

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.124/Coch/2017 : Asst.Year 2011-2012

The Asst.Commissioner of Income-tax, Central Circle 2 Ernakulam	Vs.	M/s.Thomson Metals Kombodinjammakkal P.O. Thrissur - 680 697. <b>PAN : AACCT0876E.</b>
(Appellant)		(Respondent)

Appellant by : Smt.A.S.Bindhu, Sr.DR  
Respondent by : Sri. Sathish John Kanichai, FCA

<b>Date of Hearing : 07.03.2019</b>	<b>Date of Pronouncement : 01.04.2019</b>
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**ORDER**

**Per George George K., JM**

This appeal at the instance of the Revenue is directed against the order of the CIT(A) dated 13.01.2017. The relevant assessment year is 2011-2012.

2. The solitary issue that is raised in this appeal is whether the CIT(A) is justified in deleting the addition made u/s 68 of the I.T.Act.

3. The brief facts of the case are as follows:

The assessee is a firm, engaged in the business of manufacture and sale of M Sand. The partners of the assessee-firm are as follows:-

- (i) Sri. P.T.Davis
- (ii) Sri. P.T.Varghese

- (iii) Sri. P.T.Jose
- (iv) Sri. P.T.Benny
- (v) Sri. Samuel P.Thomas
- (vi) Sri. Martin P.J.

3.1 The share ratio of the above partners are equal. The assessee-firm belongs to Thomson Group. There was a search and seizure proceedings u/s 132 of the I.T.Act on 27.09.2011 in the case of Thomson Group concerns. The search and seizure proceedings were also conducted in the business premises of the assessee and the residential premises of the partners of the assessee. During the course of search of the residential premises one of the partners Sri. P.T.Johnson, certain documents inventorized as CHN-17/11/OMP/A(3) was found and seized. This document according to the Assessing Officer, contain the business transaction carried out by the assessee-firm. The assessee-firm did not file the return of income as on the date of search. Therefore, notice u/s 153C of the I.T.Act was issued for reopening the assessment for assessment years 2011-2012 and 2012-2013. In the course of assessment proceedings, it was noticed that the partners of assessee firm had brought in capital investment and current account cash credits. The total cash introduced into the firm by various partners amounting to Rs.68 lakh for the assessment year 2011-2012. When asked to prove the source, it was stated that the withdrawals of these individual partners from the other concern would be sufficient to cover investment in the assessee-firm. However, the Assessing Officer noticed that there was no matching

withdrawal for making investment in assessee-firm and treated entire capital introduced by partners as unexplained cash credits u/s 68 of the I.T.Act. The relevant finding of the Assessing Officer reads as follows:-

*“4. The only activity carried out by the firm during the year was purchase of 6.456 J hectares of land at Muthalamada, Palakkad district for the purpose of mining. The land was purchased by cash introduced into the firm by partners. The details of cash introduced into the firm are as follows:*

Date	Amount	in the name of
09-04-	500000	Martin P John capital
09-04-	100000	P.T.Benny capital
11-05-	400000	P.T.Benny capital
05-04-	100000	P.T.Davis capital
09-04-	900000	P.T.Davis capital
11-05-	400000	P.T.Davis capital
09-04-20]	100000	P.TJose capital
11-05-	100000	P.TJose capital
11-05-	400000	P.TJose capital
09-04-	100000	P.T. Varghese capital
11-05-	400000	P.T.Varghese capital
09-04-	500000	Samuel P Thomas
11-05-	100000	Samuel P Thomas
Total	680000	

*4.1 On being asked to prove the source, the AR explained it as withdrawal of these individuals from concerns in which they are proprietors or partners. On inspection of the ledger statement of each of these individuals the observations are as under:*

*4.2 Martin P John : He is not assessed to tax and has no independent source of income during the period under consideration. He is the son of Sri. P.T.Johnson. On inspection of P.T.Johnson's current account statement as maintained in his proprietary business, St.Thomas Poultry Farm, no such*

*withdrawal has been made by him on that particular date or on dates immediately preceding.*

*4.3 P.T.Benny: He is the proprietor of Best Poultry Farm and on inspection of current account statement as in his proprietary business, on the above given dates, no withdrawal is seen. In fact, it is observed that he had even in that business had brought in cash of Rs.27,94,973/- during this period. The source for which he requires to explain independently.*

*4.4 P.T.Davis:He is -the proprietor of Maria Poultry Farm and on inspection of current account statement as in his proprietary business, on the above given dates, no withdrawal is seen. In fact, it is observed that he had even in that business had brought in cash of Rs.16, 16,736/- during this period. The source for which he requires to explain independently.*

*4.5 P.T.Jose:He is the proprietor of Rose Poultry Farm and on inspection of current account statement as in his proprietary business, on the above given dates, no withdrawal is seen. In fact, it is observed that he had even in that business had brought in cash of Rs.39,25,681/- during this period. The source for which he requires to explain independently.*

*4.6 P.T.Varghese: He is the proprietor of Anna Poultry Farm and on inspection of current account statement as in his proprietary business, on the above given dates, no withdrawal is seen. In fact, it is observed that he had even in that business had brought in cash of Rs.43,72,432/- during this period. The source for which he requires to explain independently.*

*4.7 Samuel P Thomas:He is not assessed to tax and has no independent source of income during the period under consideration. He is the son of Sri P.T Thomas. On inspection of P.T.Thomas current*

*account statement as maintained in his proprietary business, Thomson Automobiles, and partnership concern Fuels, no such withdrawal has been made by him."*

4. Aggrieved by the addition made u/s 68 of the I.T.Act by the Assessing Officer, the assessee preferred an appeal to the first appellate authority. The CIT(A) deleted the addition made u/s 68 of the I.T.Act. The CIT(A) held that the assessee-firm did not have any business operation during the relevant assessment year and hence was not in a position to generate any unaccounted income. It was also held by the CIT(A) that the partners of the firm have confirmed introduction of capital to the assessee-firm and if at all the partners are not able to explain the source of this money, the additions are to be made in their hands and not in the hands of the assessee-firm. The relevant finding of the CIT(A) reads as follows:-

*"6. I have gone through the assessment order and submission of the appellant. The appellant M/s.Thomson Metals is a newly constituted firm, consisting of 6 partners. The AO has mentioned at para 4 of the assessment order, which is reproduced even at the cost of repetition:*

The only activity carried out by the firm during the year was purchase of 6.4561 hectares of land at Muthalamada, Palakkad district for the purpose of mining. The land was purchased by cash introduced into the firm by partners.

*Thus, there is no dispute about the fact that the appellant has not commenced its business during the year under consideration. Since the business itself has not commenced, there is no question of it generating any income, leave aside the unaccounted income.*

*There is also no dispute that the fund is brought in by its partners and that constitutes the capital of the firm and capital cannot be treated as income. Capital can also not be equated with loans. If the creditworthiness of source of partners are not explained, the addition needs to be made in the hands of the partners and not the firm.*

*The partners were also covered in the search. Partners have confirmed that they have given this money to the firm. In this case, if the partners are not able to explain the source of this money, addition needs to be made in their case, and not the appellant firm.*

*After the search, the partners approached Hon'ble Income Tax Settlement Commission wherein substantial income has been assessed in the hands of the partners. In this respect, assessee's submission may be referred to, which is self-explanatory.*

*In view of the above discussed facts, in my opinion, addition of Rs.68 lakhs made u/s 68 by the AO cannot be sustained. The same is deleted."*

5. Aggrieved by the order of the CIT(A), the Department has filed the present appeal raising the following grounds:-

*1. The Order of the CIT(A) is contrary to facts and Law.*

*2. The CIT(A) overlooked that the assessee failed to prove creditworthiness of the creditors and genuineness of the transactions. As such the credits deserved to be assessed as income of the assessee.*

*3.a. The CIT(A) erred in holding that when credits are unproven, addition needs to be made in the hands of the creditors. This goes against the very*

*logic of section 68 which is to tax bogus credits in the hands of the assessee who records such credits in the books.*

*3.b. The CIT(A) erred in not considering the decision in Gumani Ram Siri Ram Vs CIT[1975] 98 ITR 337 (P&H) where it was held that provisions of Section 68 applies to all credit entries.*

*3.c. The CIT(A) erred in not considering the decision in CIT Vs Kishorilal Santhoshilal (1995) 216 ITR 9 (Raj).*

*4. The CIT(A) erred in holding that when capital is contributed from unproved sources, the same cannot be assessed as income. The CIT(A) has overlooked that Section 68 only talks about 'any sum credited-in the books'. The section does not make any distinction between loans or capital.*

*5. When an assessee records credits in the name of third parties in its books, he must prove Identity of the creditor, capacity of the creditor to advance money and genuineness of transaction. [CIT Vs Biju Patnaik (SC) 160 ITR 674]. Onus of proving the source of a sum of money found to have been received by an assessee is on him. When the nature and source of receipt cannot be satisfactorily explained by the assessee, it is open to Revenue to hold that it is the income of the assessee and no further burden lies with the Revenue to how that the income is from any particular source. [Roshan di Hatti Vs CIT (SC) 107 ITR 938]."*

6. The learned Departmental Representative strongly relied on the grounds raised. The learned AR, on the other hand, strongly supported the CIT(A)'s order. The learned AR has also filed a paper book enclosing the assessment order, the

CIT(A)'s order, the grounds of appeal, partnership deed, capital / current account of the partners, etc.

7. We have heard the rival submissions and perused the material on record. The CIT(A) had deleted the addition u/s 68 of the I.T.Act for the reasons that (i) the assessee-firm did not commence its business activity during the year under consideration, (ii) the creditors are identifiable and additions, if any, is to be made in the hands of the creditors, and(iii) the partners of the assessee-firm had disclosed substantial additional income before the Income Tax Settlement Commission and that would be sufficient to cover the introduction of capital credits in their current account. We find an identical issue was considered by an order of even date in the case of assessee's sister-concern, i.e., M/s.Thomas Agencies in ITA No.310 to 316/Coch/2017. The Tribunal in the case of assessee's sister-concern restored the matter to the Assessing Officer for *de novo* consideration. The relevant finding of the Tribunal in assessee's sister-concern reads as follows:-

*"8. We have heard the rival submissions and perused the material on record. The CIT(A) had deleted the addition made u/s 68 of the I.T.Act primarily for the reason that the creditors are identified and the additions are to be made in the hands of the creditors. This reasoning of the CIT(A) goes against the provisions of section 68 of the I.T.Act. When an assessee records credit in the name of third party in its books of account, it must prove not only the identity of the creditors, the capacity of the creditors to advance money, but also the genuineness of the transaction. The onus of proving*

*the source of a sum of money found to have been received by the assessee is on the assessee itself. When the nature and source of the receipt cannot be satisfactorily explained by the assessee, it is open for the Revenue to hold that it is the income of the assessee. Further the burden lies with the assessee to show that the income is from a particular source. In the instant case, for all the assessment years, the A.O. has examined the creditworthiness of all the partners and has categorically found that the partners did not have sufficient withdrawals on matching dates of introduction of capital / current account credits. We also notice that the A.O. had given due credits for source when there was matching withdrawal / explanation by partners.*

*8. The CIT(A) further was of the view that the partners of the assessee-firm had disclosed substantial additional income before the Income Tax Settlement Commission and that would be sufficient to cover the introduction of capital / credit in their current account. We have perused the order of the Settlement Commission dated 23.06.2014. There are variations in the additional income computed by the Income Tax Settlement Commission and the details of the additional income that was furnished by the learned AR before the Tribunal. For example, in the case of Sri.P.T.Davis, the additional income computed by Income Tax Settlement Commission according to the learned AR for the assessment year 2006-2007 is a sum of Rs.27,27,954, whereas as per the order of the Income Tax Settlement Commission, we noticed that the additional income computed was only Rs.5,83,954 and including income returned, the total income for Sri.P.T.Davis is only a sum of Rs.12,77,164. Similar variation is found in the case of other partners and for other assessment years also. Moreover, we notice that the additional income offered before the Income Tax Settlement Commission and accepted by it was also sought to be explained for making investments with Thomson Granites Private Limited, in which the partners of the*

*assessee-firm are also shareholders / Directors. There is no clarity of the availability of additional income with the partners for introduction of capital / credits in the partners account in the assessee-firm. The Assessing Officer also did not have the benefit of Income Tax Settlement Commission's order (The assessment order was completed on 28.03.2014, whereas the Income Tax Settlement Commissioner's order was dated 23.06.2014). Since the Assessing Officer did not have the benefit of Income Tax Settlement Commissioner's order and for a proper examination of availability of funds with the partners of the assessee-firm for making investments in assessee-firm, necessary the matter needs to be remanded to the A.O. for fresh consideration. The assessee is directed to furnish the orders of the Income Tax Settlement Commission and also cash flow statement to prove that there the disclosure made before the Income Tax Settlement Commission towards unexplained income was directly invested in these funds as their respective capital and there should be direct nexus between the disclosure made by the assessee before the Settlement Commission and the investment in these firms. If so the A.O. shall take into consideration the additional income computed by Income Tax Settlement Commission in the hands of partners of assessee-firm for giving due credits in partners account. The A.O. shall also consider whether there was duplication in source of investments by partners in the other group companies / concerns out of additional income computed by the Income Tax Settlement Commission and reduce the same for giving due credit in the hands of partners for introduction of capital in assessee-firm. It is ordered accordingly."*

8. In view of the above order of the Tribunal in the cases of assessee's sister-concern, which is identical to the facts of the instant case, we restore this case also to the file of the A.O. The A.O. shall take into account the directions of the Tribunal

in assessee's sister-concern for reframing the assessment in this case. It is ordered accordingly.

9. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced on this 01<sup>st</sup> day of April, 2019.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K.)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 01<sup>st</sup> April, 2019.  
Devdas\*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-IV, Kochi.
4. The CIT(Central), Kochi.
5. The DR, ITAT, Cochin.
6. Guard file.

BY ORDER,

AR-ITAT- Cochin