jain is totally wrong, bad in law and needs to be quashed.
3. That the addition made u/s. 68 without considering the facts that the assessee has fulfilled the conditions of section 68 is totally wrong, bad in law and needs to be quashed.
4. That the notice u/s. 148 issued after the period of four years without mentioning in the recorded reasons that the escapement of chargeable income from tax was due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessarily for assessment is invalid, bad in law and needs to be quashed.
5. That the order of the Ld. CIT(A) in confirming addition of Rs. 12,500/- as commission paid without bringing any evidence is wrong and needs to be deleted.
6. The above grounds of appeal are without prejudice to one another and assessee prays permission to add, delete or amend one or more grounds of appeal.

7. That the assessee assures unstinted cooperation in all proceedings before your goodself.

2. The brief facts of the case are that assessee original assessment was completed u/s. 143(3)/148 of the Income Tax Act, 1961 (in short "Act") on 27.2.2013 at Rs. 3,62,900/- against the returned income of Rs. 1,00,400/-. The assessee filed an appeal before the Ld. CIT(A) who vide its order dated 16.7.2014 dismissed the appeal of the assessee. Further the assessee moved to the ITAT against the order of the Ld. CIT(A) and the Tribunal vide its order dated 6.8.2015 restored the matter back to the file of the AO with the directions to decide the matter afresh under the law, after considering the relevant evidences, after giving full opportunity to the assessee of being heard. Following the decision and directions of the ITAT, the AO completed the assessment proceedings u/s. 254 of the Act r.w.s. 143(3)/148 of the Act on 30.11.2016 by making the additions of Rs. 2,50,000/- as unexplained cash credit and Rs. 1,2500/- for the commission and assessed the income of the assessee at Rs. 3,62,900/-. Aggrieved with above disallowances the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 28.3.2018 has dismissed the appeal of the assessee. Against the impugned order dated 28.3.2018, assessee is in appeal before the Tribunal.

3. During the hearing, Ld. counsel for the assessee has argued on the merits of the case and stated that assessee has received refund of Rs. 2,50,000/- from Sh. Niraj Jain / Pooja Expo Inc. out of payment of Rs.

3,00,000/- paid to him earlier as advance against property leaving a balance of Rs. 50,000/-. However, the AO treated this amount of Rs. 2,50,000/- received from Niraj Jain/ Pooja Expo Inc. as unaccounted income of the assessee and addition has been made on surmises and conjectures, presumption and without bringing any evidence on record that it is the unaccounted income of the assessee, hence, he submitted that the addition made is totally wrong, bad in law and needs to be quashed. It was further submitted that that the addition made is without cross examination of Niraj Jain is totally wrong, bad in law and needs to be quashed. That the addition made u/s. 68 without considering the facts that the assessee has fulfilled the conditions of section 68 is totally wrong, bad in law and needs to be quashed. It was further submitted that the notice u/s. 148 of the Act was issued after the period of four years without mentioning in the recorded reasons that the escapement of chargeable income from tax was due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessarily for assessment is invalid, bad in law and needs to be quashed. It was further submitted that the order of the Ld. CIT(A) in confirming addition of Rs. 12,500/- as commission paid without bringing any evidence is wrong and needs to be deleted. In support of the aforesaid contention, the Ld. counsel for the assessee has filed a Paper Book containing pages 1-60 in which he has attached the copy of written submissions before the Ld. CIT(A); copy of reasons provided for issuing notice u/s. 148 dated 4.8.2018 with tracking report; copy of reasons provided for issuing notice

u/s. 148 dated 29.11.2012; copy of letter dated 14.7.2016, 26.7.2016, 1.9.2016 and 29.9.2016 to AO regarding cross examination of Sh. Neeraj Jain; copy of letter dated 21.6.2017 to CIT(A) for Remand Report; copy of letter dated 21.7.2017 to AO & CIT(A) for remand report; copy of letter dated 8.2.2013 to AO; copy of acknowledgement of return, computation and balance sheet of AY 2005-06; copy of acknowledgement of return and balance sheet of AY 2004-05; copy of acknowledgement of return of Sh. Neeraj Jain; copy of pass book of Assessee and copy of letter dated 22.3.2018 to CIT(A) and relied upon the ITAT decision dated 3.3.2016 passed in the case of VS Capital Services Pvt. Ltd. in ITA No. 6162/Del/2012 (AY 2002-03) by placing the copy thereof.

4. On the other hand, Ld. DR relied upon the orders of the authorities below and stated that they have passed well reasoned orders, which do not need any interference and needs to be upheld.

5. I have heard both the parties and perused and considered the records especially the impugned order as well as the Paper Book and the case law relied upon by the Assessee's counsel. I find that Ld. CIT(A) has elaborately discussed the issues in dispute and adjudicated the same vide para no. 5 to 6 at page no. 14 to 22, which are reproduced hereunder:-

"5.1 After perusing the aforesaid findings of the Ld. CIT(A), we find that

5. Examination of the Issue and Decision:-

I have considered the facts of the case, the basis of the additions made by the AO and the submissions and the paper books placed on record before me by the appellant.

By way of facts, the AO has received a report from the investigation wing, evidencing that the appellant has received an accommodation entry of Rs. 2,50,000 from Mr Niraj Jain Prop. Pooja Expo Inc. On the basis of such information, the AO has recorded the reasons to believe and issued notice under Section 147/148 of the Act.

The appeal relates to main issue relating to addition of cash credit amounting to Rs. 2,50,000 received from Pooja Expo Inc. under Section 68 and commission amounting to Rs, 12,500/- for obtaining accommodation entry of Rs. 2,50,000/-.

The matter is in the second round of appeal, after Hon'ble ITAT has referred the matter back to the files of the AO for fresh disposal.

Hon'ble Tribunal in its common order in the cases of Ramesh Chander Garg HUF and Kavita Gupta dated 06.08.2015 in ITA No. 5190/Del/2014 and ITA No. 5191/Del/2014 remitted back the issue to the file of AO by holding that:

"Therefore, in the interest of natural justice, I remit back the issue in dispute to the file of the AO with the directions to decide the same afresh, under the law, after considering all the relevant evidences, after giving full opportunity to the assessee of being heard. The Assessee is also directed to furnish all the evidences before the AO to substantiate his case. "

The AO refixed the matter post the decision of the ITAT and gave ample opportunity to the AO. However, the appellant did not appear before the AO pursuant to first two notices dated 18.05.2016 and 01.06.2016. The appellant filed first letter before the AO on 14.07.2016 requisitioning the cross-examination of Mr. Niraj Jain owner of Pooja Expo Inc. in person.

The AO summoned Mr. Niraj Jain, but Mr. Jain did not appear before the AO for the purpose of cross-examination. The AO then requisitioned the appellant to prove the identity, credit worthiness and genuineness of the transaction and fixed the matter to November 21, 2016. However, again no one appeared on November 21, 2016 nor any communication was received from the assessee in this regard.

AO placing reliance on the previous order passed, made the addition under Section 68 of the Act amounting to Rs. 2,50,000 and further added a sum amounting to Rs. 12,500/- on account of commission paid to obtain the above mentioned entry.

Before the AO at the time of original assessment, the appellant's stand was that the amount of Rs. 2,50,000 was received back on account of the advance of Rs. 3,00,000 paid in cash by the appellant to Mr. Niraj Jain for purchase of property. However, the deal could not materialise and Mr. Niraj Jain only returned Rs. 2,50,000/- and forfeited Rs. 50,000/-.

Before me the appellant raised two grounds of appeal. One pertaining to addition of Rs. 2,50,000/- made under Section 68 of the Act and other against addition of unaccounted expenses of Rs. 12,500/-.

However, vide letter dated 18.04.2017, the appellant raised additional grounds. The appellant raised a ground stating that the AO has erred in reopening the case under Section 148 of the Act. Additional grounds of appeal raised during the appellate proceedings are as follows:-

1. That on the facts and in the circumstances of the case and in law, Ld. AO erred in reopening of the case u/s 148 due to following reasons:-

a Total lack of tangible material and/or reasonable cause, absence of nexus (much less live nexus) between alleged information (unknown whether exists on the file or not) an tentative inference drawn, non application of mind much less independent application of mind, total lack of clarity on the nature of transaction in the reasons recorded.

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b In the reasons recorded on page no 2 of the assessment order has been mentioned as Ramesh Chand Garge (HUF.) has obtained following accommodation entry during the F. Y 2004-05, relevant to A. Y 2005-06

Date	Cheque No.	Amount	Beneficiary Name	Beneficiary bank	Beneficiary Branch name	Name	Bank	A/c No.
22.8.04	045888	250000	Ramesh Chand Garg (HUF)	PNB	Punjabi Bagh	Pooja Expo Inc.	Corporation Bank, Kamla Nagar	3950

Further, in the original assessment order dated 27.02.2013, it has been mentioned that the advance

was received back from Manoj Jain whereas no money was received from Manoj Jain.

It is settled that reasons cannot be recorded in a piecemeal manner and is not empty ritual.

c. The addition is made on the directions and dictates of investigation wing treating its recommendation as gospel truth.

d. Adverse interference is automatically drawn solely and merely because of non- appearance of Sh. Niraj Jain in spite of the fact that department has complete details of Sh. Niraj Jain, Prop, of Pooja Expo Inc.

Findings on Additional Ground

Vide submission dated 5/5/2017 before me, the appellant has submitted and averred that the reopening is bad in law and totally wrong and thus the reassessment proceedings must be quashed as notice under Section 148 was not properly served and that the reason to believe of the AO is not proper.

After carefully considering the submission of the appellant and the order passed by the AO, it is noticed that no such contention was ever raised by the

appellant before the AO. Further, the appellant never raised any such contention in the first round of appeal before any of the authority be it CIT(A) or Hon'ble Tribunal.

*Ramesh Chander Garg (HUF) Appeal No. 187/16-17,
AY: 2005-06*

However, considering the principles of natural justice, the additional grounds of appeal raised by the appellant are considered.

Before me the appellant has furnished a written submission dated 05.05.2017 and at the outset stated that the initiation of reassessment proceedings is barred by limitation as notice issued under Section 147 of the Act was not served within the prescribed time limits. In this regard, firstly no such ground of appeal is raised by the appellant, further no additional ground of appeal is also raised by the appellant on such issue. However, having considered so, even on merits, it is worth taking note that as per the provisions of Section 147/148 of the Act, the AO has to issue the notice within the prescribed timelines and it is not necessary that the order is served to the assessee within the said timelines. If the notice is issued within the suggested

timelines it is a valid notice and not barred by limitation. In the instant case the notice was issued on 16.03.2012 much before the limitation hence, the notice is not barred by limitation.

Further, the appellant has submitted that there is no nexus between alleged information and tentative inference, non-application of mind much less independent application of mind, total lack of clarity on the nature of transaction and hence the addition made and order passed under Section 147/148 is bad in law. Before me the appellant has also submitted few case laws on different issues. Appellant has mixed two three issues such as "change of opinion", "coherence of reason to believe", "definitive recording of reasons that there is escapement of income" and has quoted the case laws without realising that the same do not pertain to the grounds of appeal of the appellant. One should not just for the sake of proving a point quote a decision which does not relate to the submissions made.

I have gone through the reasons recorded by the AO for the purpose of reopening the assessment. Even though, the AO has relied on the information received from the

investigation wing, the AO has applied his mind before issuing the notice under Section 148 of the Act.

The submission of the appellant that the reopening is bad in law because there is total lack of clarity on the nature of transaction in the reasons recorded is totally baseless.

One has to understand that at the time of recording reason it is a believe that the income has escaped assessment. Such belief may or may not lead to addition to the income of the assessee and will totally depend upon how the appellant discharges his onus by submitting the evidence on record. The provision of the Act only mandates that from the information available on record, the AO after applying his mind independently is prima facie of the view and have reason to believe that the income has escaped assessment.

Thus, the additional ground of appeal raised by the appellant is rejected.

Further, before me, the appellant has submitted and averred at length with case laws that the appellant requisitioned the cross-examination of Mr. Niraj Jain, however, the AO did not provide the said cross-examination, hence the addition is bad in law as no

evidence can be used against the appellant without granting any opportunity to cross-examine the same, in view of the principles of natural justice.

Here, it is important to note that though the authorised representative for and on behalf of the appellant has made lengthy submission before me, but again no ground of appeal was raised on the said contention before me, thus the submissions of the appellant cannot be considered as no such ground of appeal is raised before me and nor even any application for additional ground of appeal was filed on such contention.

Any judicial authority or quasi-judicial authority, can render its decision only on the ground of appeal raised before the said authority. The authority cannot go beyond the grounds raised.

Ground Number 1

Now, considering the ground number 1 raised by the appellant, a bare perusal of the same would reveal that it appears to be a statement of fact rather than a ground of appeal. However, from perusal of the same, one could gather that the contention of the appellant is that no addition could be made in the absence of any evidence on record.

In this regard, I have taken note of the order passed The AO gave ample opportunity to the appellant to prove the identity, creditworthiness and genuineness of the transaction. But instead of submitting anything on record, the appellant chose to keep quiet after filing a letter for requisitioning the cross-examination. The whole act of the appellant itself suggest that the appellant was totally building up its case on the legal grounds of cross-examination without bringing anything on record to substantiate its claim.

As regards the issue of providing an opportunity of cross examination of Mr. Jain, the assessee cannot shun its duty and responsibility as a taxpayer and take the shelter of such arguments instead of leading evidences in support of his claim. Once the appellant was made aware of the result of investigation carried out by the Investigation Wing in respect of entry providers and the name of the assessee appeared as a beneficiary, the onus under section 101 of the Indian Evidence Act, 1972 was on the assessee to prove that it has entered into a genuine transaction with Mr. Nirav Jain as it is the assessee who is asserting a claim that the HUF had entered into genuine transactions. It is relevant to note here that Hon'ble Supreme Court in the case of Shri

Charan Singh ' versus Chandra Bhan Singh AIR 1988 SC 637 has clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. Since in this case the appellant had made the claim that money was given for purchase of a property, all the facts were especially within its knowledge. Section 102 of Indian evidence act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof is used in two distinct meanings in the law of evidence viz, 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the others. In this

case, once the evidence that assessee has obtained accommodation entry was introduced by the AO, the burden of evidence shifted to the assessee.. During the assessment proceeding and even during the appellate proceeding, the assessee has failed to produce any evidence to prove that the transaction in question was genuine.

It has also been contested by the appellant that the assessee was not provided with opportunity to cross examine the persons/witness who according to revenue was an accommodation entry provider, I find that such right as held in various decisions, is not an absolute right and depends not only the circumstances of the case but also on the statute concerned. The Hon'ble Supreme Court has held in the case of State of J&K vs Bakshi Gulam Mohd. AIR 1967 (SC) 122, and in the case of Nath International Sales vs. UOI AIR 1992 Del 295 that the right of hearing does not include a right to cross examine. The right to cross examine must depend upon the circumstances of each case and also on the statute concerned. In the case of T. Devasahaya Nadar vs. CIT (1965) 51 ITR 20 (Mad) it was held that "it is not an universal rule that any evidence upon which the department may rely should have been subjected to

cross-examination. If the AO refuses to produce an informant for cross examination by the assessee there cannot be any violation of natural justice. "In the case of GTC Industries Ltd. Vs ACIT(1998) 60 TTJ(Bomb-Trib) 308, it was held that where statement and report of third parties are only the secondary and subordinate material which were used to buttress the main matter connected with the amount of addition, denial of opportunity to cross examine third did not amount to violation of natural justice." Each case has got to be decided on the facts and circumstances of that case. The relevant factors to be considered are surrounding circumstances, objective facts, evidences adduced, presumption of facts based on common human experience in life and reasonable conclusions. In the present case, as discussed above, there is overwhelming evidences that the transactions on which adverse views have been taken are not genuine transactions but accommodation entries.

Against the above background, it is worth reiteration that in terms of the provisions of Section 68 of the Act, initial onus is on the appellant to substantiate the identity, creditworthiness and genuineness of the transaction. It is not a case where there was no entry in

the books of accounts of the appellant and an arbitrary addition was made. There was very much a credit entry in the books of accounts of the appellant, for which the AO asked the appellant to prove the identity, creditworthiness and genuineness of the transaction. Thus, in terms of the provisions of the Act where the duty is cast upon the appellant to discharge the onus of proving the identity, creditworthiness and genuineness, the ground of the appellant that the AO failed to bring any evidence on record is totally baseless and against the principles of law.

Before me and the AO, the appellant did not furnish anything on record to justify the same. The appellant only placed one story on record without any evidence/ documents to suggest the same. The appellant has not furnished any confirmation, any document to suggest any such transaction. The appellant has also not submitted the details of the property for which the advance was given. Even if as per the submission of the appellant, the appellant returned the original receipt to Mr. Niraj Jain, the appellant must have kept a photocopy of the same for records, further the appellant must be aware of the property for which such advance was given, furthermore, there should have been some

MOU and Agreement to Sale disclosing the total consideration of the property at that time and other terms and conditions. However, nothing was placed on record by the appellant.

Here, it is also worth noting that the Hon'ble Tribunal in its order dated 06.08.2015 at Para 7 of the order has clearly quoted that "The Assessee is also directed to furnish all the evidences before the AO to substantiate his case."

However, in view of the above, it is obvious that the appellant has failed to furnish even a single document on record to substantiate its stand.

In such a scenario, considering the submission and the grounds raised, this ground of appeal is rejected, and the addition of Rs. 2,50,000/- is sustained.

Findings on Ground Number 2

The appellant has also raised a ground with regard to addition on account of expenses of commission at the rate of 5% amounting to Rs. 12,500 made under Section 69C of the Act.

The ground reality that arranging of accommodation entry necessarily entails payment of commission to

entry providers cannot be ignored. I find the rate of commission has reasonably been estimated by the AO at the rate of 5% on the amount of accommodation entry. Accordingly, addition of Rs.12,500/- is also confirmed.

6. In the result, the appeal is dismissed.”

5.1 As far as ground no. 1 & 3 relating to addition of Rs. 2,50,000/- made under section 68 of the Act is concerned, I find that that initial onus is on the assessee to substantiate the identity, creditworthiness and genuineness of the transaction. It is not a case where there was no entry in the books of accounts of the assessee and an arbitrary addition was made. There was very much a credit entry in the books of accounts of the appellant, for which the AO asked the assessee to prove the identity, creditworthiness and genuineness of the transaction. Thus, in terms of the provisions of the Act where the duty is cast upon the assessee to discharge the onus of proving the identity, creditworthiness and genuineness, the ground of the assessee that the AO failed to bring any evidence on record is totally baseless and against the principles of law. It is noted that the assessee has not furnished any confirmation, any document to suggest any such transaction. The assessee has also not submitted the details of the property for which the advance was given. Even if as per the submission of the assessee, the assessee returned the original receipt to Mr. Niraj Jain, the assessee must have kept a

photocopy of the same for records, further the assessee must be aware of the property for which such advance was given, furthermore, there should have been some MOU and Agreement to Sale disclosing the total consideration of the property at that time and other terms and conditions. However, nothing was placed on record by the assessee and he has failed to furnish even a single document on record to substantiate its stand. Therefore, Ld. CIT(A) has rightly confirmed the addition of Rs. 2,50,000/-, which does not need any interference on my part, hence, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee. It is also noted that the case laws cited by the Id. Counsel for the assessee is distinguished on facts.

5.2 As regards issue involved in ground no. 2 relating to cross examination of Sh. Niraj Jain is concerned, assessee's counsel argued that AO as well as Ld. CIT(A) has not granted opportunity to cross examine Sh. Niraj Jain, therefore, the assessment in dispute may be quashed. After going through the orders passed by the revenue authorities as well as arguments advanced by the Ld. Counsel for the assessee on the issue involved in ground no. 2, I am of the considered view that assessee has not taken any specific ground before the Ld. CIT(A) and therefore, the Ld. CIT(A) has rightly rejected the request of the assessee for cross examination of Sh. Niraj Jain. Therefore, no interference is required on my part in the well reasoned order of the Ld. CIT(A) on this issue, hence, I uphold the action of the Ld. CIT(A) on this issue and dismiss the ground raised by the Assessee.

5.3 As regards ground no. 4 relating to issue of notice u/s. 148 of the Act after the period of four years without mentioning in the recorded reason that the escapement of chargeable income from tax was due to

omission or failure on the part of the assessee to disclose fully and truly all material facts necessarily for assessment is invalid, bad in law and needs to be quashed is concerned, I find that the said ground was not argued by the Ld. Counsel for the assessee, hence, the same is dismissed as such. However, Ld. CIT(A) has rightly adjudicated the legal ground against the assessee at page no. 17 & 18 of the impugned order which does not require any interference on my part.

5.4 As regards ground no. 5 relating to confirmation of addition of Rs. 12,500/- as commission paid is concerned, I find that the rate of commission has reasonably been estimated by the AO at the rate of 5% on the amount of accommodation entry and therefore, Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my part, hence, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Assessee.

6. In the result, the Appeal of the Assessee is dismissed.

Order pronounced on 25-03-2019.

Sd/-

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date: 25/03/2019

SRBhatnagar

Copy forwarded to: -

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

By Order,

Assistant Registrar, ITAT, Delhi Benches